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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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NUCLEAR REGULATORY COMMISSION

10 CFR Parts 21, 50, and 52

[NRC–2023–0166]

Regulatory Guide: Dedication of Commercial-Grade Items for Use in Nuclear Power Plants

AGENCY: Nuclear Regulatory Commission.

ACTION: Final guide; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing Revision 1 to Regulatory Guide (RG) 1.164, ''Dedication of Commercial-Grade Items for Use in Nuclear Power Plants.'' This RG describes methods that the staff of the NRC considers acceptable in meeting regulatory requirements for the dedication of commercial grade items and services used in nuclear power plants.

DATES: Revision 1 to RG 1.164 is available on April 29, 2024.

ADDRESSES: Please refer to Docket ID NRC–2023–0166 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0166. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

Revision 1 to RG 1.164 and the regulatory analysis may be found in ADAMS under Accession Nos. ML24038A310 and ML23187A534, respectively.

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

FOR FURTHER INFORMATION CONTACT: Amir Mobasheran, Office of Nuclear Regulatory Research, telephone: 301–415–8112; email: *Amir.Mobasheran@nrc.gov* and Deanna Zhang, Office of Nuclear Reactor Regulation, telephone: 301–415–1946; email: *Deanna.Zhang@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Discussion

The NRC is issuing a revision in the NRC's ''Regulatory Guide'' series. This series was developed to describe methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, to explain techniques that the staff uses in evaluating specific issues or postulated events, and to describe information that the staff needs in its review of applications for permits and licenses.

The proposed Revision 1 to RG 1.164 was issued with a temporary identification of Draft Regulatory Guide, (DG)–1415 (ADAMS Accession No. ML23187A531). This revision of the guide (Revision 1) updates the guidance to provide additional clarification on the NRC's definition of counterfeit, fraudulent, and suspect items. This revision also provides additional clarity on requirements applicable to the dedication of commercial-grade items. In addition, the staff made several editorial changes to conform to the current format and content of RGs.

II. Additional Information

The NRC published notice of the availability of DG–1415 in the **Federal Register** on November 17, 2023 (88 FR 80195), for a 30-day public comment period. The public comment period closed on December 18, 2023. Public comments on DG–1415 and the staff responses to the public comments are available under ADAMS Accession No. ML24059A003.

As noted in the **Federal Register** on December 9, 2022 (87 FR75671), this document is being published in the ''Rules'' section of the **Federal Register** to comply with publication requirements under chapter I of title 1 of the *Code of Federal Regulations* (CFR).

III. Congressional Review Act

This RG is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

IV. Backfitting, Forward Fitting, and Issue Finality

Issuance of RG 1.164, Revision 1, does not constitute backfitting as defined in 10 CFR 50.109, ''Backfitting,'' and as described in NRC Management Directive (MD) 8.4, ''Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests''; does not affect issue finality of any approval issued under 10 CFR part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants''; and does not constitute forward fitting as that term is defined and described in MD 8.4, because, as explained in RG 1.164, Revision 1, licensees would not be required to comply with the positions set forth in the RG.

V. Submitting Suggestions for Improvement of Regulatory Guides

A member of the public may, at any time, submit suggestions to the NRC for improvement of existing RGs or for the development of new RGs. Suggestions can be submitted on the NRC's public website at *https://www.nrc.gov/reading-rm/doc-collections/reg-guides/contactus.html.* Suggestions will be

considered in future updates and enhancements to the ''Regulatory Guide'' series.

Dated: April 22, 2024.

For the Nuclear Regulatory Commission.

Meraj Rahimi,

Chief, Regulatory Guide and Programs Management Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2024–08963 Filed 4–26–24; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

[NRC–2024–0034]

RIN 3150–AL07

List of Approved Spent Fuel Storage Casks: NAC International, Inc., NAC–UMS Universal Storage System, Certificate of Compliance No. 1015, Renewal of Initial Certificate and Amendment Nos. 1 Through 9

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is amending its spent fuel storage regulations by revising the NAC International, Inc., NAC–UMS Universal Storage System listing within the ''List of approved spent fuel storage casks'' to renew the initial certificate and Amendment Nos. 1 through 9 of Certificate of Compliance No. 1015. The renewal of the initial certificate of compliance and Amendment Nos. 1 through 9 for 40 years changes the certificate's conditions and technical specifications to address aging management activities related to the structures, systems, and components important to safety of the dry storage system to ensure that these will maintain their intended functions during the period of extended storage operations.

DATES: This direct final rule is effective July 15, 2024 unless significant adverse comments are received by May 29, 2024. If the direct final rule is withdrawn as a result of such comments, timely notice of the withdrawal will be published in the **Federal Register**. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Comments received on this direct final rule will also be considered to be comments on a companion proposed rule published in the Proposed Rules section of this issue of the **Federal Register**.

ADDRESSES: Submit your comments, identified by Docket ID NRC–2024–0034 at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

You can read a plain language description of this direct final rule at *https://www.regulations.gov/docket/NRC-2024-0034.* For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Christopher Markley, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–6293, email: *Christopher.Markley@nrc.gov* and Greg Trussell, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–6244, email: *Gregory.Trussell@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

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I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2024–0034 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2024–0034. Address questions about NRC dockets to Helen Chang, telephone: 301–415- 3228, email: *Helen.Chang@nrc.gov.* For technical questions contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.resource@nrc.gov.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time, Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2024–0034 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Rulemaking Procedure

This direct final rule is limited to the changes contained in the initial certificate and Amendment Nos. 1 through 9 to Certificate of Compliance (CoC) No. 1015 and does not include other aspects of NAC International, Inc., NAC–UMS Universal Storage System design. The NRC is using the ''direct final rule procedure'' to issue this renewal because this action represents a

limited and routine change to an existing CoC that is expected to be non-controversial and, accordingly, is unlikely to result in significant adverse comments. Adequate protection of public health and safety continues to be reasonably assured. The amendment to the rule will become effective on July 15, 2024. However, if the NRC receives any significant adverse comment on this direct final rule by May 29, 2024, then the NRC will publish a document that withdraws this action and will subsequently address the comments received in a final rule as a response to the companion proposed rule published in the Proposed Rules section of this issue of the **Federal Register** or as otherwise appropriate. In general, absent significant modifications to the proposed revisions requiring republication, the NRC will not initiate a second comment period on this action.

A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

(1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, a substantive response is required when:

(a) The comment causes the NRC to reevaluate (or reconsider) its position or conduct additional analysis;

(b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the NRC.

(2) The comment proposes a change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition.

(3) The comment causes the NRC to make a change (other than editorial) to the rule, CoC, or technical specifications.

III. Background

Section 218(a) of the Nuclear Waste Policy Act of 1982, as amended, requires that ''[t]he Secretary [of the Department of Energy] shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the [Nuclear Regulatory] Commission may, by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission.'' Section 133 of the Nuclear Waste Policy Act states, in part, that ''[t]he Commission shall, by rule, establish procedures for the licensing of any technology approved by the Commission under Section 219(a) [sic: 218(a)] for use at the site of any civilian nuclear power reactor.''

To implement this mandate, the Commission approved dry storage of spent nuclear fuel in NRC-approved casks under a general license by publishing a final rule that added a new subpart K in part 72 of title 10 of the *Code of Federal Regulations* (10 CFR) entitled ''General License for Storage of Spent Fuel at Power Reactor Sites'' (55 FR 29181; July 18, 1990). This rule also established a new subpart L in 10 CFR part 72 entitled ''Approval of Spent Fuel Storage Casks,'' which contains procedures and criteria for obtaining NRC approval of spent fuel storage cask designs. The NRC subsequently issued a final rule on October 19, 2000 (65 FR 62581), that approved the NAC–UMS Universal Storage System design and added it to the list of NRC-approved cask designs in § 72.214 as CoC No. 1015.

On August 28, 2007 (72 FR 49352), the NRC amended the scope of the general licenses issued under § 72.210 to include the storage of spent fuel in an independent spent fuel storage installation (ISFSI) at power reactor sites to persons authorized to possess or operate nuclear power reactors under 10 CFR part 52. On February 16, 2011 (76 FR 8872), the NRC amended subparts K and L in 10 CFR part 72, to extend and clarify the term limits for certificates of compliance and to revise the conditions for spent fuel storage casks renewals, including adding requirements for the safety analysis report to include time-limited aging analyses and a description of aging management programs. The NRC also clarified the terminology used in the regulations to use ''renewal'' rather than ''reapproval'' to better reflect that extending the term of a currently approved cask design is based on the cask design standards in effect at the time the CoC was approved rather than current standards.

IV. Discussion of Changes

The term certified by the initial CoC No. 1015 was 20 years. The period of extended operation for each cask begins 20 years after the cask is first used by the general licensee to store spent fuel. On October 13, 2020, NAC International, Inc. submitted a request to the NRC to renew CoC No. 1015 for a period of 40 years beyond the initial certificate period and Amendment Nos. 1 through 7 to Certificate of Compliance No. 1015 for the NAC–UMS® Universal Storage System. NAC International, Inc. supplemented its request on March 3, 2022; March 18, 2022 (adding Amendment Nos. 8 and 9 to the request); July 28, 2022; and December 21, 2022.

The NAC–UMS Universal Storage System (the system) is certified as described in the Safety Analysis Report (SAR) and in NRC's Safety Evaluation Report (SER) accompanying the CoC. The system consists of the following components: (1) transportable storage canister (TSC), which contains the spent fuel; (2) vertical concrete cask (VCC), which contains the TSC during storage; and (3) a transfer cask, which contains the TSC during loading, unloading, and transfer operations.

The original CoC for the NAC–UMS Universal Storage System included designs for the storage of five classes of TSCs, including three lengths for pressurized-water reactor (PWR) fuel types and two lengths for boiling-water reactor (BWR) fuel types. The system included a TSC provided with integral fuel baskets for the storage of up to 24 PWR and 56 BWR spent nuclear fuel assemblies. Subsequently, the NRC issued nine amendments to the NAC–UMS Universal Storage System CoC.

The Nuclear Energy Institute's (NEI) document NEI 14–03, Revision 2, ''Format, Content and Implementation Guidance for Dry Cask Storage Operations-Based Aging Management,'' (December 2016) provides an operations-based, learning approach to aging management for the storage of spent fuel, which builds on the lessons learned from industry's experience with aging management for reactors. The NRC endorsed NEI 14–03, Revision 2, with clarifications, in Regulatory Guide 3.76, Revision 0, ''Implementation of Aging Management Requirements for Spent Fuel Storage Renewals,'' issued July 2021. Specifically, NEI 14–03 provides a framework for sharing operating experience through an industry-developed database called the ISFSI Aging Management Institute of Nuclear Power Operations Database. NEI 14–03 also includes a framework for learning aging management programs using aging management ''tollgates,'' which offer a structured approach for periodically assessing operating experience and data from applicable research and industry initiatives at specific times during the period of extended operation and performing a safety assessment that confirms the safe storage of the spent nuclear fuel by

ensuring the aging management programs continue to effectively manage the identified aging effects. The ISFSI Aging Management Institute of Nuclear Power Operations Database provides operating experience information and a basis to support licensees' future changes to the aging management programs. The ISFSI Aging Management Institute of Nuclear Power Operations Database and the aging management tollgates are considered key elements in ensuring the effectiveness of aging management activities and the continued safe storage of spent fuel during the period of extended operation.

NAC International Inc., incorporated periodic tollgate assessments as requirements in the renewed certificate of compliance, as recommended in NEI 14–03, Revision 2. The implementation of tollgate assessments provides reasonable assurance that the aging management programs for the canister, the transfer cask, and the overpack will continue to effectively manage aging effects during the period of extended operation.

The renewal of the initial certificate and Amendment Nos. 1 through 9 was conducted in accordance with the renewal provisions in § 72.240. The NRC's regulations require the safety analysis report for the renewal to include time-limited aging analyses that demonstrate that structures, systems, and components important to safety will continue to perform their intended function for the requested period of extended operation and a description of the aging management programs for the management of issues associated with aging that could adversely affect structures, systems, and components important to safety. The NRC spent fuel storage regulations in 10 CFR 72.240 authorize the NRC to revise the CoC to include any additional terms, conditions, and specifications it deems necessary to ensure the safe operation of the cask during the CoC's renewal term. Here, the NRC is adding three new conditions to the renewal of the CoC to address aging management activities related to the structures, systems, and components important to the safety of the dry storage system to ensure that these will maintain their intended functions during the period of extended storage operations. This would ensure the safe operation of the cask during the CoC's renewal term and would allow the use of the NAC–UMS Universal Storage System during the approved period of extended operation. Additionally, the NRC is amending the condition that describes the authorization for use of the NAC–UMS Universal Storage System design under the general license.

The three new conditions added to the renewal of the initial CoC and Amendment Nos. 1 through 9 are the following:

- A condition requiring the CoC holder to submit an updated final safety analysis report within 90 days after the effective date of the renewal. The updated final safety analysis report must reflect the changes resulting from the review and approval of the renewal of the CoC, including the NAC–UMS Universal Storage System final safety analysis report. This condition ensures that final safety analysis report changes are made in a timely fashion to enable general licensees using the storage system during the period of extended operation to develop and implement necessary procedures related to renewal and aging management activities. The CoC holder is required to continue to update the final safety analysis report pursuant to the requirements of § 72.248.
- A condition requiring each general licensee using the NAC–UMS Universal Storage System design to include, in the evaluations required by § 72.212(b)(5), evaluations related to the terms, conditions, and specifications of this CoC amendment as modified (*i.e.,* changed or added) as a result of the renewal of the CoC and include, in the document review required by § 72.212(b)(6), a review of the final safety analysis report changes resulting from the renewal of the CoC and the NRC Safety Evaluation Report (SER) for the renewal of the CoC. The general licensee would also be required to ensure that the evaluations required by § 72.212(b)(7) in response to these changes are conducted and the determination required by § 72.212(b)(8) is made. This condition also makes it clear that to meet the requirements in § 72.212(b)(11), general licensees that currently use a NAC–UMS Universal Storage System will need to update their § 72.212 reports, even if they do not put additional NAC–UMS Universal Storage Systems into service after the renewal's effective date. These evaluations, reviews, and determinations are to be completed before the dry storage system enters the period of extended operation (which begins 20 years after the first use of the NAC–UMS Universal Storage System) or no later than 365 days after the effective date of this rule, whichever is later. This will provide general licensees a minimum of 365 days to comply with the new terms, conditions, specifications, and other changes to the CoC and to make the necessary determinations required by § 72.212(b)(8) as to whether activities related to the storage of spent nuclear fuel using the renewed CoC involve a change in the facility Technical Specifications or requires a license amendment for the facility.
- A condition requiring all future amendments and revisions to the CoC (*i.e.,* the initial certificate 1015 and Amendment Nos. 1 through 9) include evaluations of the impacts to aging management activities (*i.e.,* time-limited aging analyses and aging management programs) to ensure that they remain adequate for any changes to structures, systems, and components important to safety within the scope of renewal. This condition ensures that future amendments to the CoC address the renewed design bases for the CoC, including aging management impacts that may arise from any changes to the system in proposed future amendments.

Additionally, the condition for the initial certificate and Amendment Nos. 1 through 9 would be amended to reflect changes to the scope of the general license granted by § 72.210 that were made after the approval of the initial certificate. The authorization is amended to allow persons authorized to possess or operate a nuclear power reactor under 10 CFR part 52 to use the NAC–UMS Universal Storage System under the general license issued under § 72.210.

The NRC made one corresponding change from the technical specifications for the initial CoC and Amendment Nos. 1 through 9 by adding a section addressing the aging management program. General licensees using the NAC–UMS Universal Storage System design during the period of extended operation will need to establish, implement, and maintain written procedures for each applicable aging management program in the final safety analysis report to use the NAC–UMS Universal Storage System design during the approved period of extended operation. The procedures will need to include provisions for changing aging management program elements, as necessary, and within the limitations of the approved design bases to address new information on aging effects based on inspection findings and/or industry operating experience provided to the general licensee during the renewal period. The program document must contain a reference to the specific aspect of the aging management program element implemented by that procedure, and that reference must be maintained even if the procedure is modified.

General licensees will need to establish and implement these written

procedures prior to entering the period of extended operation (which begins 20 years after the first use of the cask system) or no later than 365 days after the effective date of this direct final rule, whichever is later. The general licensee is required to maintain these written procedures for as long as the general licensee continues to operate NAC–UMS Universal Storage System in service for longer than 20 years.

Under § 72.240(d), the design of a spent fuel storage cask will be renewed if (1) the quality assurance requirements in 10 CFR part 72, subpart G, ''Quality Assurance,'' are met; (2) the requirements of 10 CFR 72.236(a) through (i) are met; and (3) the application includes a demonstration that the storage of spent fuel has not, in a significant manner, adversely affected the structures, systems, and components important to safety. Additionally, § 72.240(c) requires that the safety analysis report accompanying the application contain time-limited aging analyses that demonstrate that the structures, systems, and components important to safety will continue to perform their intended function for the requested period of extended operation and a description of the aging management program for management of aging issues that could adversely affect structures, systems, and components important to safety.

As documented in the preliminary safety evaluation report, the NRC reviewed the application for the renewal of the CoC and the conditions in the CoC and determined that the conditions in subpart G, § 72.236(a) through (i), have been met and that the application includes a demonstration that the storage of spent nuclear fuel has not, in a significant manner, adversely affected structures, systems, and components important to safety. The NRC's safety review determined that the NAC–UMS Universal Storage System, with the added terms, conditions, and specifications in the CoC and the technical specifications, will continue to meet the requirements of 10 CFR part 72 for an additional 40 years beyond the initial certificate term. Consistent with § 72.240, the NRC is renewing the NAC–UMS Universal Storage System initial certificate 1015 and Amendment Nos. 1 through 9.

Extending the expiration date of the approval for the initial certificate and Amendment Nos. 1 through 9 for 40 years and requiring the implementation of aging management activities during the period of extended operation does not impose any modification or addition to the design of a cask system's structures, systems, and components important to safety, or to the procedures or organization required to operate the system during the initial 20-year storage term certified by the cask's initial CoC. General licensees who have loaded these casks, or who load these casks in the future under the specifications of the applicable renewed CoC, may store spent fuel in these cask system designs for 20 years without implementing the aging management program. For any casks that have been in use for more than 20 years, the general licensee will have 365 days to complete the analyses required to use the cask system design pursuant to the terms and conditions in the renewed CoC. As explained in the 2011 final rule that amended 10 CFR part 72 (76 FR 8872), the general licensee's authority to use a particular storage cask design under an approved CoC will be for at least the term certified by the cask's CoC. For casks placed into service before the expiration date of the initial certificate, the general licensee's authority to use the cask would be extended for an additional 40 years from the date the initial certificate expired. For casks placed into service after the expiration date of the initial certificate and before the effective date of this rule, the general licensee's authority to use the cask would last the length of the term certified by the cask's CoC (*i.e.,* 40 years after the cask is placed into service). For casks placed into service after this rule becomes effective, the general licensee's authority to use the cask would expire 40 years after the cask is first placed into service.

This direct final rule revises the NAC International, Inc., NAC–UMS Universal Storage System design listing in § 72.214 by renewing, for 40 more years, the initial certificate and Amendment Nos. 1 through 9 of CoC No. 1015. The renewed CoC includes the changes to the CoC and technical specifications previously described. The renewed CoC includes terms, conditions, and specifications that will ensure the safe operation of the cask during the renewal term and the added conditions that will require the implementation of an aging management program. The preliminary safety evaluation report describes the new and revised conditions in the CoC, the changes to the technical specifications, and the NRC staff evaluation.

V. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113) requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. In this direct final rule, the NRC revises the NAC International, Inc., NAC–UMS Universal Storage System design listed in § 72.214, ''List of approved spent fuel storage casks.'' This action does not constitute the establishment of a standard that contains generally applicable requirements.

VI. Agreement State Compatibility

Under the ''Agreement State Program Policy Statement'' approved by the Commission on October 2, 2017, and published in the **Federal Register** on October 18, 2017 (82 FR 48535), this rule is classified as Compatibility Category NRC—Areas of Exclusive NRC Regulatory Authority. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the Atomic Energy Act of 1954, as amended, or the provisions of 10 CFR chapter I. Therefore, compatibility is not required for program elements in this category.

VII. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31885).

VIII. Environmental Assessment and Finding of No Significant Impact

Under the National Environmental Policy Act of 1969, as amended, and the NRC's regulations in 10 CFR part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions,'' the NRC has determined that this direct final rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required. The NRC has made a finding of no significant impact based on this environmental assessment.

A. The Action

The action is to amend § 72.214 to change the NAC International, Inc., NAC–UMS Universal Storage System listing within the ''List of approved spent fuel storage casks'' to renew, for an additional 40 years, the initial certificate and Amendment Nos. 1 through 9 of CoC No. 1015.

B. The Need for the Action

This direct final rule renews the initial certificate and Amendment Nos. 1 through 9 of CoC No. 1015 for the NAC International, Inc., NAC–UMS Universal Storage System design within the list of approved spent fuel storage casks to allow power reactor licensees to store spent fuel at reactor sites in casks with the approved modifications under a general license. Specifically, this direct final rule extends the expiration date for the NAC–UMS Universal Storage System certificate for an additional 40 years, allowing a power reactor licensee to continue using the cask design during a period of extended operation for a term certified by the cask's renewed CoC.

The new conditions added to the renewal of the initial CoC and Amendment Nos. 1 through 9 are:

- A condition for submitting an updated final safety analysis report to the NRC, in accordance with § 72.4, within 90 days after the effective date of the CoC renewal.
- A condition for renewed CoC use during the period of extended operation to ensure that a general licensee's report prepared under § 72.212 evaluates the appropriate considerations for the period of extended operation. All future amendments and revisions to this CoC must include evaluations of the impacts to aging management activities.
- The NRC is revising the initial certificate and Amendment Nos. 1 through 9 to address the language change in § 72.210 ''General license issue'' and other updates to the regulations.
- A condition requiring all future amendments and revisions to the CoC (*i.e.,* the initial certificate 1015 and Amendment Nos. 1 through 9) include evaluations of the impacts to aging management activities (*i.e.,* time-limited aging analyses and aging management programs) to ensure that they remain adequate for any changes to structures, systems, and components important to safety within the scope of renewal.

The NRC will also make various corrections and editorial changes to the CoC and TSs.

C. Environmental Impacts of the Action

On July 18,1990 (55 FR 29181), the NRC issued an amendment to 10 CFR part 72 to provide for the storage of spent fuel under a general license in cask designs approved by the NRC. The potential environmental impacts of using NRC-approved storage casks were analyzed in the environmental assessment for the 1990 final rule and are described in ''Environmental Assessment for Proposed Rule Entitled, 'Storage of Spent Nuclear Fuel in NRC-Approved Storage Casks at Nuclear Power Reactor Sites.''' The potential environmental impacts for the longer-term use of dry cask designs and the renewal of certificates of compliance were analyzed in the environmental assessment for the 2011 final rule establishing the regulatory requirements for renewing certificates of compliance and are described in ''Environmental Assessment and Finding of No Significant Impact for the Final Rule Amending 10 CFR part 72 License and Certificate of Compliance Terms.'' The environmental impacts from continued storage were also considered in NUREG–2157, ''Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel.'' The environmental assessment for the renewal of the initial certificate and Amendment Nos. 1 through 9 of CoC No. 1015 tiers off of the environmental assessment for the February 16, 2011, final rule and NUREG–2157. Tiering on past environmental assessments is a standard process under the National Environmental Policy Act of 1969, as amended.

The NAC–UMS Universal Storage System is designed to mitigate the effects of design basis accidents that could occur during storage. Design basis accidents account for human-induced events and the most severe natural phenomena reported for the site and surrounding area. Postulated accidents analyzed for an independent spent fuel storage installation, the type of facility at which a holder of a power reactor operating license would store spent fuel in casks in accordance with 10 CFR part 72, can include tornado winds and tornado-generated missiles, a design basis earthquake, a design basis flood, an accidental cask drop, lightning effects, fire, explosions, and other incidents.

A renewal reaffirms the original design basis and allows the cask to be used during a period of extended operation that corresponds to the term certified by the cask's CoC in the renewal. As a condition of the renewal, the NRC requires an aging management program that will ensure that structures, systems, and components important to safety will perform as designers intended during the renewal period. The renewal does not reflect a change in design or fabrication of the cask system. This renewal does not reflect a significant change in design or fabrication of the cask. Because there are no significant design or process changes, any resulting occupational exposure or offsite dose rates from the renewal of the initial certificate and Amendment Nos. 1 through 9 would remain well within the 10 CFR part 20 limits. The NRC has also determined that the design of the cask would continue to maintain confinement, shielding, and criticality control in the event of an accident. Therefore, these changes would not result in any radiological or non-radiological environmental impacts that significantly differ from the environmental impacts evaluated in the environmental assessment supporting the February 16, 2011, final rule. There will be no significant change in the types or significant revisions in the amounts of any effluent released, no significant increase in the individual or cumulative radiation exposures, and no significant increase in the potential for, or consequences from, radiological accidents. The NRC determined that the structures, systems, and components important to safety will continue to perform their intended functions during the requested period of extended operation. The NRC determined that the renewed NAC–UMS Universal Storage System, when used under the conditions specified in the renewed CoC, the technical specifications, and the NRC's regulations, will meet the requirements of 10 CFR part 72; therefore, adequate protection of public health and safety will continue to be reasonably assured. The NRC documented its safety findings in the preliminary SER.

Based on the previously stated assessments and its preliminary SER for the requested renewal of the NAC–UMS Universal Storage System CoC, the NRC has determined that the expiration date of this system in 10 CFR 72.214 can be safely extended for an additional 40 years, and that commercial nuclear power reactor licensees can continue using the system during this period under a general license without significant impacts on the human environment.

D. Alternative to the Action

The alternative to this action is to deny the renewal of the initial certificate and Amendment Nos. 1 through 9 and not issue the direct final rule. Consequently, any 10 CFR part 72 general licensee that seeks to load spent nuclear fuel into the NAC–UMS Universal Storage System after the expiration date of the CoC or that seeks to continue storing spent nuclear fuel in the NAC–UMS Universal Storage System for longer than the term certified by the cask's CoC for the initial certificate (*i.e.,* more than 20 years) would have to request an exemption

from the requirements of §§ 72.212 and 72.214 or would have to load the spent nuclear fuel into a different approved cask design. Under this alternative, those licensees interested in continuing to use the NAC–UMS Universal Storage System would have to prepare, and the NRC would have to review, a separate exemption request, thereby increasing the administrative burden upon the NRC and the costs to each licensee. If the general licensee is granted an exemption, the environmental impacts would be the same as the proposed action. If the general licensee is not granted an exemption, the general licensee would need to unload the NAC–UMS Universal Storage System and load the fuel into another cask system design, which would result in environmental impacts that are greater than for the proposed action because activities associated with cask loading and decontamination may result in some small liquid and gaseous effluent.

E. Alternative Use of Resources

Renewal of the initial certificate and Amendment Nos. 1 through 9 to CoC No. 1015 would result in no irreversible commitment of resources.

F. Agencies and Persons Contacted

No agencies or persons outside the NRC were contacted in connection with the preparation of this environmental assessment.

G. Finding of No Significant Impact

This direct final rule is to amend § 72.214 to revise the NAC International, Inc., NAC–UMS Universal Storage System listing within the ''List of approved spent fuel storage casks'' to renew, for an additional 40 years, the initial certificate and Amendment Nos. 1 through 9 of CoC No. 1015. The environmental impacts of the action have been reviewed under the requirements in the National Environmental Policy Act of 1969, as amended, and the NRC's regulations in subpart A of 10 CFR part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions.'' The renewal does not reflect a change in design or fabrication of the cask system as approved for the initial certificate or Amendment Nos. 1 through 9. The NRC determined that the renewed NAC–UMS Universal Storage System design, when used under the conditions specified in the renewed CoC, the technical specifications, and the NRC's regulations, will meet the requirements of 10 CFR part 72; therefore, adequate protection of public health and safety will continue to be reasonably assured.

Based on the foregoing environmental assessment, the NRC concludes that this direct final rule, ''List of Approved Spent Fuel Storage Casks: NAC International, Inc., NAC–UMS Universal Storage System, Certificate of Compliance No. 1015, Renewal of Initial Certificate and Amendment Nos. 1 through 9,'' will not have a significant effect on the quality of the human environment. Therefore, the NRC has determined that an environmental impact statement is not necessary for this direct final rule.

IX. Paperwork Reduction Act Statement

This direct final rule does not contain any new or amended collections of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing collections of information were approved by the Office of Management and Budget, approval number 3150–0132.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid Office of Management and Budget control number.

X. Regulatory Flexibility Certification

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the NRC certifies that this direct final rule will not, if issued, have a significant economic impact on a substantial number of small entities. This direct final rule affects only nuclear power plant licensees and NAC International, Inc. These entities do not fall within the scope of the definition of small entities set forth in the Regulatory Flexibility Act or the size standards established by the NRC (§ 2.810).

XI. Regulatory Analysis

On July 18, 1990 (55 FR 29181), the NRC issued an amendment to 10 CFR part 72 to provide for the storage of spent nuclear fuel under a general license in cask designs approved by the NRC. Any nuclear power reactor licensee can use NRC-approved cask designs to store spent nuclear fuel if (1) it notifies the NRC in advance; (2) the spent fuel is stored under the conditions specified in the cask's CoC; and (3) the conditions of the general license are met. A list of NRC-approved cask designs is contained in § 72.214. On October 19, 2000 (65 FR 62581), the NRC issued an amendment to 10 CFR part 72 that approved the NAC–UMS Universal Storage System design by adding it to the list of NRC-approved cask designs in § 72.214.

On October 13, 2020, NAC International, Inc. submitted a request to the NRC to renew, for an additional 40 years, the initial certificate and Amendment Nos. 1 through 7 of CoC No. 1015 for the NAC–UMS Universal Storage System. NAC International, Inc. supplemented its request on March 3, 2022; March 18, 2022 (adding Amendment Nos. 8 and 9 to the request); July 28, 2022; and December 21, 2022. Because NAC International, Inc. filed its renewal application at least 30 days before the certificate expiration date of November 20, 2020, pursuant to the timely renewal provisions in § 72.240(b), the initial issuance of the certificate and Amendment Nos. 1 through 9 of CoC No. 1015 did not expire.

The alternative to this action is to withhold approval of the renewal of the initial certificate and Amendment Nos. 1 through 9 and to require any 10 CFR part 72 general licensee seeking to continue the storage of spent nuclear fuel in NAC–UMS Universal Storage System using the initial certificate or Amendment Nos. 1 through 9 beyond the initial 20-year storage term certified by the cask's initial CoC to request an exemption from the requirements of §§ 72.212 and 72.214. The term for general licenses would not be extended from 20 years to 40 years. Under this alternative, each interested 10 CFR part 72 licensee would have to prepare, and the NRC would have to review, a separate exemption request, thereby increasing the administrative burden upon the NRC and the costs to each licensee.

Approval of this direct final rule is consistent with previous NRC actions. Further, as documented in the preliminary SER and environmental assessment, this direct final rule will have no adverse effect on public health and safety or the environment. This direct final rule has no significant identifiable impact or benefit on other government agencies. Based on this regulatory analysis, the NRC concludes that the requirements of this direct final rule are commensurate with the NRC's responsibilities for public health and safety and the common defense and security. No other available alternative is believed to be as satisfactory; therefore, this action is recommended.

XII. Backfitting and Issue Finality

The NRC has determined that the actions in this direct final rule do not constitute backfitting because they do not meet the definition of backfitting

under § 72.62. That definition states that backfitting means the addition, elimination, or modification, after the license has been issued, of the structures, systems, or components of an ISFSI or the procedures or organization required to operate an ISFSI. Certificate of compliance holders like NAC International, Inc. are not within the scope of the backfit rule in § 72.62.

Certificate of Compliance No. 1015 for the NAC International, Inc., NAC–UMS Universal Storage System design, as currently listed in § 72.214, ''List of Approved Spent Fuel Storage Casks,'' was initially approved for a 20-year term. This direct final rule would renew the initial certificate and Amendment Nos. 1 through 9, extending their approval period by 40 years. With this renewal, the term certified by the cask's CoC would change from 20 years to 40 years, with the period of extended operation beginning 20 years after the cask is placed into service. Because the term for the renewal would be longer than the initial term certified by the cask's CoC, the general licensee's authority to use the cask also would be extended to 40 years. Further, the revision to the CoC through the renewal would require implementation of aging management programs during the period of extended operation.

Renewing these certificates does not fall within the definition of backfitting under § 72.62 during the COC's initial 20-year term. General licensees who have loaded these casks, or who load these casks in the future under the specifications of the applicable certificate, may continue to store spent fuel in these systems for the initial 20-year storage period authorized by the original certificate. Extending the certificates' expiration dates for 40 more years and requiring the implementation of aging management programs does not impose any modification or addition to the design of the structures, systems, and components important to safety of a cask system, or to the procedures or organization required to operate the system during this initial 20-year term certified by the cask's CoC. The aging management programs required to be implemented by this renewal are only required to be implemented after the storage cask system's initial 20-year service period ends.

General licensees using the existing systems subject to these renewals are not required to continue using these systems following the end of the initial 20-year storage period. If general licensees choose to continue to store spent fuel in the NAC–UMS Universal Storage System after the initial 20-year period, these general licensees will be required to implement aging management activities for any cask systems subject to a renewed CoC. Such continued use is voluntary, so renewing the CoC with aging management program conditions does not constitute backfitting under § 72.62 for these general licensees.

XIII. Congressional Review Act

This direct final rule is not a rule as defined in the Congressional Review Act.

XIV. Availability of Documents

The documents identified in the following table are available to interested persons, as indicated.

BILLING CODE 7590–01–P

DOCUMENT	ADAMS ACCESSION NO. / WEB LINK / *FEDERAL REGISTER* CITATION
Proposed Certificate of Compliance	
Proposed Renewed Certificate of Compliance No. 1015, Renewed Initial Certificate	ML23213A151
Proposed Renewed Certificate of Compliance No. 1015, Renewed Amendment 1	ML23213A152
Proposed Renewed Certificate of Compliance No. 1015, Renewed Amendment 2	ML23213A153
Proposed Renewed Certificate of Compliance No. 1015, Renewed Amendment 3	ML23213A154
Proposed Renewed Certificate of Compliance No. 1015, Renewed Amendment 4	ML23213A155
Proposed Renewed Certificate of Compliance No. 1015, Renewed Amendment 5	ML23213A156
Proposed Renewed Certificate of Compliance No. 1015, Renewed Amendment 6	ML23213A157
Proposed Renewed Certificate of Compliance No. 1015, Renewed Amendment 7	ML23213A158
Proposed Renewed Certificate of Compliance No. 1015, Renewed Amendment 8	ML23213A159
Proposed Renewed Certificate of Compliance No. 1015, Renewed Amendment 9	ML23213A160
Preliminary Safety Evaluation Report	
Preliminary Safety Evaluation Report for Renewed Certificate of Compliance No. 1015, Amendments Nos. 1 through 9	ML23213A161
Proposed Conditions for Cask Use and Technical Specifications	
Proposed Conditions for Cask Use and Technical Specifications, Renewed Initial Certificate	ML23213A164
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 1	ML23213A166
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 2	ML23213A168
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 3, Appendix A	ML23213A171
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 3, Appendix B	ML23213A178
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 4, Appendix A	ML23213A172

Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 4, Appendix B	ML23213A179
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 5, Appendix A	ML23213A173
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 5, Appendix B	ML23213A180
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 6, Appendix A	ML23213A174
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 6, Appendix B	ML23213A181
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 7, Appendix A	ML23213A175
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 7, Appendix B	ML23213A182
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 8, Appendix A	ML23213A176
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 8, Appendix B	ML23213A183
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 9, Appendix A	ML23213A177
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 9, Appendix B	ML23213A184
Environmental Documents	
"Environmental Assessment for Proposed Rule Entitled, "Storage of Spent Nuclear Fuel in NRC-Approved Storage Casks at Nuclear Power Reactor Sites." (1989)	ML051230231
"Environmental Assessment and Findings of No Significant Impact for the Final Rule Amending 10 CFR Part 72 License and Certificate of Compliance Terms." (2010)	ML100710441
Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel: Final Report (NUREG-2157, Volumes 1 and 2). (2014)	ML14198A440 (package)
NAC International, Inc., NAC-UMS Universal Storage System Renewal Application Documents	
NAC International, Inc., NAC-UMS Universal Storage System, Certificate of Compliance (CoC) Renewal Application, October 13, 2020	ML20293A102

NAC International, Inc., Request for Additional Information Responses NAC-UMS Cask System, Revision 22A, March 3, 2022	ML22062A764
Replacement Page for Responses to the Nuclear Regulatory Commission's (NRC) Request for Additional Information for the Request to Renew the NAC-UMS Cask System Certificate of Compliance No. 1015, March 18, 2022	ML22077A076
NAC, Supplement to the NRC's Request for Additional Information for the Request to Renew the NAC-UMS Cask System Certificate of Compliance No. 1015, July 28, 2022	ML22209A078 (package)
Request to Withdraw Administrative Controls for Adverse Weather Events During Operations from NAC-MPC CoC Renewal Application, December 21, 2022	ML22355A120
Other Documents	
"General License for Storage of Spent Fuel at Power Reactor Sites." (July 18, 1990)	55 FR 29181
"Licenses, Certifications, and Approvals for Nuclear Power Plants." (August 28, 2007)	72 FR 49352
"License and Certificate of Compliance Terms." (February 16, 2011)	76 FR 8872
"Agreement State Program Policy Statement; Correction." (October 18, 2017)	82 FR 48535
Nuclear Energy Institute NEI 14-03, Revision 2, "Format, Content and Implementation Guidance for Dry Cask Storage Operations-Based Aging Management." (December 21, 2016)	ML16356A210
Regulatory Guide 3.76, Revision 0, "Implementation of Aging Management Requirements for Spent Fuel Storage Renewals." (July 31, 2021)	ML21098A022
"List of Approved Spent Fuel Storage Casks: NAC-UMS Addition." (October 19, 2000)	65 FR 62581
Presidential Memorandum, "Plain Language in Government Writing." (June 10, 1998)	63 FR 31885

BILLING CODE 7590–01–C

The NRC may post materials related to this document, including public comments, on the Federal Rulemaking website at *https://www.regulations.gov* under Docket ID NRC–2024–0034. In addition, the Federal rulemaking website allows members of the public to receive alerts when changes or additions occur in a docket folder. To subscribe: (1) navigate to the docket folder (NRC–2024–0034); (2) click the ''Subscribe'' link; and (3) enter an email address and click on the ''Subscribe'' link.

List of Subjects in 10 CFR Part 72

Administrative practice and procedure, Hazardous waste, Indians, Intergovernmental relations, Nuclear energy, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; the Nuclear Waste Policy Act of 1982, as amended; and 5 U.S.C. 552 and 553; the NRC is adopting the following amendments to 10 CFR part 72:

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE, AND REACTOR-RELATED GREATER THAN CLASS C WASTE

■ 1. The authority citation for part 72 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 223, 234, 274 (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2210e, 2232, 2233, 2234, 2236, 2237, 2238, 2273, 2282, 2021); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); National Environmental Policy Act of 1969 (42 U.S.C. 4332); Nuclear Waste Policy Act of 1982, secs. 117(a), 132, 133, 134, 135, 137, 141, 145(g), 148, 218(a) (42 U.S.C. 10137(a), 10152, 10153, 10154, 10155, 10157, 10161, 10165(g), 10168, 10198(a)); 44 U.S.C. 3504 note.

■ 2. In § 72.214, Certificate of Compliance No. 1015 is revised to read as follows:

§ 72.214 List of approved spent fuel storage casks.

* * * * *

Certificate Number: 1015.

Initial Certificate Effective Date: November 20, 2000, superseded by Renewed Initial Certificate on July 15, 2024.

Amendment Number 1 Effective Date: February 20, 2001, superseded by Renewed Amendment Number 1 on July 15, 2024.

Amendment Number 2 Effective Date: December 31, 2001, superseded by Renewed Amendment Number 2 on July 15, 2024.

Amendment Number 3 Effective Date: March 31, 2004, superseded by Renewed Amendment Number 3 on July 15, 2024.

Amendment Number 4 Effective Date: October 11, 2005, superseded by Renewed Amendment Number 4 on July 15, 2024.

Amendment Number 5 Effective Date: January 12, 2009, superseded by Renewed Amendment Number 5 on July 15, 2024.

Amendment Number 6 Effective Date: January 7, 2019, superseded by Renewed Amendment Number 6 on July 15, 2024.

Amendment Number 7 Effective Date: July 29, 2019, superseded by Renewed Amendment Number 7 on July 15, 2024.

Amendment Number 8 Effective Date: October 19, 2021, as corrected (ADAMS Accession No. ML21312A499); superseded by Renewed Amendment Number 8 on July 15, 2024.

Amendment Number 9 Effective Date: August 29, 2022, superseded by Renewed Amendment Number 9 on July 15, 2024.

SAR Submitted by: NAC International, Inc.

SAR Title: Final Safety Analysis Report for the NAC–UMS Universal Storage System.

Docket Number: 72–1015.

Renewed Certificate Expiration Date: November 20, 2060.

Model Number: NAC–UMS.

* * * * *

Dated: April 9, 2024.

For the Nuclear Regulatory Commission.

Raymond Furstenau,

Acting Executive Director for Operations.

[FR Doc. 2024–08508 Filed 4–26–24; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

10 CFR Part 420

RIN 1930–AA01

Mandatory Transmission and Distribution Planning Support Activities

AGENCY: Office of State and Community Energy Programs, State Energy Program, Department of Energy.

ACTION: Interim final rule and request for comment.

SUMMARY: The U.S. Department of Energy (DOE) is publishing an interim final rule that amends the State Energy Program (SEP) regulations to incorporate certain changes made to the DOE-administered formula grant program by the Infrastructure Investment and Jobs Act of 2021. Through this rulemaking, DOE amends SEP's mandatory requirements for state energy conservation plans.

DATES: This rule is effective April 29, 2024. Written comments must be received by May 29, 2024.

FOR FURTHER INFORMATION CONTACT: Ari Gerstman, U.S. Department of Energy, Office of State and Community Energy Programs, State Energy Program, SCEP–30, 1000 Independence Avenue SW, Washington, DC 20585–0121, Telephone: (240) 388–5805, Email: *ari.gerstman@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Authority and Background

The U.S. Department of Energy's State Energy Program provides financial assistance in the form of formula grants to states, U.S. territories, and the District of Columbia (hereinafter referred to as states) [1] for a wide variety of energy efficiency and renewable energy initiatives authorized under the Energy Policy and Conservation Act (EPCA) (Pub. L. 94–163), as amended. 42 U.S.C. 6321 *et seq.* Section 40109(a)(3) of the Infrastructure Investment and Jobs Act (IIJA 2021) (Pub. L. 117–58) amended Section 362(c) of EPCA, which pertains to the mandatory features of state energy conservation plans. 42 U.S.C. 6322(c). The submission of such plans is required for a state's participation in SEP and receipt of a formula grant. This interim final rule amends SEP regulations in part 420 of title 10 of the Code of Federal Regulations to incorporate the IIJA 2021 amendments.

Section 40109 of IIJA 2021 amended section 362(c) of EPCA to include a new paragraph (7) that mandates the inclusion of transmission and distribution planning support activities into states' energy conservation plans.[2] 42 U.S.C. 6322(c). With the issuance of this interim final rule, DOE amends 10 CFR 420.15 to include a new paragraph (g) to adopt this new statutory requirement. Once in effect, DOE's regulatory requirement for state energy conservation plans will reflect the corresponding statutory requirement.

DOE is also revising the reference to the Energy Policy and Conservation Act included in the 10 CFR part 420 authority line from Part D to Part B.

II. Interim Final Rulemaking

DOE is issuing this action as an interim final rule, without prior notice and opportunity for public comment, for two reasons. First, in general, the Administrative Procedure Act (APA) requires an agency to first provide public notice of a proposed rulemaking that is published in the **Federal Register** and provide the public an opportunity to participate in the rulemaking before finalizing the regulatory action. 5 U.S.C. 553(b)–(c). The APA's requirements of notice and public comment do not apply ''to the extent that there is involved . . . a matter related to agency . . . *grants,* benefits, or contracts.'' 5 U.S.C. 553(a)(2), emphasis added. SEP is a program that provides formula and competitive grants as well as technical assistance to states to enhance energy security, advance state-led energy initiatives, and increase energy affordability.

The interim final rule amends SEP's regulations to include the new mandatory features for state energy conservation plans established by section 40109(a)(3) of the IIJA 2021. States applying for SEP grants must submit plans that consider these new features in addition to those already set out SEP's regulations. 10 CFR 420.15. Because this rulemaking pertains to DOE's grant program and adopts new mandatory plan features that states must satisfy in order to receive SEP grant funds, the APA's requirements for notice and comment do not apply.

Second, this rulemaking regards a nondiscretionary action because DOE is incorporating the section 40109(a)(3) of IIJA 2021 amendments to SEP's regulations without substantive change. The language adopted in regulation mirrors the language of the statute verbatim and DOE is not amending any other provision of SEP's existing regulations as part of this rulemaking. DOE is simply adopting a mandatory requirement for state energy conservation plans as prescribed in statute into SEP's regulation.

Therefore, because this action concerns a grant program subject to an APA exception and is nondiscretionary, DOE has determined notice and comment is not necessary and is pursuing this activity through an interim final rule.

[1] Per 10 CFR 420.2, ''state'' means a state, the District of Columbia, Puerto Rico, or any territory or possession of the United States.

[2] The mandatory plan features include ''the mandatory conduct of activities to support transmission and distribution planning, including—(A) support for local governments and Indian Tribes; (B) feasibility studies for transmission line routes and alternatives; (C) preparation of necessary project design and permits; and (D) outreach to affected stakeholders.'' 42 U.S.C. 6322(c)(7).

III. Procedural Requirements

A. Review Under Executive Orders 12866, 13563, and 14094

This final rule has been determined not to be a ''significant regulatory action'' under E.O. 12866, Regulatory Planning and Review, 58 FR 51735 (October 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). Accordingly, this rule is not subject to review under the E.O. by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB).

B. Administrative Procedure Act

As discussed previously, the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* generally requires public notice and an opportunity for comment before a rule becomes effective. 5 U.S.C. 553(b)–(c). However, the APA provides that the requirements of 5 U.S.C. 553 do not apply ''to the extent that there is involved . . . a matter relating to agency . . . grants, benefits, or contracts.'' The interim final rule amends SEP's regulations to include the new mandatory state energy conservation plan features established by section 40109(a) of the IIJA 2021, which amended SEP's state energy conservation plan requirements. States applying for SEP grants are required to submit plans that consider these and the other mandatory features established in statute and codified in SEP's regulations. Because this rulemaking amends SEP's regulations at 10 CFR 420.15 to include features states must satisfy in order to receive a grant from SEP, the APA's general notice and comment requirements do not apply.

C. 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 for any rule that by law must be proposed for public comment. As discussed previously, DOE has determined that prior notice and opportunity for public comment is not required under the APA for this rulemaking because it concerns a grant program. Because a notice of proposed rulemaking is not required for this action pursuant to 5 U.S.C. 553, or any other law, no regulatory flexibility analysis has been prepared for this interim final rule. *See* 5 U.S.C. 601(2), 603(a).

D. Review Under the Paperwork Reduction Act of 1995

This interim final rule imposes no new information or recordkeeping requirements. Accordingly, Office of Management and Budget clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

E. Review Under the National Environmental Policy Act of 1969

DOE has determined that this interim final rule falls into a class of actions that are categorically exclude from review under the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, DOE has determined that this rulemaking is consistent with activities identified in 10 CFR part 1021, subpart D, appendix A6, because it is strictly procedural and meets the requirements for application of a categorical exclusion. Therefore, DOE has determined that promulgation of this rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA and does not require an environmental assessment nor an environmental impact statement.

F. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The 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 examined this interim final rule and determined that it does not preempt State law and does 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. Accordingly, no further action is required by Executive Order 13132.

G. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 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 interim final rule meets the relevant standards of Executive Order 12988.

H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a) and (b).) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice

and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA (62 FR 12820) (also available at *www.energy.gov/gc/office-general-counsel*). This interim final rule does not contain an intergovernmental mandate or a mandate that may result in the expenditure of $100 million or more in any year, so these requirements under the Unfunded Mandates Reform Act do not apply.

I. Review Under the Treasury and General Government Appropriations Act of 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 interim final 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.

J. Review Under Executive Order 12630

Pursuant to E.O. 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), DOE has determined that this interim final rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

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

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 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). DOE has reviewed this interim final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

L. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under 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.

This interim final rule would not have a significant adverse effect on the supply, distribution, or use of energy and, therefore, is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

IV. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this interim final rule.

List of Subjects in 10 CFR Part 420

Energy conservation, Grant programs—energy, Technical assistance.

Signing Authority

This document of the Department of Energy was signed on April 22, 2024, by David Crane, Under Secretary for Infrastructure, 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 April 23, 2024.

Treena V. Garrett,

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

For the reasons set forth in the preamble, the Department of Energy amends part 420 of chapter II, subchapter D of title 10 of the Code of Federal Regulations as set forth below:

PART 420—STATE ENERGY PROGRAM

■ 1. The authority citation for part 420 is revised to read as follows:

Authority: Title III, part B, as amended, of the Energy Policy and Conservation Act (42 U.S.C. 6321 *et seq.*); Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*)

■ 2. Amend § 420.15 by revising the section heading and adding a new paragraph (g) to read as follows:

§ 420.15 Annual State applications and amendments to State plans.

* * * * *

(g) The mandatory conduct of activities to support transmission and distribution planning, including—

(1) Support for local governments and Indian Tribes;

(2) Feasibility studies for transmission line routes and alternatives;

(3) Preparation of necessary project design and permits; and

(4) Outreach to affected stakeholders.

[FR Doc. 2024–08984 Filed 4–26–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

10 CFR Part 611

RIN 1901–AB60

Statutory Updates to the Advanced Technology Vehicles Manufacturing Program

AGENCY: Loan Programs Office, Department of Energy.

ACTION: Direct final rule.

SUMMARY: The Department of Energy (''DOE'') issues this direct final rule to amend the regulations implementing the direct loan provisions for the Advanced Technology Vehicles Manufacturing Incentive Program established by section 136 of the Energy Independence and Security Act of 2007, as amended (''ATVM statute''). The ATVM statute provides for grants and loans to eligible automobile manufacturers and component suppliers for projects that

reequip, expand, or establish manufacturing facilities in the United States to produce qualifying advanced technology vehicles or qualifying components. Specifically, this rule: amends the existing applicable regulations in order to implement additional categories of advanced technology vehicles added to the ATVM statute by the Infrastructure Investment and Jobs Act and funded by the Inflation Reduction Act of 2022, including certain medium-duty and heavy-duty vehicles, trains, locomotives, maritime vessels, aircraft, and hyperloop technology. This rule also amends the existing applicable regulations to reflect the ultra efficient vehicle category of advanced technology vehicles added to the ATVM statute through an earlier appropriations act. DOE is implementing these amendments through a final rule so that the implementing regulations are consistent with the statutory requirements of the ATVM statute.

DATES: This final rule is effective July 15, 2024, unless adverse comment is received by May 29, 2024. If adverse comments are received that DOE determines may provide a reasonable basis for withdrawal of the direct final rule, a timely withdrawal of this rule will be published in the **Federal Register**.

ADDRESSES: Interested persons may submit comments, identified by RIN 1901–AB60, by any of the following methods:

Federal eRulemaking Portal: www.regulations.gov. Follow the instructions for submitting comments.

Electronic Mail (Email): lpofederalregistercomments@hq.doe.gov. Include the RIN 1901–AB60 in the subject line of the message.

Postal Mail: Loan Programs Office, Attn: LPO Legal Department, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585–0121. Please submit one signed original paper copy. Due to potential delays in DOE's receipt and processing of mail sent through the U.S. Postal Service, we encourage respondents to submit comments electronically to ensure timely receipt.

Hand Delivery/Courier: U.S. Department of Energy, Room 4B–122, 1000 Independence Avenue SW, Washington, DC 20585.

No telefacsimiles (faxes) will be accepted. For detailed instructions on submitting comments and additional information on the rulemaking process, see section IV of this document, *Public Participation.*

Docket: The docket, which includes **Federal Register** notices, comments, and other supporting documents and materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available. The docket web page can be found at the *www.regulations.gov* web page associated with RIN 1901–AB60. The docket web page contains simple instructions on how to access all documents, including public comments, in the docket. See section IV of this document, *Public Participation,* for information on how to submit comments through *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Steven Westhoff, Attorney-Adviser, Loan Programs Office, email: *steven.westhoff@hq.doe.gov,* or phone: (240) 220–4994.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction and Background

A. ATVM Statute and Regulations

Section 136 of the Energy Independence and Security Act of 2007, as amended (42 U.S.C. 17013) (''ATVM statute'') authorizes the Secretary of Energy (''Secretary'') to issue grants and direct loans to applicants for the costs of reequipping, expanding, or establishing manufacturing facilities in the United States to produce qualified advanced technology vehicles or qualifying components. The ATVM statute also authorizes the Secretary to issue grants and direct loans for the costs of engineering integration performed in the United States of qualifying advanced technology vehicles and qualifying components. The Advanced Technology Vehicles Manufacturing Loan Program (''ATVM Program'') represents the Secretary's implementation of the direct loan authority under the ATVM statute. The ATVM Program is administered by the U.S. Department of Energy's (''DOE'') Loan Programs Office (''LPO''). The purpose of the ATVM Program is to originate, underwrite, and service loans to eligible automotive manufacturers and component manufacturers to finance the cost of: (i) reequipping, expanding, or establishing manufacturing facilities in the United States to produce Advanced Technology Vehicles (''ATVs'') and qualifying components; and (ii) engineering integration performed in the United States of ATVs and qualifying components.

Consistent with section 17013(e) of title 42 of the United States Code (''U.S.C.''), DOE promulgated regulations for the ATVM Program in 2009, which are set forth at 10 Code of Federal Regulations (''CFR'') part 611.[1] Part 611 provides eligibility criteria for automobile manufacturers, project eligibility requirements, and application requirements and general terms for the ATVM Program. Part 611 has since been amended twice to: (1) standardize the submission and handling within DOE's assistance programs, of trade secrets and commercial or financial information that is privileged or confidential [2] and (2) clarify the eligibility of critical minerals projects.[3]

B. Energy and Water Development and Related Agencies Appropriations Act of 2010

Section 312 of the Energy and Water Development and Related Agencies Appropriations Act of 2010 [4] amended the ATVM statute to include the ultra efficient vehicle category within the statutory definition of ATVs. In this final rule, DOE is adding this category of vehicles to part 611 to reflect the ATVM statute.

C. Infrastructure Investment and Jobs Act

Section 40401(b) of the Infrastructure Investment and Jobs Act (''IIJA'') [5] amended the definitions provision of the ATVM statute to add the following categories of vehicles within the statutory definition of ATVs: a medium-duty vehicle or a heavy-duty vehicle that exceeds 125 percent of the greenhouse gas emissions and fuel efficiency standards established by the final rule of the Environmental Protection Agency entitled ''Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles-Phase 2'' (81 FR 73478 (October 25, 2016)); a train or locomotive; a maritime vessel; an aircraft; and hyperloop technology.[6]

[1] 73 FR 66721 (November 12, 2008).
[2] 76 FR 26579 (May 9, 2011).
[3] 86 FR 3747 (January 15, 2021).
[4] Public Law 111–85 (2009).
[5] Public Law 117–58 (2021).
[6] Section 40401(l) of the IIJA prohibited the Secretary from using amounts appropriated prior to

Continued

In this final rule, DOE is adding these categories of vehicles to part 611 in order for them to be eligible for a direct loan under the ATVM Program.

D. Inflation Reduction Act

The Inflation Reduction Act of 2022 (''IRA'')[7] contains energy and climate provisions that appropriate $3 billion for the ATVM Program, including to support the categories of ATVs added to the program by the IIJA. However, section 50142 of the IRA, which provides the Secretary with the authority to use funds appropriated by the IRA for the costs of providing direct loans to the categories of ATVs added to the definition of ATV by the IIJA, also provides that, with respect to trains or locomotives; maritime vessels; aircraft; and hyperloop technology, such funds may be used for that purpose only if the relevant advanced technology vehicles emit, under any possible operational mode or condition, low or zero exhaust emissions of greenhouse gases. The IRA appropriations for the ATVM Program are available through September 30, 2028.

E. Intended Future Rulemaking Process

This direct final rule is focused on revising part 611 to implement additional categories of advanced technology vehicles that are already statutorily eligible. In addition to this current rulemaking, DOE expects to undertake a separate rulemaking to implement further improvements to part 611 based on experience implementing the ATVM Program and to potentially further define the requirements for nonroad advanced technology vehicle projects. In that separate rulemaking, DOE intends to issue a request for information requesting public feedback regarding ATVM Program design as related to the new categories of advanced technology vehicles and regarding potential demand for loans for manufacturing facilities for such ATVs, as well as invite additional public input regarding part 611 and the ATVM Program. Following further consideration of such issues and comments, which may include related comments received in response to this direct final rule, DOE may then issue a notice of proposed rulemaking proposing more expansive changes to part 611. In addition to the two rulemakings, DOE expects to conduct a broader set of updates to the ATVM Program guidance and application materials to reflect the changes in these rulemakings. DOE does not expect ATVM Program applicants in the new ATV categories relying on this direct final rule to be materially impacted by the future rulemaking.

II. Discussion

This final rule allows the Secretary to implement the amendments to the ATVM statute enacted by the IIJA and funded by the IRA by codifying these requirements in the Code of Federal Regulations. Without revisions to part 611, applicants for projects that were made eligible for the ATVM Program under the IIJA and the IRA would not be eligible for direct loans under the regulations applicable to the ATVM Program. Further, the requirements applicable to the use of the funds provided for the cost of direct loans under the IRA for the applicable vehicle categories are not currently set forth in part 611.

As such, this final rule amends the definition of ''advanced technology vehicle'' under part 611 to include the categories of ATVs added by the IIJA. It also amends the provisions describing the eligibility requirements for these new categories of ATVs as provided by the IRA and distinguishes between the requirements applicable to on-road advanced technology vehicles and nonroad advanced technology vehicles. These technical and administrative changes to part 611 represent conforming changes to the text of the ATVM statute, as amended by the IIJA and the IRA requirements applicable to the use of funds appropriated by the IRA for the ATVM Program. The final rule adopts the IRA requirement that projects for nonroad ATVs support only ATVs that ''emit, under any possible operational mode or condition, low or zero exhaust emissions of greenhouse gases'' for all nonroad ATV projects in order to prescribe a single eligibility standard.[8]

For consistency and completeness, this direct final rule also makes conforming changes to reflect the earlier amendments to the ATVM statute that established the ultra efficient vehicles category of ATVs.

III. Section-by-Section Analysis

Provided below is a section-by-section analysis of the changes made by this direct final rule.

§ 611.1 Purpose

DOE is revising § 611.1 to include legal references relating to the IIJA and the IRA, as well as the Energy and Water Development and Related Agencies Appropriations Act of 2010.

§ 611.2 Definitions

DOE is revising the definition of ''advanced technology vehicle'' to include both on-road advanced technology vehicles and nonroad advanced technology vehicles; adding a definition of ''on-road advanced technology vehicle'' that includes ultra efficient vehicles, light duty vehicles, medium duty vehicles, and heavy duty vehicles, in each case as defined in the ATVM statute; adding a definition of ''nonroad advanced technology vehicle'' that includes low or zero emission trains or locomotives, maritime vessels, aircraft, and hyperloop technologies; and adding a definition of ''ultra efficient vehicle'' from the ATVM statute.

§ 611.3 On-Road Advanced Technology Vehicle

DOE is revising § 611.3 to refer to ''on-road advanced technology vehicles'' as this section describes program requirements that are specific to on-road vehicle manufacturers and not to manufacturers of nonroad advanced technology vehicles.

§ 611.4 Nonroad Advanced Technology Vehicle

DOE is adding a new § 611.4, ''Nonroad advanced technology vehicle'' to distinguish and describe the program requirements applicable to a manufacturer of a nonroad advanced technology vehicle or a manufacturer of a nonroad advanced technology vehicle qualifying component as provided by section 50142(a) of the IRA.

§ 611.100 Eligible Applicant

DOE is revising § 611.100 to distinguish between the requirements applicable to on-road advanced technology vehicle manufacturers and those applicable to nonroad advanced technology vehicle manufacturers. Due to the addition of new categories of on-road advanced technology vehicles, DOE is also clarifying, consistent with the current statute and pre-existing § 611.100, that the specified improved fuel economy requirements of paragraph (b) continue to apply only to manufacturers of light duty vehicles.

the date of the enactment of the IIJA to provide direct loans under section 136(d) for the costs of activities that were not eligible for those loans prior to that date. Public Law 117–58 (2021). However, this prohibition was later eliminated by the Consolidated Appropriations Act of 2023. Public Law 117–328 (2022).

[7] Public Law 117–169 (2022).

[8] DOE notes that certain appropriations for the ATVM Program are not subject to the IRA requirement. However, DOE believes the IRA requirement demonstrates Congressional intent regarding how the ATVM Program should consider nonroad advanced technology vehicles as ''advanced'' and therefore eligible for loans under the program.

IV. Public Participation

DOE will accept comments, data, and information regarding this final rule on or before the date provided in the **DATES** section at the beginning of this final rule. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this document.

Submitting comments via www.regulations.gov. The *www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will 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 the disclosure of which 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 written in English, and that are free of any defects or viruses. Documents should not contain special characters or any form of encryption. If possible, documents should carry the electronic signature of the author.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that they believe to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery/courier 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'' that deletes the information believed to be confidential. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and will treat it according to its determination. It is DOE's policy that all comments, including any personal information provided in the comments, may be included in the public docket, without change and as received, except for information deemed to be exempt from public disclosure.

V. Regulatory and Notices Analysis

A. Executive Orders 12866, 13563, and 14094

Executive Order (''E.O.'') 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 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'') 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 regulatory action is consistent with these principles.

Section 6(a) of E.O. 12866 requires agencies to submit ''significant regulatory actions'' to OIRA for review. This final rule has been determined to be a ''significant regulatory action'' under E.O. 12866. Accordingly, this action was subject to review by OIRA.

Section 6(a) of E.O. 12866 requires an agency issuing a ''significant regulatory action'' to provide an assessment of the potential costs and benefits of the regulatory action. To that end, DOE has further assessed the qualitative and quantitative costs and benefits of this direct final rule.

As discussed in previous sections of this direct final rule, DOE is aligning its regulations with the statutory

requirements for the voluntary federal loan program provided in the ATVM statute. However, DOE has considered the costs and benefits in this analysis for transparency. DOE does not expect the costs and benefits associated with applying to the ATVM Program in connection with the new categories of ATVs to deviate materially from the costs associated with the current categories of ATVs. The estimated costs of completing an application for a newly eligible project under the direct final rule are detailed in the current Paperwork Reduction Act burden analysis: $27,075 per applicant. While the range of advanced ATVs and qualifying components projects may broaden under the amendments under this direct final rule, DOE anticipates receiving the previously estimated 40 annual applications to the ATVM Program across all vehicle categories, resulting in the same estimated $1,083,000 combined annual cost to applicants as articulated in DOE's current burden analysis. As DOE has previously noted, much of the financial and technical information and other activities required as part of an ATVM Program loan application is required of an applicant that is raising equity, seeking a loan in the private sector, or exploring other financing sources for a project of similar complexity, size, and risk.

DOE estimated its annual costs in administering the ATVM Program for fiscal year 2024 to be $25,000,000.[9] DOE anticipates that the new ATV classes will produce 2–4 more loan applications per year in the 12 months following the effectiveness of this direct final rule. Given the above-mentioned cost estimates of $27,075 per applicant, that would amount to between $54,150 and $108,300 per year in costs borne by industry for these ATV applications. At the same time, DOE expects a natural decrease in the number of applications from the prior ATV categories, as parties planning projects under those categories have already applied to the ATVM Program, leaving the overall volume of ATVM Program applications steady over the next few years. Given the number of loan applications generated by nonroad vehicle technologies, DOE does not anticipate requiring additional resources, personnel, or staff time compared to its baseline to process applications in new ATV categories. DOE has issued eight loans for a total of more than $10 billion obligated to borrowers, with a further conditional commitment of eight more loans and $16 billion more dollars. In total, this would suggest on average a loan amount of roughly $1.73 billion per loan, although many loans are expected to be less than $1 billion. To the extent any of the loan applications for nonroad technology classes introduced by this rulemaking are successful, without additional information on the size of the loan requests at this stage DOE would anticipate a similar level of transfer. DOE does not anticipate any greater administrative costs to the Federal Government resulting from this direct final rule.

While the ATVM Program has no application fee, each applicant would incur the following costs: costs by DOE's independent advisors in connection with the applicant's project; and a fee at the time of closing of a loan, equal to 10 basis points (0.1%) of the principal amount of the loan. The interest rate associated with an ATVM Program loan is equal to the U.S. Treasury-equivalent yield curve with zero credit spread.

Like other federal credit programs, the ATVM Program accounts for the cost of each individual loan in accordance with the Federal Credit Reform Act of 1990, as amended (2 U.S.C. 661 *et seq.*) (''FCRA''), which requires agencies to estimate the cost to the government of extending or guaranteeing credit. This cost, referred to as credit subsidy cost, equals the net present value of estimated cash flows from the government minus estimated cash flows to the government over the life of the loan and excluding administrative costs. In accordance with FCRA, the non-administrative cost to the Federal Government of issuing each individual loan under the ATVM Program must be estimated, using a model provided by the Office of Management and Budget (''OMB'').

The benefits of this direct final rule derive from facilitating the applications for statutorily eligible projects under the ATVM Program. Under the existing part 611 and over the course of the ATVM Program, DOE has financed facilities for the manufacturing of advanced automobiles, as well as more recently for the manufacturing of electric vehicle batteries and battery-grade critical minerals. Throughout its history, the ATVM Program has issued eight total loans, and more than $10 billion has been obligated to borrowers. Since the passage of the IIJA, the ATVM Program has added two loans to its portfolio: Ultium Cells and Syrah Technologies.

Loans for relatively newer low or zero emissions vehicle technologies might differ from loans for the existing vehicle definitions. At present, DOE does not have an estimate on the average size of a loan for the additional categories of nonroad vehicles added to the ATVM Program by this rule, nor does DOE have an estimate for the failure rate of loans for nonroad technologies. These are important considerations when projecting the impact the nonroad vehicle classes will have on available ATVM Program funds. For example, if project failure rates are relatively higher for the nonroad vehicle classes, then DOE might make different decisions on the size of disbursed funds based on the likelihood of retrieving loaned amounts. Similarly, if loans tend to be relatively larger in this space, then the pool of funding might be exhausted faster as loan applications are approved than in DOE's previous experience. As DOE develops more experience with loan applications for nonroad technologies, DOE will consider providing additional guidance or rulemaking.

To date, projects that have been financed in part by ATVM Program loans have produced vehicles that are estimated to have saved over 19 billion gallons of gasoline, equivalent to a cumulative 26 million metric tons of carbon dioxide emissions, and created more than 43,000 direct jobs across eight states. DOE has issued conditional commitments for eight additional projects, potentially totaling over $16 billion in ATVM Program loans, that would further contribute to the reduction of vehicle emissions and to the creation of new domestic manufacturing opportunities. Through the ATVM Program, domestic and foreign automakers and manufacturers have deployed advanced technologies, saved or created thousands of jobs, reduced costs for consumers through increased fuel efficiency, and enhanced U.S. energy independence and security. DOE anticipates that this direct final rule will, consistent with current law, potentially advance the same types of benefits seen in existing and pending ATVM Program loans across a broader range of advanced technology vehicles and qualifying components.

A final consideration for the addition of new vehicle classes is the spillover impacts the new vehicle classes might have on existing classes. The IRA provided $3 billion in additional funding for the ATVM Program, including for the purpose of nonroad vehicle technologies. This funding is also available for technologies currently eligible for ATVM Program loans. To the extent that loan demand increases for existing technologies, it is possible that funding might become limited for

[9] See DOE's Fiscal Year 2024 Budget Justification, Loan Programs Office Summary, available at *https://www.energy.gov/sites/default/files/2023-03/doe-fy-2024-budget-vol-3-lpo-v2.pdf*.

nonroad vehicles. In the reverse case, where nonroad loan demand is especially high, the loan amounts for currently eligible technologies might decrease. DOE does not believe that demand for loans will exceed the point such that either of the above are practical concerns, but does note that in the event of this possibility, further communication might be necessary.

B. Administrative Procedure Act

The Administrative Procedure Act (5 U.S.C. 551 *et seq.*) (''APA'') exempts from the APA's notice and comment procedures under 5 U.S.C. 553(b) and (c) rulemakings that involve matters relating to public property, loans, grants, benefits, or contracts. (5 U.S.C. 553(a)(2)). As this rule relates to the issuance of loans, DOE has determined that notice of proposed rulemaking (and comment thereon) is not required.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that an agency prepare an initial regulatory flexibility analysis 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 Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 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).

This final rule updates part 611. DOE is not obligated to prepare a regulatory flexibility analysis for this rulemaking because there is not a requirement to publish a general notice of proposed rulemaking for rules related to loans under the APA. (See 5 U.S.C. 553(a)(2)). Furthermore, this direct final rule implements, without substantive change, amendments to the ATVM statute and applicable provisions from the IRA.

D. Paperwork Reduction Act of 1995

The final rule would impose no new information or record keeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act. (See 42 U.S.C. 3501 *et seq.*). The information collection necessary to administer DOE loans under the ATVM Program under 10 CFR part 611 is subject to approval under the Paperwork Reduction Act. The information collection provisions of this part were previously approved by the OMB under OMB Control Number 1910–5137.

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.

E. National Environmental Policy Act of 1969

In this rule, DOE amends part 611 to add additional categories of advanced technology vehicles authorized to be considered eligible for loans under the ATVM Program. DOE has determined that this final rule qualifies for categorical exclusion under 10 CFR part 1021, subpart D Appendix A5 as a rulemaking that amends an existing rule or regulation (*i.e.,* part 611) without changing the environmental effect of that rule. Therefore, DOE has determined that this final rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA and does not require an environmental assessment or an environmental impact statement. Through the issuance of this rule, DOE is making no decision relative to the approval of a loan for a particular project. DOE would prepare appropriate NEPA review for any proposed project.

F. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on executive agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction.

With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires, in pertinent part, 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 rule meets the relevant standards of Executive Order 12988.

G. Executive Order 13132

Executive Order 13132, ''Federalism,'' [10] imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required 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.[11]

DOE has examined this final rule and has determined that it will not preempt State law and 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. Accordingly, no further action is required by Executive Order 13132.

H. Executive Order 13175

Under Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments,'' [12] DOE may not issue a discretionary rule that has ''Tribal'' implications and imposes substantial direct compliance costs on Indian Tribal governments. DOE has determined that this final rule will not have such effects and has concluded that Executive Order 13175 does not apply to this final rule.

[10] 64 FR 43255 (August 4, 1999).

[11] 65 FR 13735 (March 14, 2000).

[12] 65 FR 67249 (November 9, 2000).

I. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (''UMRA'') [13] requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments and the private sector. For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy (2 U.S.C. 1532(a) and (b)). UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and tribal governments on a proposed ''significant intergovernmental mandate'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA.[14] DOE examined this final rule according to UMRA and its statement of policy and has determined that the final rule contains neither an intergovernmental mandate nor a mandate that may result in the expenditure of $100 million or more in any year by State, local, and tribal governments, in the aggregate, or by the private sector. The final rule establishes only requirements that are a condition of Federal assistance or a duty arising from participation in a voluntary program. Accordingly, no further assessment or analysis is required under UMRA.

J. Treasury and General Government Appropriations Act of 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 [15] requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. This final rule will 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.

K. Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 [16] provides for Federal agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). 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: *https://www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf.*

DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

L. Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' [17] requires Federal agencies to prepare and submit to the 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 promulgated 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. This regulatory action will not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

M. Congressional Review Act

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule. The report will state that OIRA has determined that the rule meets the criteria set forth in 5 U.S.C. 804(2).

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this direct final rule.

List of Subjects in 10 CFR Part 611

Administrative practice and procedure, Energy, Loan programs, Reporting and recordkeeping requirements.

Signing Authority

This document of the Department of Energy was signed on April 23, 2024, by Jigar Shah, Executive Director, Loan Programs 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 April 24, 2024.

Treena V. Garrett,

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

For the reasons stated in the preamble, DOE amends part 611 of chapter II of title 10 of the Code of Federal Regulations as set forth below:

PART 611—ADVANCED TECHNOLOGY VEHICLES MANUFACTURER ASSISTANCE PROGRAM

■ 1. The authority citation for part 611 is revised to read as follows:

Authority: Pub. L. 110–140 (42 U.S.C. 17013), Pub. L. 110–329, Pub. L. 111–85, Pub. L. 117–58.

■ 2. Revise § 611.1 to read as follows:

§ 611.1 Purpose.

This part is issued by the Department of Energy (DOE) pursuant to section 136 of the Energy Independence and Security Act of 2007, Public Law 110–140, as amended by section 129 of Consolidated Security, Disaster Assistance, and Continuing

[13] Public Law 104–4 (1995).

[14] 62 FR 12820 (March 18, 1997); also available at *www.energy.gov/gc/office-general-counsel.*

[15] Public Law 105–277 (1998); 5 U.S.C. 601 note.

[16] Public Law 106–554 (2000); 44 U.S.C. 3516 note.

[17] 66 FR 28355 (May 22, 2001).

Appropriations Act of 2009, Public Law 110–329, section 312 of Energy and Water Development and Related Agencies Appropriations Act of 2010, Public Law 111–85, section 40401(b) of the Infrastructure Investment and Jobs Act, Public Law 117–58, and section 50142 of the Inflation Reduction Act of 2022, Public Law 117–169. Specifically, section 136(e) directs DOE to promulgate an interim final rule establishing regulations that specify eligibility criteria and that contain other provisions that the Secretary deems necessary to administer this section and any loans made by the Secretary pursuant to this section.

■ 3. Amend § 611.2 by:
■ a. Revising the definitions for ''Advanced technology vehicle'' and;
■ b. Adding, in alphabetical order, definitions for ''Nonroad advanced technology vehicle'', ''On-road advanced technology vehicle'', and ''Ultra efficient vehicle''.

The additions and revision read as follows:

§ 611.2 Definitions.

* * * * *

Advanced technology vehicle means an on-road advanced technology vehicle or a nonroad advanced technology vehicle.

* * * * *

Nonroad advanced technology vehicle means:

(1) A train or locomotive;

(2) A maritime vessel;

(3) An aircraft; and

(4) Hyperloop technology

That, in each case, emit, under any possible operational mode or condition, low or zero exhaust emissions of greenhouse gases.

On-road advanced technology vehicle means

(1) An ultra efficient vehicle or a light duty vehicle that meets—

(i) The Bin 5 Tier II emission standard established in regulations issued by the Administrator of the Environmental Protection Agency under section 202(i) of the Clean Air Act (the Act) (42 U.S.C. 7521(i)), as of the date of application, or a lower-numbered Bin emission standard;

(ii) Any new emission standard in effect for fine particulate matter prescribed by the Administrator under the Act (42 U.S.C. 7401 *et seq.*), as of the date of application; and

(iii) At least 125 percent of the harmonic production weighted average combined fuel economy, for vehicles with substantially similar attributes in model year 2005.

(2) A medium duty vehicle or heavy duty vehicle that exceeds 125 percent of the greenhouse gas emissions and fuel efficiency standards established by the final rule of the Environmental Protection Agency entitled ''Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2'' (81 FR 73478 (October 25, 2016)).

* * * * *

Ultra efficient vehicle means a fully closed compartment vehicle designed to carry at least 2 adult passengers that achieves—

(1) At least 75 miles per gallon while operating on gasoline or diesel fuel;

(2) At least 75 miles per gallon equivalent while operating as a hybrid electric-gasoline or electric-diesel vehicle; or

(3) At least 75 miles per gallon equivalent while operating as a fully electric vehicle.

■ 4. Amend § 611.3 by revising the section heading, the introductory text, and paragraph (a) to read as follows:

§ 611.3 On-road advanced technology vehicle.

In order to demonstrate that a light duty vehicle is an ''on-road advanced technology vehicle'', an automobile manufacturer must provide the following:

(a) Emissions certification. An automobile manufacturer must certify in writing that the vehicle meets, or will meet, the emissions requirements specified in the definition of ''on-road advanced technology vehicle''; and

* * * * *

■ 5. Add § 611.4 to subpart A to read as follows:

§ 611.4 Nonroad advanced technology vehicle.

A manufacturer of a nonroad advanced technology vehicle or a manufacturer of a nonroad advanced technology vehicle qualifying component must provide DOE with such information to demonstrate to the satisfaction of DOE that the applicable nonroad advanced technology vehicle emits, under any possible operational mode or condition, low or zero exhaust emissions of greenhouse gases.

■ 6. Amend § 611.100 by revising paragraph (a)(1) to read as follows.

§ 611.100 Eligible applicant.

(a) * * *

(1) Must be—

(i) An on-road advanced technology vehicle manufacturer that, if it is a light duty vehicle manufacturer, can demonstrate an improved fuel economy as specified in paragraph (b) of this section, or otherwise satisfies the applicable standards set forth in the definition of on-road advanced technology vehicle,

(ii) A manufacturer of a qualifying component, or

(iii) A nonroad advanced technology vehicle manufacturer; and

* * * * *

[FR Doc. 2024–09105 Filed 4–26–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

10 CFR Part 955

RIN 1903–AA12

Elemental Mercury Management and Storage Fees

AGENCY: Office of Environmental Management, U.S. Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is removing the regulatory provisions established by the final rule Elemental Mercury Management and Storage Fees that was published in the **Federal Register** on December 23, 2019. On September 5, 2020, the U.S. District Court for the District of Columbia issued an order that vacated and remanded the rule to DOE for reconsideration. This action amends the Code of Federal Regulations to reflect the Court's order.

DATES: This rule is effective on April 29, 2024. However, the Court's order had legal effect immediately upon its issuance on September 5, 2020.

FOR FURTHER INFORMATION CONTACT: Timothy Herald, U.S. Department of Energy, Office of Environmental Management, Room B126, 19901 Germantown Road, Germantown, MD 20874; (240) 243–8753 or *timothy.herald@em.doe.gov.*

SUPPLEMENTARY INFORMATION: Section 5(a)(1) of the Mercury Export Ban Act (MEBA), as amended, 42 U.S.C. 6939f(a)(1), provides that the Secretary of Energy shall designate a facility or facilities of DOE for the purpose of long-term management and storage of elemental mercury generated within the United States. MEBA section 5(b)(1), 42 U.S.C. 6939f(b)(1), further provides that DOE shall assess and collect a fee at the time of delivery for providing such management and storage, based on the pro rata cost of long-term management and storage of elemental mercury delivered to the facility.

On December 6, 2019, DOE published its Record of Decision (ROD) identifying a portion of two buildings at a Texas facility leased by DOE and owned by

Waste Control Specialists, LLC (WCS facility) as its designated facility under MEBA section 5(a). (84 FR 66890). In accordance with MEBA section 5(b), on December 23, 2019, DOE issued a final rule that established the fee for the management and storage of elemental mercury at the designated facility. (84 FR 70402). The rule, which became effective on January 22, 2020, added 10 CFR part 955 titled ''Fee for Long-Term Management and Storage of Elemental Mercury Under the Mercury Export Ban Act of 2008, as Amended.''

On January 17, 2020, Nevada Gold Mines, LLC (NGM) filed suit against DOE in the U.S. District Court for the District of Columbia seeking to vacate both the final rule and the ROD. *Nevada Gold Mines, LLC* v. *Dan Brouillette, et al.,* Case No. 1:20–cv–00141–RJL (D.D.C. 2020). On August 21, 2020, NGM and DOE executed a settlement agreement in which DOE agreed to move the district court to vacate and remand the fee rule. On September 5, 2020, the district court granted DOE's motion to vacate the fee rule and ordered the rule vacated and remanded to DOE for reconsideration. Consistent with the agreement, DOE subsequently issued an amended ROD withdrawing the designation of the WCS facility. In this final rule, DOE removes 10 CFR part 955 to reflect the district court's order.

This final rule is not subject to the requirement to provide prior notice and an opportunity for public comment under 5 U.S.C. 553(b) and (c) because it falls under the good cause exception at 5 U.S.C. 553(b)(3)(B). The good cause exception is satisfied when notice and comment is ''impracticable, unnecessary, or contrary to the public interest.'' *Id.* This final rule is an administrative step that implements the district court's order vacating the December 2019 rule. Notice and comment are unnecessary for implementation of the court's vacatur and would be impracticable and contrary to the public interest in light of DOE's need to implement the now-effective final judgment. Additionally, because this final rule implements a court order already in effect, DOE has good cause to waive the 30-day effective date. *See* 5 U.S.C. 553(d)(3).

Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 955

Elemental Mercury, Hazardous Waste Treatment, Storage, and Disposal, and Reporting and Recordkeeping Requirements.

Signing Authority

This document of the Department of Energy was signed on April 23, 2024, by David M. Turk, Deputy Secretary of Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on April 24, 2024.

Treena V. Garrett,

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

PART 955—[REMOVED AND RESERVED]

■ For the reasons stated in the preamble, and under the authority of 42 U.S.C. 6939f(b), DOE removes and reserves 10 CFR part 955.

[FR Doc. 2024–09134 Filed 4–26–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1989; Project Identifier AD–2023–00512–E; Amendment 39–22719; AD 2024–06–14]

RIN 2120–AA64

Airworthiness Directives; International Aero Engines, LLC Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain International Aero Engines, LLC (IAE) Model PW1124G1–JM, PW1127G–JM, PW1127GA–JM, PW1129G–JM, PW1130G–JM, PW1133G–JM, and PW1133GA–JM engines. This AD was prompted by a report that certain high-pressure compressor (HPC) 2nd stage rotors and HPC 4th stage rotors have potentially degraded knife-edge seals and abrasive coating of the rear wing 4th stage rotor due to having been cleaned in alkaline solution without masking the knife-edge seal coating. Operating in this condition could result in material degradation and fracture of the HPC 2nd stage rotor and HPC 4th stage rotor. This AD requires replacement of certain HPC 2nd stage rotors and HPC 4th stage rotors. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 3, 2024.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 3, 2024.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1989; 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, 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 Pratt & Whitney (PW) service information identified in this final rule, contact International Aero Engines, LLC, 400 Main Street, East Hartford, CT 06118; phone: (860) 565–0140; email: *help24@pw.utc.com;* website: *connect.prattwhitney.com.*

• 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.

FOR FURTHER INFORMATION CONTACT: Carol Nguyen, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7655; email: *carol.nguyen@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain IAE Model PW1124G1–JM, PW1127G–JM, PW1127GA–JM, PW1129G–JM, PW1130G–JM, PW1133G–JM, and PW1133GA–JM engines. The NPRM published in the **Federal Register** on October 5, 2023 (88 FR 69099). The NPRM was prompted by a report of a batch of HPC 2nd stage rotors and HPC 4th stage rotors that could have degraded knife-edge seals and abrasive coating on the rear wing 4th stage rotor due to having been cleaned in alkaline solution without

masking the knife-edge seal coating. Operating in this condition could result in material degradation and fracture of the HPC 2nd stage rotor and HPC 4th stage rotor. In the NPRM, the FAA proposed to require replacement of the affected HPC 2nd stage rotor and HPC 4th stage rotor with parts eligible for installation. The FAA is issuing this AD to address the unsafe condition on these products.

Since the NPRM was issued, PW also revised PW Service Bulletin PW1000G–C–72–00–0208–00A–930A–D, Issue 001, dated September 13, 2022, to PW Alert Service Bulletin (ASB) PW1000G–C–72–00–0208–00A–930A–D, Issue 002, dated January 18, 2024, to incorporate editorial changes. This service bulletin revision does not affect compliance or add any additional burden upon owners/operators of aircraft with the affected engines installed. Full credit will be given for PW Service Bulletin PW1000G–C–72–00–0208–00A–930A–D, Issue 001, dated September 13, 2022.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from two commenters. The commenters were the Air Line Pilots Association, International (ALPA), and Delta Air Lines, Inc (DAL). ALPA supported the NPRM without change. The following presents the comment received from DAL on the NPRM and the FAA's response.

Request To Revise Definition for Parts Eligible for Installation

DAL requested that the FAA revise paragraph (h)(1)(ii) of the proposed AD to specify which version of the service bulletin is acceptable for compliance. DAL noted that the definition of a part eligible for installation in paragraph (h)(1)(ii) of the proposed AD does not currently specify which version of the service bulletin is acceptable for compliance, and it may be unclear to operators if the use of a future revision of the service bulletin is acceptable.

The FAA agrees with the request to revise paragraph (h)(1)(ii) of this AD in order to specify which version of the service bulletin is acceptable for compliance. The FAA revised paragraph (h)(2)(ii) of this AD to reference PW ASB PW1000G–C–72–00–0208–00A–930A–D, Issue 002, dated January 18, 2024, which was issued by PW after the NPRM was published. The FAA also added paragraph (i) to this AD, and redesignated subsequent paragraphs of this AD accordingly, to provide credit for actions performed before the effective date of this AD using PW SB PW1000G–C–72–00–0208–00A–930A–D, Issue 001, dated September 13, 2022.

Conclusion

The FAA reviewed the relevant data, considered any comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial changes, and any other changes described previously, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Pratt & Whitney ASB PW1000G–C–72–00–0208–00A–930A–D, Issue 002, dated January 18, 2024. This service information identifies the affected HPC 2nd stage rotors and HPC 4th stage rotors and specifies procedures for inspection and repair of the HPC 2nd stage rotors and HPC 4th stage rotors. 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**.

Costs of Compliance

The FAA estimates that this AD affects 6 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
Replace HPC 2nd stage rotor and HPC 4th stage rotor with repaired parts.	73 work-hours × $85 per hour = $6,205	$0	$6,205	$37,230

Operators may choose to use new parts instead of repaired parts to comply with this AD. For replacement with new parts, the FAA estimates the following costs:

Action	Labor cost	Parts cost	Cost per product
Replace HPC 2nd stage rotor	32 work-hours × $85 per hour = $2,720	$312,000	$314,720
Replace HPC 4th stage rotor	32 work-hours × $85 per hour = $2,720	244,000	246,720

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,

(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 adding the following new airworthiness directive:

2024–06–14 International Aero Engines, LLC: Amendment 39–22719; Docket No. FAA–2023–1989; Project Identifier AD–2023–00512–E.

(a) Effective Date

This airworthiness directive (AD) is effective June 3, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to International Aero Engines, LLC Model PW1124G1–JM, PW1127G–JM, PW1127GA–JM, PW1129G–JM, PW1130G–JM, PW1133G–JM, and PW1133GA–JM engines having a high-pressure compressor (HPC) 2nd stage rotor or HPC 4th stage rotor having a part number and serial number identified in the Applicability, Table 2, of Pratt & Whitney (PW) Alert Service Bulletin (ASB) PW1000G–C–72–00–0208–00A–930A–D, Issue 002, dated January 18, 2024 (PW ASB PW1000G–C–72–00–0208–00A–930A–D, Issue 002).

(d) Subject

Joint Aircraft System Component (JASC) Code 7230, Turbine Engine Compressor Section.

(e) Unsafe Condition

This AD was prompted by a report that certain HPC 2nd stage rotors and HPC 4th stage rotors have potentially degraded knife-edge seals and abrasive coating of the rear wing 4th stage rotor due to having been cleaned in alkaline solution without masking the knife-edge seal coating. The FAA is issuing this AD to prevent material degradation and fracture of the HPC 2nd stage rotor and HPC 4th stage rotor. The unsafe condition, if not addressed, could result in uncontained part release or dual-engine shutdown, damage to engine, damage to airplane, and loss of the airplane.

(f) Compliance

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

(g) Required Actions

(1) At the next engine shop visit after the effective date of this AD, remove the HPC 2nd stage rotor having a part number and serial number identified in the Applicability, Table 2, of PW ASB PW1000G–C–72–00–0208–00A–930A–D, Issue 002, and replace with a part eligible for installation.

(2) At the next engine shop visit after the effective date of this AD, remove the HPC 4th stage rotor having a part number and serial number identified in the Applicability, Table 2, of PW ASB PW1000G–C–72–00–0208–00A–930A–D, Issue 002, and replace with a part eligible for installation.

(h) Definitions

(1) For the purposes of this AD, a ''part eligible for installation'' is:

(i) Any HPC 2nd stage rotor or HPC 4th stage rotor, as applicable, that does not have a part number and serial number identified in the Applicability, Table 2, of PW ASB PW1000G–C–72–00–0208–00A–930A–D, Issue 002; or

(ii) Any HPC 2nd stage rotor or HPC 4th stage rotor, as applicable, that has incorporated PW ASB PW1000G–C–72–00–0208–00A–930A–D, Issue 002.

(2) For the purposes of this AD, an ''engine shop visit'' is the induction of an engine into the shop for maintenance involving the separation of the ''H'' flange.

(i) Credit for Previous Actions

You may take credit for the replacement of the HPC 2nd stage rotor or HPC 4th stage rotor required by paragraph (g)(1) or (2) of this AD if the HPC 2nd stage rotor or HPC 4th stage rotor incorporated PW Service Bulletin PW1000G–C–72–00–0208–00A–930A–D, Issue 001, dated September 13, 2022, before the effective date of this AD.

(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, 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.*

(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 Carol Nguyen, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7655; email: *carol.nguyen@faa.gov.*

(l) 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 the AD specifies otherwise.

(i) Pratt & Whitney Alert Service Bulletin PW1000G–C–72–00–0208–00A–930A–D, Issue 002, dated January 18, 2024.

(ii) [Reserved]

(3) For Pratt & Whitney service information identified in this AD, contact International Aero Engines, LLC, 400 Main Street, East Hartford, CT 06118; phone: (860) 565–0140; email: *help24@pw.utc.com;* website: *connect.prattwhitney.com.*

(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-locationsoremailfr.inspection@nara.gov.*

Issued on March 22, 2024.

Victor Wicklund,

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

[FR Doc. 2024–09104 Filed 4–26–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0045; Project Identifier MCAI–2023–01088–A; Amendment 39–22740; AD 2024–08–07]

RIN 2120–AA64

Airworthiness Directives; Pilatus Aircraft Ltd. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2023–12–17, which applied to Pilatus Aircraft Ltd. (Pilatus) Model PC–12, PC–12/45,

PC–12/47, and PC–12/47E airplanes. AD 2023–12–17 required revising the airworthiness limitation section (ALS) of the existing aircraft maintenance manual (AMM) or Instructions for Continued Airworthiness (ICA) for your airplane by introducing new and more restrictive instructions and maintenance tasks as specified in the component limitations section, which includes repetitive inspections for cracks in the lower main spar connection of the horizontal stabilizer. Since the FAA issued AD 2023–12–17, the FAA has determined that new or more restrictive airworthiness limitations are necessary. This AD requires revising the ALS of your existing AMM or ICA and your existing approved maintenance or inspection program, as applicable, 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 June 3, 2024.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 3, 2024.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2024–0045; 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 EASA material, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.* You may find this material on the EASA website at *ad.easa.europa.eu.*
- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *regulations.gov* under Docket No. FAA–2024–0045.

FOR FURTHER INFORMATION CONTACT: Doug Rudolph, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4059; email: *doug.rudolph@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2023–12–17, Amendment 39–22475 (88 FR 42604, July 3, 2023) (AD 2023–12–17). AD 2023–12–17 applied to Pilatus Model PC–12, PC–12/45, PC–12/47, and PC–12/47E airplanes. AD 2023–12–17 required incorporating new revisions to the ALS of the existing AMM or ICA for your airplane to establish new or more restrictive airworthiness limitations that include repetitive inspections for cracks in the lower main spar connection of the horizontal stabilizer. The FAA issued AD 2023–12–17 to address cracks in the lower main spar connection of the horizontal stabilizer and failure of certain parts, which could result in loss of airplane control.

The NPRM published in the **Federal Register** on February 2, 2024 (89 FR 7297). The NPRM was prompted by EASA AD 2023–0184, dated October 19, 2023 (EASA AD 2023–0184) (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 new or more restrictive tasks and limitations have been developed. These new or more restrictive airworthiness limitations include repetitive eddy current inspections for cracks in the main landing gear yoke fitting.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2024–0045.

In the NPRM, the FAA proposed to require revising the ALS of your existing AMM or ICA and your existing approved maintenance or inspection program, as applicable, as specified in EASA AD 2023–0184. The FAA is issuing this AD to address failure of certain parts, which could result in asymmetric main landing gear failure that could lead to loss of airplane control during take-off, landing, and taxiing operations. Additionally, the actions required to address the unsafe condition in AD 2023–12–17 are included in ''the applicable ALS,'' as defined in EASA AD 2023–0184.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from two anonymous commenters, an individual, and the Air Line Pilots Association, International (ALPA). All commenters 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 comments 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. This AD is adopted as proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

EASA AD 2023–0184 requires certain actions and associated thresholds and intervals, including life limits and maintenance tasks. EASA AD 2023–0184 also requires doing corrective actions if any discrepancy (as defined in ''the applicable ALS'' as defined in EASA AD 2023–0184) is found during accomplishment of any task required by paragraph (1) of EASA AD 2023–0184 and revising the aircraft maintenance program (AMP) by incorporating the limitations, tasks, and associated thresholds and intervals described in ''the applicable ALS'' as defined in EASA AD 2023–0184. 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**.

Differences Between This AD and the MCAI

Paragraph (1) of EASA AD 2023–0184 requires replacing each component before exceeding the applicable life limit and within the identified thresholds and intervals accomplishing all applicable maintenance tasks as specified in the applicable ALS for that airplane. Paragraph (2) of EASA AD 2023–0184 requires corrective actions in accordance with the applicable Pilatus maintenance documentation or contacting Pilatus for approved instructions and accomplishing those instructions accordingly. Paragraph (4) of EASA AD 2023–0184 provides credit for performing actions in accordance with previous revisions of the Pilatus AMM. Paragraph (5) of EASA AD 2023–0184 explains that after revision of the AMP, it is not necessary to record accomplishment of individual actions for demonstration of AD compliance. This AD does not require compliance

with paragraphs (1), (2), (4), and (5) of EASA AD 2023–0184.

Costs of Compliance

The FAA estimates that this AD affects 1,030 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-hour × $85 per hour = $85	$0	$85	$87,550

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 2023–12–17, Amendment 39–22475 (88 FR 42604, July 3, 2023); and

■ b. Adding the following new airworthiness directive:

2024–08–07 Pilatus Aircraft Ltd.: Amendment 39–22740; Docket No. FAA–2024–0045; Project Identifier MCAI–2023–01088–A.

(a) Effective Date

This airworthiness directive (AD) is effective June 3, 2024.

(b) Affected ADs

This AD replaces AD 2023–12–17, Amendment 39–22475 (88 FR 42604, July 3, 2023) (AD 2023–12–17).

(c) Applicability

This AD applies to Pilatus Aircraft Ltd. Model PC–12, PC–12/45, PC–12/47, and PC–12/47E airplanes, all serial numbers, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 3211, Main Landing Gear Attach Section.

(e) Unsafe Condition

This AD was prompted by a revision to the airworthiness limitations section (ALS) of the existing aircraft maintenance manual (AMM) introducing new and more restrictive instructions and maintenance tasks as specified in the component limitations section, which include repetitive eddy current inspections for cracks in the main landing gear yoke fitting. The FAA is issuing this AD to address failure of certain parts, which could result in asymmetric main landing gear failure that could lead to loss of airplane control during take-off, landing, and taxiing operations.

(f) Compliance

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

(g) Required Actions

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, European Union Aviation Safety Agency (EASA) AD 2023–0184, dated October 19, 2023 (EASA AD 2023–0184).

(h) Exceptions to EASA AD 2023–0184

(1) Where EASA AD 2023–0184 refers to its effective date, this AD requires using the effective date of this AD.

(2) This AD does not adopt the requirements specified in paragraphs (1), (2), (4), and (5) of EASA AD 2023–0184.

(3) Where paragraph (3) of EASA AD 2023–0184 specifies ''Within 12 months after the effective date of this AD, revise the AMP,'' replace that text with ''Within 30 days after the effective date of this AD, revise the airworthiness limitations section of your existing airplane maintenance manual or instructions for continued airworthiness and your existing approved maintenance or inspection program, as applicable.''

(4) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2023–0184 is on or before the applicable ''limitations'' and ''associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2023–0184 or within 30 days after the effective date of this AD, whichever occurs later.

(5) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0184.

(i) Provisions for Alternative Actions and Intervals

No alternative actions and associated thresholds and intervals, including life limits, are allowed for compliance with paragraph (g) of this AD unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2023–0184.

(j) 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 local Flight Standards District Office, as appropriate. If sending information directly to the International Validation Branch, send it to the attention of the person identified in paragraph (k) 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/certificate holding district office.

(k) Additional Information

For more information about this AD, contact Doug Rudolph, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4059; email: *doug.rudolph@faa.gov.*

(l) 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 the AD specifies otherwise.

(i) European Union Aviation Safety Agency (EASA) AD 2023–0184, dated October 19, 2023.

(ii) [Reserved]

(3) For EASA AD 2023–0184, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.* You may find this EASA AD on the EASA website at *ad.easa.europa.eu.*

(4) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. 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* or email *fr.inspection@nara.gov.*

Issued on April 17, 2024.

Victor Wicklund,

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

[FR Doc. 2024–09084 Filed 4–26–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1820; Project Identifier AD–2023–00510–P; Amendment 39–22721; AD 2024–07–01]

RIN 2120–AA64

Airworthiness Directives; Hamilton Sundstrand Corporation Propellers

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Hamilton Sundstrand Corporation (Hamilton Sundstrand) Model 14SF–7, 14SF–15, and 14SF–23 propellers. This AD was prompted by a report of an auxiliary motor and pump failing to feather a propeller in flight. This AD requires replacing a certain auxiliary motor and pump. This AD also prohibits installation of a certain auxiliary motor and pump. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 3, 2024.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 3, 2024.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1820; 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, 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 Hamilton Sundstrand, One Hamilton Road, Windsor Locks, CT 06096–1010, phone: (877) 808–7575; email: *CRC@collins.com.*
- 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* under Docket No. FAA–2023–1820.

FOR FURTHER INFORMATION CONTACT: Isabel Saltzman, Aviation Safety Engineer, FAA, 1701 Columbia Avenue, College Park, GA 30337; phone: (781) 238–7649; email: *9-AVS-AIR-BACO-COS@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Hamilton Sundstrand Corporation (Hamilton Sundstrand) Model 14SF–7, 14SF–15, and 14SF–23 propellers. The NPRM published in the **Federal Register** on September 7, 2023 (88 FR 61480). The NPRM was prompted by a report of an auxiliary motor and pump installed on a non-Hamilton Sundstrand propeller failing to feather the propeller in flight through either the primary or the backup means. The failure was caused by motor magnets in the auxiliary motor and pump that were de-bonded due to corrosion at the magnet and housing interface. The de-bonded motor magnets prevented motor rotation. Hamilton Sundstrand Model 14SF–7, 14SF–15, and 14SF–23 propellers use the same auxiliary motor and pump. These propellers are installed on, but not limited to, De Havilland Aircraft of Canada Limited (Type Certificate previously held by Bombardier Inc.) Model DHC–8–100 series, DHC–8–200 series, and DHC–8–300 series airplanes. This condition, if not addressed, could result in reduced controllability of the aircraft and consequent loss of control of the aircraft.

In the NPRM, the FAA proposed to require the removal from service of an auxiliary motor and pump having part number (P/N) 782655–3 (Aerocontrolex P/N 4122–006009) and replacement with an auxiliary motor and pump having P/N 782655–4 (Aerocontrolex P/N 4122–056000). In the NPRM, the FAA also proposed to prohibit the installation of an auxiliary motor and pump having P/N 782655–3 (Aerocontrolex P/N 4122–006009) on any propeller. The FAA is issuing this AD to address the unsafe condition on these products.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from three commenters. The commenters were Collins Aerospace, Sierra Nevada Corporation, and an individual. Sierra Nevada Corporation noted that the AD does not apply to its fleet and had no objection to the NPRM. Two commenters, Collins Aerospace and an individual, recommended certain changes. The following presents the comments received on the NPRM and the FAA's response.

Request To Clarify the Use of ''Any Propeller'' in the NPRM

Two commenters, Collins Aerospace and an individual, observed that the use of the phrase ''any propeller'' in the NPRM causes confusion. The commenters noted that the phrase ''any propeller'' appears three times in the subject NPRM. Collins Aerospace stated that this use of ''any propeller'' language has caused some confusion related to AD 2023–16–06 [Amendment 39–22525 (88 FR 63513, September 15, 2023)]. An individual also observed that the use of the word ''also'' in the sentence, ''This AD also prohibits installation of a certain auxiliary motor and pump on any propeller,'' in the Summary section

of the proposed rule indicates or implies the prohibition is for other propellers in addition to what is identified in the applicability. The commenters requested that the FAA remove the phrase ''any propeller'' from all preamble and regulatory text regarding an installation prohibition in the AD. The commenters also requested that the FAA write the prohibition to show that it only pertains to the propeller models listed in this AD.

The FAA agrees to clarify regarding the use of the phrase ''any propeller'' and whether the prohibition only applies to the propeller models list in the AD. For clarification, all of the requirements of an AD can apply only to the propellers listed in the applicability. To eliminate any confusion, however, the FAA revised paragraph (h) of this final rule, Installation Prohibition, to specify that the installation prohibition applies to any propeller identified in paragraph (c) of this AD.

Conclusion

The FAA reviewed the relevant data, considered any comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial changes, and any other changes described previously, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Hamilton Sundstrand Service Bulletin (SB) 14SF–61–168, Revision 1, dated December 21, 2016. This service information specifies instructions for replacing the auxiliary motor and pump. Hamilton Sundstrand Corporation is a UTC Aerospace Systems Company. This service information is identified as both Hamilton Sundstrand Corporation and UTC Aerospace Systems. 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**.

Costs of Compliance

The FAA estimates that this AD affects 180 propellers 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
Replace auxiliary motor and pump	2 work-hours × $85 per hour = $170	$11,000	$11,170	$2,010,600
Perform post-installation system test	1 work-hour × $85 per hour = $85	0	85	15,300

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,

(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 adding the following new airworthiness directive:

2024–07–01 Hamilton Sundstrand Corporation: Amendment 39–22721; Docket No. FAA–2023–1820; Project Identifier AD–2023–00510–P.

(a) Effective Date

This airworthiness directive (AD) is effective June 3, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Hamilton Sundstrand Corporation (Hamilton Sundstrand) Model 14SF–7, 14SF–15, and 14SF–23 propellers.

Note 1 to paragraph (c): These propellers are known to be installed on, but not limited to, De Havilland Aircraft of Canada Limited (Type Certificate previously held by Bombardier Inc.) Model DHC–8–100 series, DHC–8–200 series, and DHC–8–300 series airplanes.

(d) Subject

Joint Aircraft System Component (JASC) Code 6123, Propeller Feathering/Reversing.

(e) Unsafe Condition

This AD was prompted by a report of an auxiliary motor and pump failing to feather a propeller in flight. The FAA is issuing this AD to prevent the failure of a certain auxiliary motor and pump to feather propellers. The unsafe condition, if not addressed, could result in reduced controllability of the aircraft and consequent loss of control of the aircraft.

(f) Compliance

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

(g) Required Actions

(1) Within 30 months after the effective date of this AD, remove from service an auxiliary motor and pump having part number (P/N) 782655–3 (Aerocontrolex P/N 4122–006009) and replace with an auxiliary motor and pump having P/N 782655–4 (Aerocontrolex P/N 4122–056000) in accordance with the Accomplishment Instructions, paragraphs 3.B., 3.C., and 3.E. of Hamilton Sundstrand Service Bulletin (SB) 14SF–61–168, Revision 1, dated December 21, 2016 (Hamilton Sundstrand SB 14SF–61–168, Revision 1).

(2) After replacement of the auxiliary motor and pump, perform a post-installation system test in accordance with the Accomplishment Instructions, paragraph 3.F. of Hamilton Sundstrand SB 14SF–61–168, Revision 1.

(h) Installation Prohibition

After the effective date of this AD, do not install an auxiliary motor and pump having P/N 782655–3 (Aerocontrolex P/N 4122–006009) on any propeller identified in paragraph (c) of this AD.

(i) No Return of Parts

Where the service information referenced in the Accomplishment Instructions, paragraph 3.B. of Hamilton Sundstrand SB 14SF–61–168, Revision 1, specifies returning certain parts to the manufacturer for modification, this AD does not include that requirement.

(j) Credit for Previous Actions

You may take credit for the actions required by paragraph (g) of this AD if you performed those actions before the effective date of this AD using Hamilton Sundstrand SB 14SF–61–168, Original Issue, dated December 14, 2016.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, East Certification 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 branch office, send it to the attention of the person identified in paragraph (l)(1) of this AD. Information may be emailed to: *9-AVS-AIR-BACO-COS@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.

(l) Additional Information

(1) For more information about this AD, contact Isabel Saltzman, Aviation Safety Engineer, FAA, 1701 Columbia Avenue, College Park, GA 30337; phone: (781) 238–7649; email: *9-AVS-AIR-BACO-COS@faa.gov*.

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (m)(3) and (4) 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 the AD specifies otherwise.

(i) Hamilton Sundstrand Corporation Service Bulletin 14SF–61–168, Revision 1, dated December 21, 2016.

Note 2 to paragraph (m)(2)(i): Hamilton Sundstrand Corporation is a UTC Aerospace Systems Company. This service information is identified as both Hamilton Sundstrand Corporation and UTC Aerospace Systems.

(ii) [Reserved]

(3) For service information identified in this AD, contact Hamilton Sundstrand, One Hamilton Road, Windsor Locks, CT 06096–1010, phone: (877) 808–7575; email: *CRC@collins.com.*

(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* or email *fr.inspection@nara.gov.*

Issued on March 26, 2024.

Victor Wicklund,

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

[FR Doc. 2024–09142 Filed 4–26–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1991; Project Identifier AD–2023–00700–E; Amendment 39–22727; AD 2024–07–06]

RIN 2120–AA64

Airworthiness Directives; CFM International, S.A. Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain CFM International, S.A. (CFM) Model LEAP–1A23, LEAP–1A24, LEAP–1A24E1, LEAP–1A26, LEAP–1A26CJ, LEAP–1A26E1, LEAP–1A29, LEAP–1A29CJ, LEAP–1A30, LEAP–1A32, LEAP–1A33, LEAP–1A33B2, and LEAP–1A35A engines. This AD was prompted by a report of multiple aborted takeoffs and air turn-backs (ATBs) caused by high-pressure compressor (HPC) stall, which was induced by high levels of non-synchronous vibration (NSV). Additional manufacturer investigation revealed that wear on the No. 3 bearing spring finger housing can lead to high levels of NSV. This AD requires initial and repetitive calculations of the levels of NSV, inspection of the stage 2 high-pressure turbine (HPT) nozzle assembly honeycomb and HPT stator stationary seal honeycomb and, depending on the results of the calculations and inspections, replacement of certain parts. This AD also requires replacement of certain No. 3 bearing spring finger housings at a certain time. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 3, 2024.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 3, 2024.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1991; 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, 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, contact CFM International, S.A., GE Aviation Fleet Support, 1 Neumann Way, M/D Room 285, Cincinnati, OH 45215; phone: (877) 432–3272; email: *aviation.fleetsupport@ge.com.*
- 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.

FOR FURTHER INFORMATION CONTACT: Mehdi Lamnyi, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7743; email: *mehdi.lamnyi@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain CFM Model LEAP–1A23, LEAP–1A24, LEAP–1A24E1,

LEAP–1A26, LEAP–1A26CJ, LEAP–1A26E1, LEAP–1A29, LEAP–1A29CJ, LEAP–1A30, LEAP–1A32, LEAP–1A33, LEAP–1A33B2, and LEAP–1A35A engines. The NPRM published in the **Federal Register** on October 11, 2023 (88 FR 70409). The NPRM was prompted by a manufacturer's report of three aborted takeoffs and two ATBs caused by HPC stall. Additional manufacturer investigation revealed that wear on the No. 3 bearing spring finger housing can lead to high levels of NSV, which could induce HPC stall. As a result of its investigation, the manufacturer published service information that specifies procedures for addressing this situation. In the NPRM, the FAA proposed to require repetitive calculations of the levels of NSV and, depending on the results of the calculations, replacement of the No. 3 bearing spring finger housing. The FAA also proposed to require, following the removal and replacement of the No. 3 bearing spring finger housing, inspection of the stage 2 HPT nozzle assembly honeycomb and HPT stator stationary seal honeycomb for rubs and, depending on findings, replacement of the stage 2 HPT nozzle assembly honeycomb and HPT stator stationary seal. This FAA also proposed to require replacement of the No. 3 bearing spring finger housing regardless of calculated level of NSV at a certain time. The FAA is issuing this AD to address the unsafe condition on these products.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from four commenters. Commenters included the Air Line Pilots Association, International (ALPA), American Airlines (AA), Avianca Airlines (AVA), and CFM International (CFM). ALPA supported the NPRM without change. The following presents the comments received from AA, AVA, and CFM on the NPRM and the FAA's response to each comment.

Request To Allow Automated Monitoring

AA requested that the FAA allow for the use of automated condition monitoring solutions as an alternative to the accomplishment of the manual review every 125 cycles required by paragraph (g)(1) of the proposed AD. AA noted that automated monitoring solutions have already been accepted to replace previously FAA required MRB tasks, and allowing automated condition monitoring will provide a safer, more robust solution that exceeds the minimum requirements outlined in CFM Service Bulletin (SB) LEAP–1A–72–00–0504–01A–930A–D, Issue 001, dated June 14, 2023, and the NPRM.

The FAA disagrees with the commenter's request to add automated monitoring solutions as an alternative in the final rule. However, if any operator prefers to address the unsafe condition by means other than those specified in the referenced service information, they may request approval for an alternative method of compliance (AMOC) in accordance with paragraph (j) of this AD and, if approved, may use it instead of the procedures specified in the service information and the final rule. The FAA did not change this AD as a result of this comment.

Request To Include Customer Notification Report (CNR) in AD

Avianca requested that the CNR for exceedance of NSV thresholds be included in the NPRM as an additional method of compliance for all operators who have active CFM Diagnostics Monitoring. Avianca noted that under the CFM Diagnostics Program, the parameter NSV TCF Max Vibe Fleeting Event is actively monitored and if any exceedance is detected, a CNR is triggered for NSV exceedance.

The FAA disagrees with the commenter's request to add CNR for NSV thresholds exceedance as an additional method of compliance in the final rule. However, if any operator prefers to address the unsafe condition by means other than those specified in the referenced service information, they may request approval for an AMOC in accordance with paragraph (j) of this AD and, if approved, may use it instead of the procedures specified in the service information and the final rule. The FAA did not change this AD as a result of this comment.

Request To Clarify Replacement Language in Summary

CFM requested that the FAA update the Summary section of the proposed AD to read: ''This proposed AD would also require replacement of the No. 3 bearing spring finger housing having P/N 2629M62G01 and a serial number identified in Table 1 of CFM SB LEAP–1A–72–00–0504–01A–93 0A–D.'' CFM noted that the focus of the proposed AD should be on NSV monitoring and the actions required when NSV is present. CFM also noted that service bulletins LEAP–1A–72–00–0505–01A–93 0A–D, Issue 001, dated June 05, 2023, and LEAP–1A–72–00–0498–01A–93 0A–D, Issue 001, dated June 05, 2023, include the shop visit workscope recommendations for engines with potential No. 3 bearing spring finger housing wear, regardless of the signs of NSV vibrations.

The FAA partially agrees with the request. The FAA agrees to edit the Summary section of this AD to clarify that only certain No. 3 bearing spring finger housings require replacement. The FAA disagrees with the request to specify the part number and serial number of the affected parts in the Summary section of this AD because that level of specificity is not appropriate for the Summary section. The FAA acknowledges the presence of service bulletins LEAP–1A–72–00–0505–01A–93 0A–D, Issue 001, dated June 05, 2023, and LEAP–1A–72–00–0498–01A–93 0A–D, Issue 001, dated June 05, 2023, and notes that neither of those SBs are incorporated by reference in this AD.

Request To Update Proposed AD Requirements

CFM requested that the FAA update the Proposed AD Requirements in This NPRM section to read: ''This proposed AD would also require replacement of the No. 3 bearing spring finger housing having P/N 2629M62G01 and a serial number identified in Table 1 of CFM SB LEAP–1A–72–00–0504–01A–930A–D, regardless of calculated level of NSV, at a certain time.''

The FAA agrees with the requested language. However, this section is not included in the final rule. Therefore, the FAA did not change this AD as a result of this comment.

Request To Update Background and Unsafe Condition

CFM requested that the FAA update the Background and Unsafe Condition sections of the proposed AD to include that CFM experience to date has shown that NSV has led to self-recovering HPC stalls. CFM also requested to remove the following portion from paragraph (e): ''The FAA is issuing this AD to prevent HPC stall.'' CFM acknowledged that the manufacturer investigation revealed that wear on the No. 3 bearing spring finger housing can lead to high levels of NSV, which could induce HPC stall.

The FAA disagrees with the request to include information regarding self-recovering HPC stalls in this AD. The FAA also disagrees with the requested change to paragraph (e) of this AD. The FAA notes that the field experience to date does not provide conclusive evidence that NSV-induced HPC stalls will always be self-recovering. The FAA did not change this AD as a result of this comment.

Request To Update Interim Action

CFM requested that the FAA update the Interim Action section of the proposed AD to reflect that this AD is the closing action of paragraph (e) Unsafe Condition of the proposed AD and although there are additional hardware modifications that are being developed by the design approval holder, those modifications are not necessary to address the unsafe condition.

The FAA disagrees with this request. Although at this time the required actions of this AD address the unsafe condition, additional hardware modifications, when developed and FAA-approved, could also address the unsafe condition for the long-term. Therefore, the FAA considers that the monitoring and corresponding actions required by this AD would be an interim action to address the unsafe condition, and the FAA may consider additional rulemaking on this subject. The FAA did not change this AD as a result of this comment.

Request To Update Service Information Incorporated by Reference

CFM requested that the FAA change the SB referenced in the NPRM from ''LEAP–1A–72–00–0504–01A–930A–D, Issue 001, dated June 14, 2023'' to ''LEAP–1A–72–00–0504–01A–930A–D, Issue 002, dated October 17, 2023.'' CFM noted that SB LEAP–1A–72–00–0504–01A–930A–D, Issue 002, dated October 17, 2023, contains the following revisions that are pertinent to the NPRM;

(1) A note that NSV monitoring can be performed on-wing.

(2) Correction to data labels used in the alternative procedure for NSV Monitoring with ACMS Takeoff Reports.

(3) Correction to vibration units used in the alternative procedure for NSV Monitoring with ACMS Takeoff Reports.

The FAA agrees and has updated the service information incorporated by reference from ''LEAP–1A–72–00–0504–01A–930A–D, Issue 001, dated June 14, 2023'' to ''LEAP–1A–72–00–0504–01A–930A–D, Issue 002, dated October 17, 2023.'' Requiring this updated service bulletin does not increase the scope of the AD or increase the burden on any operator over that already proposed in the NPRM.

Request To Remove ''At the Next Piece-part Exposure'' From Required Actions

CFM requested that the FAA remove the reference to ''At the next piece-part exposure'' in paragraph (g)(5) of the proposed AD. CFM stated that NSV monitoring and actions required when NSV is present are the focus of the proposed AD. CFM noted that the statement related to ''At the next piece-part exposure'' was taken from SB LEAP–1A–72–00–0498–01A–930A–D, Issue 001, dated June 05, 2023, for shop visit work scope recommendations for engines with potential No. 3 bearing spring finger housing wear. CFM also noted that this is already referenced in Chapter 05 of the LEAP–1A Engine Shop Manual LEAP–1A–05–11–03–01A–0B1B–C.

The FAA disagrees with the request because the commenter did not provide an adequate justification for changing the compliance time. The FAA notes that decision to include a mandatory action to remove all affected parts at the next piece-part exposure was not taken from SB LEAP–1A–72–00–0498–01A–930A–D, Issue 001, dated June 05, 2023. The FAA did not change this AD as a result of this comment.

Request To Add Credit for Previous Actions

CFM requested that the FAA add the following language to the NPRM to allow customers to take credit for NSV monitoring that was performed prior to the effective date of the proposed AD, in accordance with section 5.A of SB LEAP–1A–72–00–0504–01A–930A–D, Issue 001, dated June 14, 2023; ''Evaluation of the NSV of an engine, accomplished before the effective date of this AD in accordance with the instructions of section 5.A of SB LEAP–1A–72–00–0504–01A–930A–D original issue (Issue 001) and, as applicable, accomplishment of corrective actions in accordance with the instructions of SB LEAP–1A–72–00–0504–01A–930A–D original issue (Issue 001) are acceptable to comply with the requirements of paragraphs (1) and (2), as applicable, of this AD for that engine (see Note 1 of this AD). Note 1: Evaluation of the NSV of an engine, accomplished in accordance with the instructions of section 5.B ('Alternative Procedure—NSV Monitoring with ACMS Takeoff Reports') of SB LEAP–1A–72–00–0504–01A–930A–D original issue (Issue 001) is not acceptable to comply with the requirements of paragraphs (1) of this AD.''

The FAA disagrees with the request because the FAA does not believe it is necessary to provide such credit because NSV monitoring is required initially at 125 flight cycles after the effective date of the AD and repetitively at intervals of 125 flight cycles. Therefore, there would be no advantage of taking credit for NSV monitoring done before the effective date of this AD. Once the NSV data calculation exceeds the specified limits, then the affected No. 3 bearing spring finger housing must be removed from the engine and replaced with a part eligible for installation, and the AD applicability no longer applies to that engine. The FAA did not change this AD as a result of this comment.

Request To Update Compliance Time for Removal From Service

CFM requested that the FAA change compliance time language in paragraph (g)(2) of the proposed AD from, ''within 150 FCs of performing the calculation'' to ''within 150 FCs of the flight when this threshold is exceeded.'' CFM noted that there is a discrepancy in the removal compliance time language between the NPRM and CFM SB LEAP–1A–72–00–0504–01A–930A–D if NSV data exceeds the limits listed in CFM SB LEAP–1A–72–00–0504–01A–930A–D.

The FAA agrees to update the language in paragraph (g)(2) of this AD from, ''within 150 FCs of performing the calculation'' to ''within 150 FCs of the flight when these limits are exceeded.''

Conclusion

The FAA reviewed the relevant data, considered any comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial changes, and any other changes described previously, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Related Service Information Under 1 CFR Part 51

The FAA reviewed CFM SB LEAP–1A–72–00–0504–01A–930A–D, Issue 002, dated October 17, 2023. This service information identifies affected No. 3 bearing spring finger housings and specifies procedures for monitoring NSV during engine operation. This service information also specifies procedures for replacing the No. 3 bearing spring finger housings, inspecting the stage 2 HPT nozzle assembly honeycomb and HPT stator stationary seal honeycomb, and replacing the stage 2 HPT nozzle assembly honeycomb and HPT stator stationary seal. 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 the **ADDRESSES** section.

Interim Action

The FAA considers this AD to be an interim action. This unsafe condition is still under investigation by the manufacturer and, depending on the results of that investigation, the FAA may consider further rulemaking action.

Costs of Compliance

The FAA estimates that this AD affects 48 engines installed on airplanes of U.S. registry. The FAA estimates that 33 engines installed on airplanes of U.S. registry require replacement of the No. 3 bearing spring finger housing.

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
Calculate NSV data	1 work-hours × $85 per hour = $85	$0	$85	$4,080
Replace No. 3 bearing spring finger housing	17 work-hours × $85 per hour = $1,445	64,590	66,035	2,179,155

The FAA estimates the following costs to do any necessary replacement and inspection that would be required based on the results of the calculation. The agency has no way of determining the number of aircraft that might need these replacements and inspections:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Inspect stage 2 HPT nozzle assembly honeycomb and HPT stator stationary seal honeycomb.	4 work-hours × $85 per hour = $340	$0	$340
Replace stage 2 HPT nozzle assembly honeycomb	8 work-hours × $85 per hour = $680	58,536	59,216
Replace HPT stator stationary seal	8 work-hours × $85 per hour = $680	6,855	7,535

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,

(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 adding the following new airworthiness directive:

2024–07–06 CFM International, S.A.: Amendment 39–22727; Docket No. FAA–2023–1991; Project Identifier AD–2023–00700–E.

(a) Effective Date

This airworthiness directive (AD) is effective June 3, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to CFM International, S.A. (CFM) Model LEAP–1A23, LEAP–1A24, LEAP–1A24E1, LEAP–1A26, LEAP–1A26CJ, LEAP–1A26E1, LEAP–1A29, LEAP–1A29CJ, LEAP–1A30, LEAP–1A32, LEAP–1A33, LEAP–1A33B2, and LEAP–1A35A engines with an installed No. 3 bearing spring finger housing having part number (P/N) 2629M62G01 and a serial number identified in Table 1 or Table 2 of CFM Service Bulletin (SB) LEAP–1A–72–00–0504–01A–930A–D, Issue 002, dated October 17, 2023 (CFM SB LEAP–1A–72–00–0504–01A–930A–D, Issue 002).

(d) Subject

Joint Aircraft System Component (JASC) Code 7230, Turbine Engine Compressor Section.

(e) Unsafe Condition

This AD was prompted by a report of multiple aborted takeoffs and air turn-backs caused by high-pressure compressor (HPC) stall, which was induced by high levels of non-synchronous vibration (NSV), and an additional manufacturer investigation that revealed wear on the No. 3 bearing spring finger housing. The FAA is issuing this AD to prevent HPC stall. The unsafe condition, if not addressed, could result in engine power loss at a critical phase of flight such as takeoff or climb, loss of engine thrust control, reduced controllability of the airplane, and loss of the airplane.

(f) Compliance

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

(g) Required Actions

(1) Within 125 flight cycles (FCs) after the effective date of this AD and thereafter at intervals not to exceed 125 FCs, calculate the NSV data in accordance with the Accomplishment Instructions, paragraphs 5.A.(1) and 5.A.(3), or 5.B.(1) and 5.B.(3) of CFM SB LEAP–1A–72–00–0504–01A–930A–D, Issue 002.

(2) If, during any calculation required by paragraph (g)(1) of this AD, the NSV data exceeds the limits specified in the Accomplishment Instructions, paragraph 5.A.(4)(a)1 or 5.B.(4)(a)1 of CFM SB LEAP–1A–72–00–0504–01A–930A–D, Issue 002, discontinue the calculations required by paragraph (g)(1) of this AD and within 150 FCs of the flight when these limits are exceeded:

(i) Remove from service the No. 3 bearing spring finger housing having P/N 2629M62G01 and a serial number identified in Table 1 or Table 2 of CFM SB LEAP–1A–72–00–0504–01A–930A–D, Issue 002, and replace with a part eligible for installation.

(ii) Inspect the stage 2 high-pressure turbine (HPT) nozzle assembly honeycomb for rubs in accordance with the Accomplishment Instructions, paragraphs 5.A.(4)(a)3b1) or 5.B.(4)(a)3b1) of CFM SB LEAP–1A–72–00–0504–01A–930A–D, Issue 002.

(iii) Inspect the HPT stator stationary seal honeycomb for rubs in accordance with the Accomplishment Instructions, paragraphs 5.A.(4)(a)3b2) or 5.B.(4)(a)3b2) of CFM SB LEAP–1A–72–00–0504–01A–930A–D, Issue 002.

(3) If, during the inspection required by paragraph (g)(2)(ii) of this AD, the stage 2 HPT nozzle assembly honeycomb fails to meet the serviceability criteria referenced in the Accomplishment Instructions, paragraphs 5.A.(4)(a)3b1) or 5.B.(4)(a)3b1) of CFM SB LEAP–1A–72–00–0504–01A–930A–D, Issue 002, before further flight, replace the stage 2 HPT nozzle assembly honeycomb.

(4) If, during the inspection required by paragraph (g)(2)(iii) of this AD, the HPT stator stationary seal honeycomb fails to meet the serviceability criteria referenced in the Accomplishment Instructions, paragraphs 5.A.(4)(a)3b2) or 5.B.(4)(a)3b2) of CFM SB LEAP–1A–72–00–0504–01A–930A–D, Issue 002, before further flight, replace the HPT stator stationary seal.

(5) At the next piece-part exposure after the effective date of this AD, but before exceeding 9,900 cycles since new, replace the No. 3 bearing spring finger housing having P/N 2629M62G01 and a serial number identified in Table 1 of CFM SB LEAP–1A–72–00–0504–01A–930A–D, Issue 002, with a part eligible for installation.

(h) Terminating Action

Replacement of the No. 3 bearing spring finger housing having P/N 2629M62G01 and a serial number identified in Table 1 or Table 2 of CFM SB LEAP–1A–72–00–0504–01A–930A–D, Issue 002 with a part eligible for installation, as specified in paragraphs (g)(2)(i) and (g)(5) of this AD, constitutes terminating action for the calculations required by paragraph (g)(1) of this AD.

(i) Definition

For the purpose of this AD, a ''part eligible for installation'' is a No. 3 bearing spring finger housing that does not have P/N 2629M62G01 and a serial number identified in Table 1 or Table 2 of CFM SB LEAP–1A–72–00–0504–01A–930A–D, Issue 002.

(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, AIR–520 Continued Operational Safety Branch, send it to the attention of the person identified in paragraph (k) of this AD and email it to: *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.

(3) For service information that contains steps that are labeled as Required for Compliance (RC), the following provisions apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, that are required by paragraph (g) of this AD must be done to comply with this AD. An AMOC is required for any deviations to RC steps required by paragraph (g) of this AD, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

(k) Additional Information

For more information about this AD, Mehdi Lamnyi, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7743; email: *mehdi.lamnyi@faa.gov.*

(l) 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 the AD specifies otherwise.

(i) CFM International, S.A. Service Bulletin LEAP–1A–72–00–0504–01A–930A–D, Issue 002, dated October 17, 2023.

(ii) [Reserved]

(3) For service information, contact CFM International, S.A., GE Aviation Fleet Support, 1 Neumann Way, M/D Room 285, Cincinnati, OH 45215; phone: (877) 432–3272; email: *aviation.fleetsupport@ge.com.*

(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-locationsoremailfr.inspection@nara.gov.*

Issued on March 29, 2024.

Victor Wicklund,

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

[FR Doc. 2024–09110 Filed 4–26–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0771; Project Identifier AD–2023–01251–E; Amendment 39–22720; AD 2024–06–15]

RIN 2120–AA64

Airworthiness Directives; General Electric Company Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain General Electric Company (GE) Model GE90–110B1 and GE90–115B engines. This AD was prompted by a report of an aborted takeoff due to left engine failure caused by liberation of the interstage high-pressure turbine (HPT) rotor seal rim. This AD requires repetitive ultrasonic inspections (USIs) of the interstage HPT rotor seal for cracks and removal from service if necessary. As a mandatory terminating action to the repetitive USIs of the interstage HPT rotor seal, this AD also requires replacement of the interstage HPT rotor seal. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective May 14, 2024.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of May 14, 2024.

The FAA must receive comments on this AD by June 13, 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.* 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* under Docket No. FAA–2024–0771; 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, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this final rule, contact General Electric Company, 1 Neumann Way, Cincinnati, OH 45215; phone: (513) 552–3272; email: *aviation.fleetsupport@ae.ge.com;* website: *ge.com.*
- 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* under Docket No. FAA–2024–0771.

FOR FURTHER INFORMATION CONTACT: Alexander Thickstun, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (202) 267–8292; email: *alexander.m.thickstun@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 ''FAA–2024–0771 Project Identifier AD–2023–01251–E'' 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*, 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 Alexander Thickstun, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

On October 19, 2019, a The Boeing Company Model 777 airplane, powered by GE Model GE90–115B engines, experienced an engine failure, which resulted in an aborted takeoff. A manufacturer investigation determined that the engine failure was caused by rim liberation of the interstage HPT rotor seal. Additional root cause analysis determined that rim liberation was the result of high cycle fatigue cracks initiating at the interstage seal web holes occurring from atypical intermittent operating conditions with short durations. As a result, the FAA issued Emergency AD 2019–21–51, Amendment 39–19798 (84 FR 64195, November 21, 2019) for certain GE GE90–115B model turbofan engines; Emergency AD 2020–01–55, Amendment 39–19838 (85 FR 8386, February 14, 2020) for certain GE GE90–115B model turbofan engines; and AD 2020–10–04, Amendment 39–21122 (85 FR 27909, May 12, 2020) for all GE GE90–110B1 and GE90–115B model turbofan engines with a certain interstage HPT rotor seal installed to remove affected parts from engines that had accumulated high flight cycles (FCs). Since the FAA issued those three ADs, the affected engines have continued to accumulate FCs, and the manufacturer has identified additional parts for inspection and removal. This condition, if not addressed, could result in uncontained HPT failure, release of high-energy debris, damage to the engine, damage to the airplane, and possible loss of the airplane. The FAA is issuing this AD to address the unsafe condition on these products.

FAA's Determination

The FAA is issuing this AD because the agency has determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed GE GE90–100 Service Bulletin (SB) 72–0908 R00, dated July 7, 2023. The SB specifies procedures for performing a USI of the interstage HPT rotor seal. 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**.

AD Requirements

This AD requires repetitive USIs of the interstage HPT rotor seal for cracks and removal from service if necessary. As a mandatory terminating action to the repetitive USIs of the interstage HPT rotor seal, this AD requires replacement of the interstage HPT rotor seal.

Interim Action

The FAA considers this AD to be an interim action. The unsafe condition is still under investigation by the manufacturer and, depending on the results of that investigation, the FAA may consider further rulemaking action.

Justification for Immediate Adoption 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.

The FAA justifies waiving notice and comment prior to adoption of this rule because no domestic operators use this

product. It is unlikely that the FAA will receive any adverse comments or useful information about this AD from any U.S. operator. Accordingly, notice and opportunity for prior public comment are unnecessary, pursuant to 5 U.S.C. 553(b)(3)(B). In addition, for the foregoing 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

The requirements of the Regulatory Flexibility Act (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 FAA has determined that it has good cause to adopt this rule without prior notice and comment, RFA analysis is not required.

Costs of Compliance

The FAA estimates that this AD affects 0 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
Remove interstage HPT rotor seal	100 work-hours × $85 per hour = $8,500	$540,000	$548,500	$0
Perform USI of interstage HPT rotor seal	2 work-hours × $85 per hour = $170	0	170	0

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:

2024–06–15 General Electric Company: Amendment 39–22720; Docket No. FAA–2024–0771; Project Identifier AD–2023–01251–E.

(a) Effective Date

This airworthiness directive (AD) is effective May 14, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to General Electric Company (GE) Model GE90–110B1 and GE90–115B engines with an installed interstage high-pressure turbine (HPT) rotor seal having a part number and serial number listed in Table 1 or Table 2 of GE GE90–100 Service Bulletin (SB) 72–A0908 R00, dated July 7, 2023 (GE SB 72–A0908).

(d) Subject

Joint Aircraft System Component (JASC) Code 7250, Turbine Section.

(e) Unsafe Condition

This AD was prompted by a report of an aborted takeoff due to left engine failure caused by liberation of the interstage HPT rotor seal rim. The FAA is issuing this AD to prevent failure of the HPT. The unsafe condition, if not addressed, could result in uncontained HPT failure, release of high-energy debris, damage to the engine, damage to the airplane, and possible loss of the airplane.

(f) Compliance

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

(g) Required Actions

(1) Perform an ultrasonic inspection (USI) of the interstage HPT rotor seal in accordance with the Accomplishment Instructions, paragraph 3.B.(2), of GE SB 72–A0908, as follows:

(i) Perform an initial USI before reaching the part cycles since new limit listed in Table 1 or Table 2, as applicable, of GE SB 72–A0908, or within 10 flight cycles after the effective date of this AD, whichever occurs later; and

(ii) Repeat the USI thereafter within every 100 cycles or 175 cycles, as applicable, as listed in Table 1 or Table 2 of GE SB 72–A0908, since the last inspection.

(2) If, during any USI required by paragraph (g)(1)(i) or (ii) of this AD, a non-serviceable indication is found, as defined in paragraph 3.B.(2)(b) of GE SB 72–A0908, before further flight, remove the interstage HPT rotor seal from service.

(h) Mandatory Terminating Action

As a terminating action to the repetitive USI required by paragraph (g)(1)(i) or (ii) of this AD, at the next engine shop visit after the effective date of this AD, remove the affected interstage HPT rotor seal from service.

(i) Definition

For the purpose of this AD, an ''engine shop visit'' is the induction of an engine into the shop for maintenance involving the separation of pairs of major mating engine case flanges, except separation of engine flanges solely for the purposes of transportation of the engine without subsequent maintenance, which does not constitute an engine shop visit.

(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.*

(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 Alexander Thickstun, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (202) 267–8292; email: *alexander.m.thickstun@faa.gov*.

(l) 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 the AD specifies otherwise.

(i) General Electric Company GE90–100 Service Bulletin 72–0908 R00, dated July 7, 2023.

(ii) [Reserved]

(3) For service information identified in this AD, contact General Electric Company, 1 Newman Way, Cincinnati, OH 45215; phone: (513) 552–3272; email:*aviation.fleetsupport@ae.ge.com;* website: *ge.com.*

(4) 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.

(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* or email *fr.inspection@nara.gov.*

Issued on March 25, 2024.

Victor Wicklund,

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

[FR Doc. 2024–09109 Filed 4–26–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0044; Project Identifier MCAI–2023–00629–A; Amendment 39–22736; AD 2024–08–03]

RIN 2120–AA64

Airworthiness Directives; Britten-Norman Aircraft, Ltd. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Britten-Norman Aircraft, Ltd. Model BN–2, BN–2A, BN–2A–2, BN–2A–3, BN–2A–6, BN–2A–8, BN–2A–9, BN–2A–20, BN–2A–21, BN–2A–26, BN–2A–27, BN–2B–20, BN–2B–21, BN–2B–26, BN–2B27, BN–2T, BN2T–4R, and BN2T–4S airplanes; and Model BN2A MK. III, BN2A MK. III–2, and BN2A MK. III–3 airplanes. This AD is prompted by reports of electrical cable (Koiled Kord) and flight control cables interference with the control column. This AD requires inspecting for interference between the control column, rudder pedal adjuster cable, and any wiring (including the Koiled Kord) concurrently with performing a flight control full and free movement inspection, and taking corrective actions if necessary. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 3, 2024.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 3, 2024.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2024–0044; 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, contact Britten-Norman Aircraft Ltd., Bembridge Airport, Bembridge, Isle of Wight, PO35 5PR United Kingdom; phone: +44 20 3371 4000; email: *customer.support@britten-norman.com;* website: *britten-norman.com/approvals-technical-publications.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *regulations.gov* under Docket No. FAA–2024–0044.

FOR FURTHER INFORMATION CONTACT: Penelope Trease, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (303) 342–1094; email: *penelope.trease@faa.gov*.

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Britten-Norman Aircraft, Ltd. Model BN–2, BN–2A, BN–2A–2, BN–2A–3, BN–2A–6, BN–2A–8, BN–2A–9, BN–2A–20, BN–2A–21, BN–2A–26, BN–2A–27, BN–2B–20, BN–2B–21, BN–2B–26, BN–2B–27, BN–2T, BN2T–4R, and BN2T–4S airplanes; and Model BN2A MK. III, BN2A MK. III–2, and BN2A MK. III–3 airplanes. The NPRM published in the **Federal Register** on February 1, 2024 (89 FR 6452). The NPRM was prompted by AD G–2022–0017, dated September 20, 2022 (also referred to as the MCAI), issued by the Civil Aviation Authority (CAA), which is the aviation authority for the United Kingdom (UK). The MCAI states that there have been occurrences of flight control restriction in pitch during the pilot's full and free flight control checks prior to take-off. Investigations into these occurrences revealed interference between the routing of the Koiled Kord, flight control cables, and control column, which could restrict the full and free movement of the flight controls. An incorrectly routed Koiled Kord could snag the rudder pedal adjustment cable, draw it towards the control column tube where it could snag the aileron control stop, and restrict movement of the control column tube. This increased load on the rudder pedal adjustment cable could unlock the adjustment mechanism, permitting the rudder pedals to freely move forward and aft. One of the investigations also revealed that a correctly routed Koiled Kord was entangled with an incorrectly routed rudder pedal adjustment cable, which resulted in snagging the aileron control stop. In order to address this condition, the MCAI requires an inspection using Britten-Norman

Service Bulletin SB 398, Issue 2, dated May 30, 2022 (Britten-Norman SB 398, Issue 2), to ensure the Koiled Kord is correctly routed behind the instrument panel and that the rudder pedal adjustment cable and Koiled Kord are not interfering with each other.

In the NPRM, the FAA proposed to require inspecting for interference between the control column, rudder pedal adjuster cable, and any wiring (including the Koiled Kord) concurrently with performing a flight control full and free movement inspection, and taking corrective actions if necessary. Interference between the Koiled Kord, flight control cables, and the control column, if not addressed, could result in loss of control of the airplane during flight.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2024–0044.

Discussion of Final Airworthiness Directive

Comments

The FAA received a comment from an individual. The commenter 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. This AD is adopted as proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Britten-Norman SB 398, Issue 2, which specifies procedures for inspecting the cable routing behind the instrument panel to determine if the cables and wiring to the instrument panel, wiring in the surrounding area, the rudder pedal adjuster cable, and the Koiled Kord are routed securely and there is clearance to allow full and free movement of the flight controls, and if interference is found, securely tying the cables so they are clear of the control column for its full range of motion. 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

The MCAI specifies that if any interference is found during the inspection for interference between the control column, rudder pedal adjuster cable, and any wiring (including the Koiled Kord) while performing a flight control full and free movement check, complete the operator feedback form in Appendix A of Britten-Norman SB 398, Issue 2, and return it to Britten-Norman Aircraft, Ltd. That action is not required by this AD.

Costs of Compliance

The FAA estimates that this AD affects 72 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
Inspect for interference and full and free movement.	1 work-hour × $85 per hour = $85	$0	$85	$6,120

The FAA estimates the following costs to do any necessary actions that would be required based on the results of the inspection. The agency has no way of determining the number of airplanes that might need these actions:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Correct Koiled Kord cable routing	Up to 3 work-hours × $85 per hour = $255	$0	Up to $255.

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,

(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 adding the following new airworthiness directive:

2024–08–03 Britten-Norman Aircraft, Ltd.: Amendment 39–22736; Docket No. FAA–2024–0044; Project Identifier MCAI–2023–00629–A.

(a) Effective Date

This airworthiness directive (AD) is effective June 3, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Britten-Norman Aircraft Ltd airplanes, all serial numbers, certificated in any category, identified in paragraphs (c)(1) and (2) of this AD.

(1) Model BN–2, BN–2A, BN–2A–2, BN–2A–3, BN–2A–6, BN–2A–8, BN–2A–9, BN–2A–20, BN–2A–21, BN–2A–26, BN–2A–27, BN–2B–20, BN–2B–21, BN–2B–26, BN–2B–27, BN–2T, BN2T–4R, and BN2T–4S airplanes.

(2) Model BN2A MK. III, BN2A MK. III–2, and BN2A MK. III–3 airplanes.

(d) Subject

Joint Aircraft System Component (JASC) Code 2797, Flight Control System Wiring.

(e) Unsafe Condition

This AD was prompted by reports of electrical cable (Koiled Kord) and flight control cables interference with the control column. The FAA is issuing this AD to address interference between the Koiled Kord, flight control cables, and the control column, which could restrict the full and free movement of the flight controls. This unsafe condition, if not addressed, could result in loss of control of the airplane during flight.

(f) Compliance

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

(g) Definition

For the purposes of this AD, a Koiled Kord is the coiled electrical cable that carries the wires from switches on the control yoke, through the control column tube, to the rear of the instrument panel. It exits the control column tube behind the instrument panel and continues to a terminal block.

(h) Required Actions

(1) Within 100 hours time-in-service (TIS) after the effective date of this AD, inspect for interference between the control column, rudder pedal adjuster cable, and any other wiring, including the Koiled Kord, in accordance with Sections 6 and 7(1) of Britten-Norman Service Bulletin SB 398, Issue 2, dated May 30, 2022 (Britten-Norman SB 398, Issue 2), while concurrently performing a control column full and free movement inspection, in accordance with Section 8 of Britten-Norman SB 398, Issue 2, to inspect for free play, friction, binding, non-linear forces, and any remaining interference.

(2) If interference between the control column, the rudder pedal adjuster cable, and any other wiring, including the Koiled Kord, or any free play, friction, binding, non-linear forces, or any remaining interference was found during the inspections required by paragraph (h)(1) of this AD, before further flight, securely tie any interfering electrical cables clear of the control column for its full range of motion and perform a final full and free movement inspection in accordance with Section 8 of Britten-Norman SB 398, Issue 2, to inspect for free play, friction, binding, non-linear forces, and any remaining interference. If there is any free play, friction, binding, non-linear forces, or any remaining interference, before further flight resolve these issues in accordance with a method approved by the Manager, International Validation Branch, FAA; or the Civil Aviation Authority United Kingdom (CAA UK); or Britten-Norman Aircraft Ltd.'s CAA UK Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(i) 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 local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, mail it to the address identified in paragraph (j)(2) 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 local Flight Standards District Office/certificate holding district office.

(j) Additional Information

(1) Refer to CAA UK AD G–2022–0017, dated September 20, 2022, for related information. This CAA UK AD may be found in the AD docket at regulations.gov under Docket No. FAA–2024–0044.

(2) For more information about this AD, contact Penelope Trease, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (303) 342–1094; email: *penelope.trease@faa.gov.*

(k) 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) Britten-Norman Service Bulletin SB 398, Issue 2, dated May 30, 2022.

(ii) [Reserved]

(3) For service information, contact Britten-Norman Aircraft Ltd., Bembridge Airport, Bembridge, Isle of Wight, PO35 5PR United Kingdom; phone: +44 20 3371 4000; email: *customer.support@britten-norman.com;* website: *britten-norman.com/approvals-technical-publications.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. 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* or email *fr.inspection@nara.gov.*

Issued on April 15, 2024.

Victor Wicklund,

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

[FR Doc. 2024–09083 Filed 4–26–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0035; Project Identifier MCAI–2023–00986–A; Amendment 39–22728; AD 2024–07–07]

RIN 2120–AA64

Airworthiness Directives; GA 8 Airvan (Pty) Ltd Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2010–18–06, which applied to all GA8 Airvan (Pty) Ltd Model GA8 and GA8–TC320 airplanes. AD 2010–18–06 required inspections and a minor design change to the forward slide of the cargo door with corrective action as necessary. Since the FAA issued AD 2010–18–06, the Civil Aviation Safety Authority (CASA), which is the aviation authority for Australia, superseded the previous CASA Australia AD to incorporate more detailed inspections and additional modifications as specified in updated

service information published by the manufacturer. This AD was prompted by reports of in-flight cargo door separation. This AD requires inspections and rework (modifications) of the cargo door with corrective action as necessary. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 3, 2024.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 3, 2024.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2024–0035; 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 contact GA8 Airvan (Pty) Ltd, PO Box 881, Morwell, Victoria 3840, Australia; phone: +61 03 5172 1200; website: *gippsaero.com.au;* email: *TECHPUBS@gippsaero.com.au.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA call (817) 222–5110. It is also available at *regulations.gov* under Docket No. FAA–2024–0035.

FOR FURTHER INFORMATION CONTACT: Doug Rudolph, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4059; email: *doug.rudolph@faa.gov*.

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2010–18–06, Amendment 39–16419 (75 FR 52253, August 25, 2010) (AD 2010–18–06). AD 2010–18–06 applied to all GA8 Airvan (Pty) Ltd Model GA8 and GA8–TC320 airplanes. AD 2010–18–06 was prompted by MCAI originated by CASA, which is the aviation authority for Australia. CASA Australia issued CASA Australia AD AD/GA8/3 Amdt 2, dated August 11, 2010 (CASA Australia AD/GA8/3 Amdt 2) to correct an unsafe condition identified as excessive wear in the forward cargo door slide, which could result in an in-flight separation of the cargo door, with possible loss of control of the airplane. CASA Australia AD AD/GA8/3 Amdt 2 was issued to require the actions in service information updated by the manufacturer to remove any ambiguities in the previous revision and provide an improved inspection method and a minor design change to the forward slide of the cargo door (inclusion of a slide backing plate, castellated nut, and split pin).

AD 2010–18–06 required doing all of Action 1 (measuring the groove width of the forward cargo door slide and if it exceeds 0.145 inch at any point along the slide, or is cracked, installing a new slider assembly) and Action 2 (inspecting wear of the forward slide of the cargo door and doing applicable corrective action steps specified in Action 1) of GippsAero Pty. Ltd. Mandatory Service Bulletin SB–GA8–2005–23, Issue 3, dated August 5, 2010. The FAA issued AD 2010–18–06 to address excessive wear in the forward cargo door slide.

The NPRM published in the **Federal Register** on January 23, 2024 (89 FR 4211). The NPRM was prompted by CASA Australia AD AD/GA8/3 amdt 3, dated August 18, 2023 (also referred to as the MCAI). The MCAI states that inspections revealed cases of excessive wear in the forward slide of the cargo door. Excessive wear in the forward slide of the cargo door may result in the cargo door separating from the airplane in flight with potentially catastrophic results. The MCAI requires accomplishing the actions specified in GippsAero Service Bulletin SB–GA8–2005–23, Issue 7, dated May 30, 2023 (GippsAero Service Bulletin SB–GA8–2005–23, Issue 7). This service bulletin includes procedures for revised inspections of the door mechanism, installing a stop on the forward slide of the cargo door and reworking the door slide to suit (accommodate) the track stop installation. Depending on the findings of the inspections, additional actions might be necessary including reworking the door mechanism pivot, upgrading the door operating rod, or fitting a door handle with an integral stop.

The FAA is issuing this AD to address excessive wear in the forward slide of the cargo door. The unsafe condition, if not addressed, could result in the cargo door separating from the airplane during flight, with potential loss of control of the airplane.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2024–0035.

Discussion of Final Airworthiness Directive

Comments

The FAA received no comments on the NPRM or on the determination of the costs.

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 and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. This AD is adopted as proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

The FAA reviewed GippsAero Service Bulletin SB–GA8–2005–23, Issue 8, dated October 11, 2023 (GippsAero SB–GA8–2005–23, Issue 8). This service information specifies procedures for installing a backing plate on the forward slide of the cargo door; inspecting the forward slide of the cargo door for excessive wear; inspecting the cargo door latching mechanism for contact between the operating rod and door handle pivot post, inspecting the threaded studs and rod ends at both ends of the operating rod for bending, and checking the cargo door handle engagement with the catch; reworking the cargo door handle pivot post; reworking the door operating rod; inspecting the door handle to determine if an integrated stop is installed and checking for excessive play; and inspecting the center rail of the cargo door to determine if an aft stop is installed, installing an aft stop, and reworking the center rail of the cargo door to accommodate the track stop.

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[

The MCAI applicability is Gippsland Aeronautics Model GA8 Series airplanes, all serial numbers. The applicability in this AD is GA8 Airvan (Pty) Ltd Model GA8 and GA8–TC320

airplanes because the FAA type certificate specifies GA8 Airvan (Pty) Ltd instead of Gippsland Aeronautics and specifies Model GA8 and GA8–TC320 airplanes instead of Model GA8 Series airplanes.

The MCAI requires doing the actions in Gippsland Aeronautics mandatory service bulletin SB–GA8–2005–23 Issue 7, dated May 30, 2023. This AD requires doing the actions in GippsAero SB–GA8–2005–23, Issue 8. After the MCAI was published, the manufacturer issued GippsAero SB–GA8–2005–23, Issue 8, which was revised to provide clarification regarding the actions and compliance schedule. The title page of GippsAero SB–GA8–2005–23, Issue 8, specifies GippsAero instead of Gippsland Aeronautics.

Costs of Compliance

The FAA estimates that this AD affects 61 airplanes of U.S. registry.

The FAA estimates the following costs to comply with this AD. The corresponding letter and number in parenthesis refer to the specific paragraph in GippsAero SB–GA8–2005–23, Issue 8.

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Installing forward cargo door slide backing plate (A1).	0.50 work-hour × $85 per hour = $42.50.	$175	$217.50	$13,267.50.
Inspecting forward cargo door slide wear (A2).	0.25 work-hour × $85 per hour = $21.25 per inspection cycle.	0	$21.25 per inspection cycle	$1,296.25 per inspection cycle.
Inspecting cargo door latching mechanism (B1).	1 work-hour × $85 per hour = $85 per inspection cycle.	0	$85 per inspection cycle	$5,185 per inspection cycle.
Inspecting cargo door handle and inspecting for excessive play (C).	0.75 work-hour × $85 per hour = $63.75.	0	$63.75	$3,88.75.
Inspecting cargo door center rail (D1).	1 work-hour × $85 per hour = $85.	0	$85	$5,185.

The FAA estimates the following costs to do any necessary actions that would be required based on the results of the inspections. The agency has no way of determining the number of airplanes that might need these actions. The corresponding letter and number in parenthesis refer to the specific paragraph in GippsAero SB–GA8–2005–23, Issue 8.

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Inspecting/replacing forward cargo door slide (A1, Steps 2 through 4), corrective action for (A2).	0.50 work-hour × $85 per hour = $42.50	$175	$217.50.
Reworking cargo door pivot (B2) and reworking/replacing door operating rod assembly (B3).	2 work-hours × $85 per hour = $170	630	800.
Replacing door handle/handle bush (C)	1 work-hour × $85 per hour = $85	267	352.
Replacing cargo door center rail/slide-center and backing plate (D1) and reworking cargo door center rail and backing plate (D2).	2 work-hours × $85 per hour = $170	152	322.

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected operators.

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 2010–18–06, Amendment 39–16419 (75 FR 52253, August 25, 2010); and

■ b. Adding the following new airworthiness directive:

2024–07–07 GA 8 Airvan (Pty) Ltd: Amendment 39–22728; Docket No. FAA–2024–0035; Project Identifier MCAI–2023–00986–A.

(a) Effective Date

This airworthiness directive (AD) is effective June 3, 2024.

(b) Affected ADs

This AD replaces AD 2010–18–06, Amendment 39–16419 (75 FR 52253, August 25, 2010).

(c) Applicability

This AD applies to GA 8 Airvan (Pty) Ltd Model GA8 and GA8–TC320 airplanes, all serial numbers, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 5230, Cargo/Baggage Doors

(e) Unsafe Condition

This AD was prompted by reports of in-flight cargo door separation. The FAA is issuing this AD to detect and correct excessive wear in the forward cargo door slide, which could result in an in-flight separation of the cargo door, with possible loss of control of the airplane.

(f) Compliance

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

(g) Required Actions

Do the applicable actions specified in Table 1 to paragraph (g) of this AD at the times in Table 1 to paragraph (g) of this AD, in accordance with the Accomplishment Instructions of GippsAero Service Bulletin SB–GA8–2005–23, Issue 8, dated October 11, 2023 (GippsAero SB–GA8–2005–23, Issue 8).

TABLE 1 TO PARAGRAPH (g)

Paragraphs in Accomplishment Instructions of GippsAero SB–GA8–2005–23, Issue 8	Action	Compliance time
12.1, A1, steps 1 and 2, for backing plate inspection, except where Figure 1 in step 1 specifies to remove and discard the vertical bolt, remove the vertical bolt from service. Steps 3 through 7, if a backing plate is not installed.	Inspect for the existence of a backing plate on the forward slide of the cargo door. If a backing plate is not installed, install a backing plate on the forward slide of the cargo door, measure the groove width of the forward slide, and replace the slide if it exceeds 0.145 inch at any point or is cracked or worn beyond limits.	Inspect within 50 hours time-in-service (TIS) or 2 months after the effective date of this AD, whichever occurs first. Install, measure, and replace before further flight after the inspection.
12.2, A2, steps 1 and 2 for the inspection ..... 12.2, A2, step 3 or 4, and 12.1, A1, steps 2 through 4, for the follow-on inspection and replacement.	Inspect for wear of the forward slide of the cargo door by inserting a slide gauge or feeler gauge to measure the clearance between the forward slide and the cargo door track. If a gap is found, measure the groove width of the forward slide and replace the slide if the groove width exceeds 0.145 inch at any point or is cracked or worn beyond limits.	Inspect for wear within 100 hours TIS or 2 months after the effective date of this AD, whichever occurs first, and thereafter at intervals not to exceed 100 hours TIS or 12 months, whichever occurs first after the most recent inspection. Measure the groove width and replace the slide before further flight after each inspection as necessary.
12.3, B1, steps 1 through 6 for the inspections 12.3, B1, steps 2, 3i, and 3ii; 12.4, B2, steps 1 through 5; and 12.5, B3, steps 1 through 12 for the corrective actions.	Inspect the cargo door mechanism for contact between the operating rod and cargo door handle pivot post, inspect the threaded studs and rod ends at both ends of the operating rod for bending, and inspect the cargo door handle engagement with the catch. Perform all applicable corrective actions.	Inspect within 50 hours TIS or 2 months after the effective date of this AD, whichever occurs first and thereafter at intervals not to exceed 100 hours TIS or 12 months, whichever occurs first after the most recent inspection. Perform all applicable corrective actions before further flight.
12.6, C, steps 1 through 6	Inspect the cargo door handle to determine if an integrated stop is installed and if an integrated stop is not installed, install a cargo door handle with an integrated stop. Inspect the cargo door handle for beyond normal play and replace the handle bush if the door handle has beyond normal play.	Within 150 hours TIS or 4 months after the effective date of this AD, whichever occurs first. Perform the installation and replacement, as necessary, before further flight after the inspection.
12.7, D1, steps 1 through 10 for the center rail cargo door inspection and installation. 12.8, D2, steps 1 through 2, for any necessary follow-on rework.	Inspect the center rail of the cargo door to determine if a center rail aft stop is installed and if a center rail aft stop is not installed, install an aft stop before further flight.	Within 50 hours TIS or 2 months after the effective date of this AD, whichever occurs first.

(h) 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 local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, mail it to the address identified in paragraph (i)(2) 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 local Flight Standards District Office/certificate holding district office.

(i) Additional Information

(1) Refer to Civil Aviation Safety Authority (CASA) Australia AD AD/GA8/3 amdt 3, dated August 18, 2023, for related information. This CASA Australia AD may be

found in the AD docket at regulations.gov under Docket No. FAA–2024–0035.

(2) For more information about this AD, contact Doug Rudolph, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4059; email: *doug.rudolph@faa.gov.*

(j) 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 the AD specifies otherwise.

(i) GippsAero Service Bulletin SB–GA8–2005–23, Issue 8, dated October 11, 2023.

(ii) [Reserved]

(3) For service information contact GA8 Airvan (Pty) Ltd, PO Box 881, Morwell, Victoria 3840, Australia; phone: +61 03 5172 1200; website: *gippsaero.com.au;* email: *TECHPUBS@gippsaero.com.au.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. 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-locationsoremailfr.inspection@nara.gov.*

Issued on March 29, 2024.

Victor Wicklund,

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

[FR Doc. 2024–09087 Filed 4–26–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No. FAA–2023–1836; Amdt. No. 91–371B]

RIN 2120–AL70

Inclusion of Additional Automatic Dependent Surveillance-Broadcast (ADS–B) Out Technical Standard Orders; Incorporation by Reference; Correction

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

ACTION: Direct final rule; correction.

SUMMARY: On October 17, 2023, the Federal Aviation Administration (FAA) published the subject direct final rule in the **Federal Register**, confirmed on November 29, 2023. In that direct final rule, the FAA redesignated two paragraphs in one section of the Code of Federal Regulations but failed to amend cross-references to those paragraphs. This document corrects those errors.

DATES: This correction is effective April 29, 2024.

FOR FURTHER INFORMATION CONTACT: Juan Sebastian Yanguas, Airspace Rules & Regulations, AJV–P21, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (202) 267–8783; email *Juan.S.Yanguas@faa.gov.*

SUPPLEMENTARY INFORMATION: On October 17, 2023, the Federal Aviation Administration (FAA) published the direct final rule, Inclusion of Additional Automatic Dependent Surveillance-Broadcast (ADS–B) Out Technical Standard Orders; Incorporation by Reference, in the **Federal Register**.[1] In that direct final rule the FAA incorporated by reference two new Technical Standard Orders (TSOs), and three RTCA documents—TSO–C166c, TSO–C154d, section 2 of RTCA DO–260C, RTCA DO–260C Change 1, and section 2 of RTCA DO–282C into 14 CFR 91.225 and 91.227. The FAA responded to comments and confirmed the direct final rule on November 28, 2023.[2]

In the direct final rule, the FAA amended § 91.225 by redesignating paragraphs (h) and (i) as set out in the following redesignation table:

Old paragraph	New paragraph
paragraph (h)	paragraph (i).
paragraph (i)	paragraph (h).

While the FAA discussed the redesignation of paragraphs (h) and (i), it failed to revise cross-references to those paragraphs appearing elsewhere in § 91.225. This document corrects those errors.

List of Subjects in 14 CFR Part 91

Air traffic control, Aircraft, Airports, Aviation safety, Incorporation by reference, Transportation.

Accordingly, 14 CFR part 91 is corrected by making the following correcting amendments:

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 § 91.225 by revising the introductory text of paragraphs (d) and (f) to read as follows:

§ 91.225 Automatic Dependent Surveillance-Broadcast (ADS–B) Out equipment and use.

* * * * *

(d) After January 1, 2020, except as prohibited in paragraph (h)(2) of this section or unless otherwise authorized by ATC, no person may operate an aircraft in the following airspace unless the aircraft has equipment installed that meets the requirements in paragraph (b) of this section:

* * * * *

(f) Except as prohibited in paragraph (h)(2) of this section, each person operating an aircraft equipped with ADS–B Out must operate this equipment in the transmit mode at all times unless—

* * * * *

Issued under the authority of 49 U.S.C. 106(f) in Washington, DC.

Brandon Roberts,

Executive Director, Office of Rulemaking.

[FR Doc. 2024–08885 Filed 4–26–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 740, 744, 746, and 762

[Docket No. 240423–0115]

RIN 0694–AJ59

Amendment to Existing Controls on Russia and Belarus Under the Export Administration Regulations (EAR) Adding New License Exception Medical Devices (MED); Corrections

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Final rule.

SUMMARY: In this final rule, the Bureau of Industry and Security (BIS) makes changes to the Russia and Belarus sanctions under the Export Administration Regulations (EAR) to add a new license exception for EAR99 medical devices and related parts, components, accessories, and attachments for use in or with medical devices that are destined for both countries and the temporarily occupied Crimea region of Ukraine, or the covered regions of Ukraine. The purpose of this final rule is to authorize under a license

[1] 88 FR 71468; FR Doc. 2023–22710.

[2] 88 FR 83022.

exception certain exports, reexports, and transfers (in-country) of ''medical devices'' that are being regularly approved and that advance U.S. national security and foreign policy interests. In addition, this final rule makes two corrections to the EAR related to Russia-related rules published in January, and March, 2024 by correcting an end-user control and adding a cross-reference correction.

DATES: This rule is effective on April 29, 2024.

FOR FURTHER INFORMATION CONTACT: For questions on this final rule, contact Mark Salinas, Senior Export Policy Analyst, Foreign Policy Division, Bureau of Industry and Security, Department of Commerce, Phone: 202–482–4252, Email: *mark.salinas@bis.doc.gov.*

For emails, include ''License Exception MED'' in the subject line.

SUPPLEMENTARY INFORMATION:

I. Background

A. Export Controls Implemented Against Russia and Belarus

In response to Russia's February 2022 full-scale invasion of Ukraine, BIS imposed extensive sanctions on Russia under the EAR as part of the final rule, ''Implementation of Sanctions Against Russia Under the Export Administration Regulations (EAR)'' (the Russia Sanctions Rule) (87 FR 12226, March 3, 2022). To address Belarus's complicity in the invasion, BIS imposed similar sanctions on Belarus under the EAR in a final rule, ''Implementation of Sanctions Against Belarus'' (''Belarus Sanctions Rule'') (87 FR 13048, March 6, 2022). During the last two years, BIS has published a number of additional final rules strengthening the export controls on Russia and Belarus, including measures undertaken in coordination with U.S. allies and partners. Most recently, in March 2024, BIS amended the EAR to strengthen export controls against Russia and other destinations by expanding controls on persons identified on the List of Specially Designated Nationals and Blocked Persons (SDN List) (March 21, 2024, 89 FR 20107). As corrected by this rule, as described below under section II.C.1, § 744.8 of the EAR imposes licensing restrictions on exports, reexports, and transfers (in-country) made in connection with persons designated as SDNs by the Department of the Treasury's Office of Foreign Asset Controls pursuant to several Russia-related Executive Orders.

B. Overview of This Final Rule

In this final rule, BIS makes changes to the Russia and Belarus sanctions under the EAR to add a new license exception for ''medical devices'' under § 740.23 (Medical Devices (MED)). License Exception MED will authorize the export, reexport, or transfer (in country) of ''medical devices'' designated as EAR99 to or within Russia, Belarus, the temporarily occupied Crimea region of Ukraine, or the covered regions of Ukraine. Items subject to the EAR that are not on the Commerce Control List (CCL) in supplement no. 1 to part 774 of the EAR are designated as EAR99. License Exception MED will also authorize ''parts,'' ''components,'' ''accessories,'' and ''attachments'' designated as EAR99 that are exclusively for use in or with ''medical devices'' designated as EAR99.

The purpose of this final rule is to create a new license exception that will authorize (subject to certain terms and conditions) certain exports, reexports, and transfers (in-country) that BIS generally has been approving under the licensing application review policies set forth in §§ 746.5, 746.6, and 746.10 of the EAR. New License Exception MED includes terms and conditions to ensure that only those exports, reexports, and transfers (in-country) that are in U.S. national security and foreign policy interests will be authorized.

This final rule also makes conforming changes to the EAR to reflect the addition of this new license exception.

Lastly, this final rule makes two corrections to the EAR, consisting of: one correction to an end-user control under the EAR that was impacted by the final rule, ''Export Administration Regulations End-User Controls: Imposition of Restrictions on Certain Persons Identified on the List of Specially Designated Nationals and Blocked Persons (SDN List),'' published March 21, 2024 (89 FR 20107); and a cross-reference correction to the final rule, ''Implementation of Additional Sanctions Against Russia and Belarus Under the Export Administration Regulations (EAR) and Refinements to Existing Controls,'' published January 25, 2024 (89 FR 4804).

The three sets of changes this final rule makes are described in section II as follows:

A. Addition of License Exception Medical Devices (MED);

B. Conforming changes to the EAR made in connection with the addition of License Exception MED; and

C. Correction to the March 21, 2024, final rule addressing EAR controls for certain Specially Designated Nationals (SDNs) and correction to the January 25, 2024, Russia sanctions final rule.

II. Amendments to the EAR

A. Addition of License Exception Medical Devices (MED)

In part 740 (License Exceptions), this final rule adds a new license exception to the EAR under § 740.23 (Medical Devices (MED)).

1. Scope of License Exception MED

This final rule adds paragraph (a) (*Scope)* to specify that License Exception MED authorizes the export, reexport, or transfer (in country) of ''medical devices'' designated as EAR99 to Russia, Belarus, the temporarily occupied Crimea region of Ukraine, or the covered regions of Ukraine. See the Supplement No. 3 to Part 774—Statements of Understanding under paragraph (a) (Statement of Understanding—medical equipment) for guidance on classifying medical equipment and the definition of ''medical device'' in § 772.1 of the EAR. Exporters, reexporters, or transferors that need assistance in classifying their items to determine whether they are designated as EAR99 may submit classification requests to BIS using the Simplified Network Application Process (SNAR–R) available on the BIS website at *https://www.bis.doc.gov.*

The second sentence of paragraph (a) specifies that License Exception MED is also available to authorize ''parts,'' ''components,'' ''accessories,'' and ''attachments'' designated as EAR99 that are exclusively for use in or with ''medical devices'' designated as EAR99. Due to the importance of ''parts,'' ''components,'' ''accessories,'' and ''attachments'' for the use of ''medical devices,'' these commodities are also included as part of this authorization. The criterion ''exclusively for use in or with ''medical devices'' designated as EAR99'' is intended to limit the types of ''parts,'' ''components,'' ''accessories,'' and ''attachments'' that may be exported, reexported, or transferred (in-country) under License Exception MED, to those which are necessary for replacement or maintenance in or with medical devices, which will also reduce the likelihood of diversion to industrial or military end uses. The last sentence of paragraph (a) specifies that License Exception MED authorizes transactions involving EAR99 designated items that would otherwise require a license pursuant to §§ 746.5, 746.6 or 746.10 of the EAR, provided the terms and conditions described in § 740.23 are met.

License Exception MED does not overcome any license requirements imposed under § 746.8 or any other EAR license requirement (*e.g.,* those specified under part 744) other than those specified under §§ 746.5, 746.6, or 746.10. Additionally, as with any EAR license exception, exports, reexports, or transfers (in-country) under License Exception MED may be restricted under § 740.2 (Restrictions on All License Exceptions).

2. Restrictions of License Exception MED

This final rule adds paragraph (b) (Restrictions) to specify that License Exception MED does not authorize the export, reexport, or transfer (in country) of any item that meets the restrictions under paragraph (b)(1), (2), or (3) of § 740.23. Paragraph (b)(1) specifies that License Exception MED is not available when a ''proscribed person,'' as defined in § 772.1, is a party to the transaction as described in § 748.5(c) through (f) of the EAR. This final rule also includes an illustrative list in a parenthetical phrase that provides some examples of ''proscribed persons'' (including but not limited to 'military end users' see §§ 744.17(e) and 744.21(g)) or in situations in which an entity on the Entity List in supplement no. 4 to part 744 or on the Military End-User (MEU) List) that are excluded from being parties to the transaction. License Exception MED may not be utilized to help support the Russian industrial base (in particular, the Russian medical device industry) or enable ''proscribed persons'' or entities to receive eligible items. Paragraph (b)(2) restricts any export, reexport, or transfers (in-country) destined to a ''production'' ''facility,'' as those terms are defined in § 772.1. For the same reason, this final rule under paragraph (b)(3) restricts any export, reexport, or transfer (in-country) destined to Russia, Belarus, the temporarily occupied Crimea region of Ukraine, or the covered regions of Ukraine when the exporter, reexporter, or transferor has ''knowledge'' that the items are intended to develop or produce items. This final rule also adds a Note 1 to paragraphs (b)(2) and (3), to specify that the assembly in a hospital or other health care ''facility'' of a finished ''medical device'' completely ''produced'' outside of Russia, Belarus, the temporarily occupied Crimea region of Ukraine, or the covered regions of Ukraine for the sole purpose of using that ''medical device'' at that facility is not considered a ''production'' activity for purposes of these two paragraphs.

3. Verification Procedures for License Exception MED

This final rule adds paragraph (c) (*Verification)* to impose a requirement on exporters, reexporters, and transferors to maintain a system of distribution that ensures that ''medical devices'' are not delivered to ''proscribed persons'' or entities engaged in the ''production'' of any product. Exporters, reexporters, and transferors are responsible for ensuring that the items being exported, reexported, or transferred (in-country) are not diverted contrary to the terms and conditions of License Exception MED. The paragraph (c) text specifies that the verification of the effectiveness of the distribution system may entail obtaining certain information from a consignee (*e.g.,* obtaining affirmations or other documentation from a consignee as part of an exporter, reexporter, or transferor's compliance program) for ensuring that the use and disposition of ''medical devices'' received under License Exception MED meet the required terms and conditions.

This final rule under paragraph (c) also provides another illustrative example for how the verification of the effectiveness of the distribution system may be confirmed by the exporter, reexporter, or transferor by conducting periodic on-site spot checks. This final rule includes criteria in a parenthetical phrase that follows the phrase 'or performing periodic on-site spot-checks' to provide illustrative examples of the verification methods that may be adopted to ensure the effectiveness of the distribution system when an exporter, reexporter, or transferor decides to use conducting periodic on-site spot checks. Specifically, this final rule specifies in that parenthetical phrase that a verification system may include periodic on-site spot-checks in Russia, Belarus, the temporarily occupied Crimea region of Ukraine, or the covered regions of Ukraine, by the exporter, reexporter, or transferor; an internationally accredited auditing firm; or by an internationally recognized non-governmental humanitarian organization.

4. Recordkeeping and Review of Records Under License Exception MED

This final rule under paragraph (d) (*Recordkeeping and review of records),* specifies that in addition to complying with the recordkeeping requirements in part 762 of the EAR, that exporters, reexporters, and transferors must maintain records of verification, as specified in paragraph (d), for 5 five years, and, upon request, these records must be provided to BIS, or any other official of the United States designated by BIS, for review.

BIS estimates the new License Exception MED under § 740.23 will result in a reduction of 3,900 license applications being submitted to BIS annually.

B. Conforming Changes to the EAR for Addition of License Exception MED

In § 746.5 (Russian and Belarusian industry sector sanctions), this final rule revises paragraph (c)'s (License exceptions) introductory text, to add a reference to new paragraph (c)(8) (License Exception MED), an additional license exception that may overcome the license requirements set forth in this section. This final rule also adds paragraph (c)(8) (License Exception MED), including adding a cross reference to new § 740.23 of the EAR.

In § 746.6 (Temporarily occupied Crimea region of Ukraine and covered regions of Ukraine), this final rule adds a new paragraph (c)(7) (License Exception MED), including adding a cross reference to new § 740.23 of the EAR.

In § 746.10 ('Luxury goods' sanctions against Russia and Belarus and Russian and Belarusian oligarchs and malign actors), this final rule revises paragraph (c) (License Exceptions) introductory text to add a reference to new paragraph (c)(8) (License Exception MED) as an additional license exception that may overcome the license requirements in paragraph (a)(1) of this section. This final rule also adds paragraph (c)(8) (License Exception MED), including adding a cross reference to new § 740.23 of the EAR.

In § 762.2 (Records to be retained), this final rule revises paragraph (b) (Records retention references) to add a new paragraph (b)(55) (§ 740.23, License Exception MED) and makes two conforming changes by revising paragraph (b)(53) to remove the word ''and'' and revising paragraph (b)(54) to replace the period with a semi-colon to reflect the addition of new paragraph (b)(55).

C. Correction to March 24, 2024 Final Rule Imposing EAR Controls on Certain Persons Identified on the SDN List and Correction to January 25, 2024 Russia Sanctions Final Rule

1. Correction to March 24, 2024 Final Rule

This final rule makes a conforming change correction to § 744.11 to reflect the revisions made to § 744.8 in the March 24, 2024, final rule, ''Export Administration Regulations End-User

Controls: Imposition of Restrictions on Certain Persons Identified on the List of Specially Designated Nationals and Blocked Persons (SDN List),'' (89 FR 20107). Specifically, this final rule removes the fourth sentence of paragraph (b) introductory text that specified that § 744.11 ''may not be used to place on the Entity List any party to which exports or reexports require a license pursuant to § 744.8, § 744.12, § 744.13, § 744.14, or § 744.18'' because it is no longer needed or accurate. Sections 744.12 through 744.14 and 744.18 were reserved as of March 24, 2024. Note 2 to paragraph (a) of the revised § 744.8 provides guidance that the Entity List in supplement no. 4 to part 744 includes certain persons that have also been designated with certain identifiers on the SDN List. Note 2 includes a cross reference that directs persons to § 744.11 and supplement no. 4 to part 744 for requirements, including license review policies, for these entities, which take precedence over the requirements in § 744.8.

2. Correction to January 25, 2024 Russia Sanctions Final Rule

This final rule makes a cross-reference correction to § 746.10 to add a reference to paragraph (c)(7) to reflect that License Exception CCD is intended to be available to overcome the license requirements under § 746.10(a)(1) as described in the Background section of the January 25, 2024, final rule, ''Implementation of Additional Sanctions Against Russia and Belarus Under the Export Administration Regulations (EAR) and Refinements to Existing Controls,'' published January 25, 2024 (89 FR 4804), but the regulatory cross-reference was not updated to reflect paragraph (c)(3) was redesignated as paragraph (c)(7) in the January 25, 2024 final rule. This final rule corrects § 746.10(c) introductory text to make a needed cross-reference correction to specify that License Exception CCD is available.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA) (codified, as amended, at 50 U.S.C. 4801–4852). ECRA provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule. To the extent it applies to certain activities that are the subject of this rule, the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA) (codified, as amended, at 22 U.S.C. 7201–7211) also serves as authority for this rule.

Rulemaking Requirements

1. BIS has examined the impact of this rule as required by Executive Orders 12866, 13563, and 14094, which 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 (*e.g.,* potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). Pursuant to E.O. 12866, as amended, this final rule has not been determined to be a ''significant regulatory action.''

2. Notwithstanding any other provision of 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 Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This rule involves the following OMB-approved collections of information subject to the PRA:

- OMB Control Number 0694–0088, ''Multi-Purpose Application,'' which carries a burden hour estimate of 29.4 minutes for a manual or electronic submission;
- OMB Control Number 0694–0096 ''Five Year Records Retention Period,'' which carries a burden hour estimate of less than one minute; and
- OMB Control Number 0607–0152 ''Automated Export System (AES) Program,'' which carries a burden hour estimate of three minutes per electronic submission.

This rule changes the respondent burden for control number 0694–0088 by reducing the estimated number of submissions by 3,900, which is expected to reduce the current approved estimates, which will result in a reduction of 1,911 burden hours saved and cost savings to the public of $72,618 under this collection. The respondent burden under controls numbers 0694–0096 and 0607–0152 are not anticipated to change as a result of this final rule.

Current information regarding all three collections of information—including all background materials—can be found at *https://www.reginfo.gov/public/do/PRAMain* by using the search function to enter either the title of the collection or the OMB Control Number.

3. This rule does not contain policies with federalism implications as that term is defined in E.O. 13132.

4. Pursuant to section 1762 of ECRA (50 U.S.C. 4821), this action is exempt from the Administrative Procedure Act (APA) (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date. While section 1762 of ECRA provides sufficient authority for such an exemption, this action is also independently exempt from these APA requirements because it involves a military or foreign affairs function of the United States (5 U.S.C. 553(a)(1)).

5. Because neither the Administrative Procedure Act nor any other law requires that notice of proposed rulemaking and an opportunity for public comment be given for this rule, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no Final Regulatory Flexibility Analysis is required and none has been prepared.

List of Subjects

15 CFR Part 740

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism

15 CFR Part 746

Exports, Reporting and recordkeeping requirements.

15 CFR Part 762

Administrative practice and procedure, Business and industry, Confidential business information, Exports, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, parts 740, 744, 746, and 762 of the Export Administration Regulations (15 CFR parts 730 through 774) are amended as follows:

PART 740—LICENSE EXCEPTIONS

■ 1. The authority citation for part 740 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 7201 *et seq.;* E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

■ 2. Part 740 is amended by adding § 740.23 to read as follows.

§ 740.23 MEDICAL DEVICES (MED).

(a) *Scope.* License Exception MED authorizes the export, reexport, or transfer (in country) of ''medical devices'' designated as EAR99 to or within Russia, Belarus, the temporarily

occupied Crimea region of Ukraine, or the covered regions of Ukraine (as specified in § 746.6(a)(2) of the EAR). *See* Supplement no. 3 to part 774—Statements of Understanding under paragraph (a) (Statement of Understanding—medical equipment) for guidance on classifying medical equipment and the definition of ''medical device'' in § 772.1 of the EAR. License Exception MED also authorizes the export, reexport, or transfer (in country) to or within Russia, Belarus, the temporarily occupied Crimea region of Ukraine, or the covered regions of Ukraine of ''parts,'' ''components,'' ''accessories,'' and ''attachments'' designated as EAR99 that are exclusively for use in or with ''medical devices'' designated as EAR99. This license exception authorizes transactions involving items designated as EAR99 that would otherwise require a license pursuant to §§ 746.5, 746.6 or 746.10 of the EAR, subject to the terms and conditions described in this section. For ''parts,'' ''components,'' ''accessories,'' and ''attachments'' authorized under License Exception MED, such replacement ''parts,'' ''components,'' ''accessories,'' and ''attachments'' may only be exported, reexported, or transferred (in-country) if they also meet the additional requirements under paragraphs (a)(1) and (2) of this section:

(1) The ''part,'' ''component,'' ''accessory,'' or ''attachment'' is being exported, reexported, or transferred (in-country) solely to replace a broken or nonoperational ''part,'' ''component,'' ''accessory,'' or ''attachment'' for use in or with a ''medical device'' that falls within the scope of paragraph (a) of this section, or the export, reexport, or transfer (in-country) of such replacement ''parts,'' ''components,'' ''accessories,'' and ''attachments'' is necessary and ordinarily incident to the proper preventative maintenance of such a ''medical device;'' *and*

(2) The number of replacement ''parts,'' ''components,'' ''accessories,'' and ''attachments'' that are exported, reexported, transferred (in-country), and stored in Russia, Belarus, the temporarily occupied Crimea region of Ukraine, or the covered regions of Ukraine does not exceed the number of corresponding operational ''parts,'' ''components,'' ''accessories,'' and ''attachments'' currently in use in or with the relevant medical devices in Russia, Belarus, the temporarily occupied Crimea region of Ukraine, or the covered regions of Ukraine.

(b) *Restrictions.* This license exception does not authorize the export, reexport, or transfer (in country) of any item:

(1) To a ''proscribed person'' (including but not limited to 'military end users' (see §§ 744.17(e) and 744.21(g)) or in situations in which an entity on the Entity List in supplement no. 4 to part 744 or on the Military End-User (MEU) List) is a party to the transaction as described in § 748.5(c) through (f) of the EAR;

(2) Destined to a ''production'' ''facility;'' *or*

(3) When you have ''knowledge'' that the item is intended to develop or produce items.

Note 1 to paragraphs (b)(2) and (3): The assembly in a hospital or other health care facility of a finished ''medical device'' completely ''produced'' outside of Russia, Belarus, the temporarily occupied Crimea region of Ukraine, or the covered regions of Ukraine'' for the sole purpose of using that ''medical device'' at that facility is not considered a ''production'' activity for purposes of the restrictions under paragraphs (b)(2) and (3) of this section.

(c) *Verification.* Exporters, reexporters, and transferors must maintain a system of distribution that ensures that ''medical devices'' and ''parts,'' ''components,'' ''accessories,'' or ''attachments'' are not delivered to ''proscribed persons'' or entities engaged in the ''production'' of any product. Verification of the effectiveness of the distribution system may entail obtaining certain information from a consignee (*e.g.,* obtaining affirmations or other documentation from a consignee, or performing periodic on-site spot-checks (*e.g.,* conducting such verification by staff of the exporter, reexporter, or transferor; an internationally accredited auditing firm; or an internationally recognized non-governmental humanitarian organization in Russia, Belarus, the temporarily occupied Crimea region of Ukraine, or the covered regions of Ukraine to conduct such verification).

(d) *Recordkeeping and review or inspection of records.* In addition to complying with the recordkeeping requirements in part 762 of the EAR, exporters, reexporters, and transferors must maintain records of verification, as specified in paragraph (c) of this section, for 5 years and, upon request, provide records to BIS, or any other official of the United States designated by BIS, for review or inspection.

PART 744—CONTROL POLICY: END-USER AND END-USE BASED

■ 3. The authority citation for part 744 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of September 19, 2022, 87 FR 57569 (September 21, 202); Notice of November 8, 2022, 87 FR 68015, 3 CFR, 2022 Comp., p. 563; Notice of September 7, 2023, 88 FR 62439 (September 11, 2023).

§ 744.11 [Amended]

■ 4. Section 744.11 is amended by removing the fourth sentence of paragraph (b) introductory text.

PART 746—EMBARGOES AND OTHER SPECIAL CONTROLS

■ 5. The authority citation for 15 CFR part 746 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 287c; Sec 1503, Pub. L. 108–11, 117 Stat. 559; 22 U.S.C. 2151 note; 22 U.S.C. 6004; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 12854, 58 FR 36587, 3 CFR, 1993 Comp., p. 614; E.O. 12918, 59 FR 28205, 3 CFR, 1994 Comp., p. 899; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13338, 69 FR 26751, 3 CFR, 2004 Comp., p 168; Presidential Determination 2003–23, 68 FR 26459, 3 CFR, 2004 Comp., p. 320; Presidential Determination 2007–7, 72 FR 1899, 3 CFR, 2006 Comp., p. 325; Notice of May 8, 2023, 88 FR 30211 (May 10, 2023).

■ 6. Section 746.5 is amended by revising paragraph (c) introductory text and adding paragraph (c)(8), to read as follows:

§ 746.5 Russian and Belarusian industry sector sanctions.

* * * * *

(c) *License exceptions.* No license exceptions may overcome the license requirements set forth in this section, except the license exceptions identified in paragraphs (c)(2), (7), and (8) of this section.

* * * * *

(8) License Exception MED (§ 740.23 of the EAR).

■ 7. Section 746.6 is amended by adding paragraph (c)(7), to read as follows:

§ 746.6 Temporarily occupied Crimea region of Ukraine and covered regions of Ukraine.

* * * * *

(c) * * *

(7) License Exception MED (§ 740.23 of the EAR).

* * * * *

■ 8. Section 746.10 is amended by revising paragraph (c) introductory text and adding paragraph (c)(8), to read as follows:

§ 746.10 'Luxury goods' sanctions against Russia and Belarus and Russian and Belarusian oligarchs and malign actors.

* * * * *

(c) *License exceptions.* No license exceptions may overcome the license requirements in paragraph (a)(1) of this section except the license exceptions identified in paragraphs (c)(1) through (3), (c)(7) and (8) of this section.

* * * * *

(8) License Exception MED (§ 740.23 of the EAR).

PART 762—RECORDKEEPING

■ 9. The authority citation for 15 CFR part 746 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

■ 10. Section 762.2 is amended by:
■ a. Revising paragraphs (b)(53) and (54), and
■ b. Adding paragraph (b)(55).

The revisions and addition read as follows:

§ 762.2 Records to be retained.

* * * * *

(b) * * *

(53) § 750.7(c)(2), Notification of name change by advisory opinion request;

(54) § 748.13, Certain Hong Kong import and export licenses; *and*

(55) § 740.23, License Exception MED.

* * * * *

Thea D. Rozman Kendler,

Assistant Secretary for Export Administration.

[FR Doc. 2024–09076 Filed 4–25–24; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 161, 164, 184, and 186

[Docket No. FDA–2024–D–1669]

Revocation of Uses of Partially Hydrogenated Oils in Foods: Guidance for Industry; Small Entity Compliance Guide; Availability

AGENCY: Food and Drug Administration, Department of Health and Human Services (HHS).

ACTION: Notification of availability.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing the availability of a guidance for industry entitled ''Revocation of Uses of Partially Hydrogenated Oils in Foods: Guidance for Industry; Small Entity Compliance Guide.'' The small entity compliance guide (SECG) is intended to help small entities comply with our regulations after we revoked specific requirements pertaining to the use of partially hydrogenated oils in certain foods or as a direct or indirect food substance.

DATES: The announcement of the guidance is published in the **Federal Register** on April 29, 2024.

ADDRESSES: You may submit either electronic or written comments on FDA guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2024–D–1669 for ''Revocation of Uses of Partially Hydrogenated Oils in Foods: Guidance for Industry; Small Entity Compliance Guide.'' 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.'' We will review this copy, including the claimed confidential information, in our 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 Office of Food Additive Safety, Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740. Send two self-

addressed adhesive labels to assist that office in processing your request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance.

FOR FURTHER INFORMATION CONTACT: Ellen Anderson, Center for Food Safety and Applied Nutrition, Office of Food Additive Safety (HFS–255), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–1309; or Philip Chao, Center for Food Safety and Applied Nutrition, Office of Regulations and Policy (HFS–024), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–2378.

SUPPLEMENTARY INFORMATION:

I. Background

We are announcing the availability of a guidance for industry entitled ''Revocation of Uses of Partially Hydrogenated Oils in Foods: Guidance for Industry; Small Entity Compliance Guide.'' We are issuing this SECG consistent with our good guidance practices regulation (21 CFR 10.115). The SECG represents the current thinking of FDA on this topic. 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.

In the **Federal Register** of August 9, 2023 (88 FR 53764), we published a direct final rule entitled ''Revocation of Uses of Partially Hydrogenated Oils in Foods'' (''the final rule''). The final rule amends our regulations that provide for the use of partially hydrogenated oils (PHOs) in food in light of our determination that PHOs are no longer generally recognized as safe (GRAS).

The final rule:

- Removes PHOs as an optional ingredient in the standards of identity for canned tuna and for peanut butter at §§ 161.190 (21 CFR 161.190) and 164.150 (21 CFR 164.150), respectively;
- Revises our regulations affirming food substances as GRAS pertaining to menhaden oil (21 CFR 184.1472) and to low erucic acid rapeseed oil (LEAR oil) (21 CFR 184.1555) to no longer include partially hydrogenated forms of these oils;
- Deletes the regulation affirming partially hydrogenated fish oil as GRAS as an indirect food substance (21 CFR 186.1551); and
- Revokes prior sanctions for the use of PHOs in margarine, shortening, and bread, rolls, and buns. (A ''prior sanction'' exempts a specific use of a substance in food from the definition of food additive and from all related food additive provisions of the Federal Food, Drug, and Cosmetic Act if the use was sanctioned or approved before September 6, 1958. In accordance with our general regulations regarding prior sanctions, we may revoke a prior sanctioned use of a food ingredient where scientific data or information demonstrate that prior-sanctioned use of the food ingredient may be injurious to health (see 21 CFR 181.1).)

The final rule became effective on December 22, 2023 (88 FR 86580, December 14, 2023).

Because we revised, removed, or revoked the regulations mentioned above, the SECG informs small entities that they should no longer use:

- PHOs as an optional ingredient in canned tuna under the standard of identity for canned tuna at § 161.190;
- PHOs as an optional ingredient in peanut butter under the standard of identity for peanut butter at § 164.150;
- Partially hydrogenated versions of menhaden oil or LEAR oil as a direct food substance;
- Partially hydrogenated fish oil as an indirect food substance used as a constituent of cotton and cotton fabrics used for dry food packaging; and
- PHOs as an ingredient in margarine, shortening, bread, rolls, and buns.

II. Paperwork Reduction Act of 1995

FDA tentatively concludes that this guidance contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

III. Electronic Access

Persons with access to the internet may obtain the guidance at *https://www.fda.gov/FoodGuidances, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.* Use the FDA website listed in the previous sentence to find the most current version of the guidance.

Dated: April 22, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–08955 Filed 4–26–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 573

[Docket No. FDA–2024–F–1850]

Food Additives Permitted in Feed and Drinking Water of Animals; Condensed, Extracted Glutamic Acid Fermentation Product

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; technical amendment.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to update the production organism *Corynebacterium lilium* that has been scientifically reclassified to *Corynebacterium glutamicum.* This action is being taken to improve the accuracy and clarity of the regulations.

DATES: This rule is effective April 29, 2024.

FOR FURTHER INFORMATION CONTACT: Chelsea Cerrito, Center for Veterinary Medicine (HFV–221), Food and Drug Administration, 12225 Wilkins Ave., Rockville, MD 20852, 240–402–6729, *Chelsea.Cerrito@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: FDA is amending the food additive regulation at 21 CFR 573.500 *Condensed, extracted glutamic acid fermentation product* for use in animal feed to update the production organism *Corynebacterium lilium* that has been scientifically reclassified to *Corynebacterium glutamicum.* This action is being taken to improve the accuracy and clarity of the regulations.

Publication of this document constitutes final action under the Administrative Procedures Act (5 U.S.C. 553). FDA has determined that notice and public comment are unnecessary because this amendment to the regulations provides only technical changes to update scientific nomenclature and is nonsubstantive.

List of Subjects in 21 CFR Part 573

Animal feeds, Food additives.

Therefore, under the Federal Food, Drug, and Cosmetic Act, and the Public Health Service Act, and under the authority delegated to the Commissioner of Food and Drugs, 21 CFR part 573 is amended as follows:

PART 573—FOOD ADDITIVES PERMITTED IN FEED AND DRINKING WATER OF ANIMALS

■ 1. The authority citation for part 573 continues to read as follows:

Authority: 21 U.S.C. 321, 342, 348.

§ 573.500 [Amended]

■ 2. In § 573.500, in paragraph (a), remove the words ''*Corynebacterium lilium*'' and add in their place the words ''*Corynebacterium glutamicum*''.

Dated: April 22, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–09073 Filed 4–26–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2024–0157]

RIN 1625–AA87

Security Zone; Port Valdez and Valdez Narrows, Valdez, AK

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The current Trans-Alaska Pipeline Valdez Terminal complex (Terminal) security zone encompasses a waterside portion and 2000 yards inland, which includes the shoreside portion of the terminal and adjacent land. The Coast Guard is amending the TAPS Terminal security zone to exclude the land portion from the security zone. The Coast Guard has never exercised any legal authority, nor has it enforced regulations within the inland portion of the security zone.

DATES: This rule is effective May 29, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2024–0157 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email Lieutenant Junior Grade Abigail Ferrara, Marine Safety Unit Valdez, US Coast Guard. Telephone 907–835–7209, email *Abigail.C.Ferrara@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Prince William Sound
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
TAPS Trans-Alaska Pipeline
U.S.C. United States Code

II. Background Information and Regulatory History

In response to the terrorist attacks on September 11, 2001, the Coast Guard instituted several temporary security zones in the Trans-Alaska Pipeline (TAPS) Terminal and Port Valdez areas. Between 2002 and 2004, Coast Guard published several proposed and supplemental proposed rulemakings to establish security zones in the area. This culminated with a final rule (71 FR 2152) published on January 13, 2006, which established the current permanent security zones in 33 CFR 165.1710.

The current TAPS Terminal security zone encompasses a waterside portion and 2000 yards inland, which includes the shoreside portion of the terminal and adjacent land. The Coast Guard has never exercised any legal authority, nor has it enforced regulations within the inland portion of the security zone. The Captain of the Port Prince William Sound (COTP) determined that the current practice of non-enforcement within the inland portion of the security zone could create confusion for future stakeholders and the public. It would be an arbitrary and unreasonable burden upon the facility and industry employees who have freely entered the inland portion without COTP permission for decades if a COTP were to begin enforcing their authority over the inland portion of the security zone in the future.

The Coast Guard is issuing this rulemaking under authority in 46 U.S.C. 70051 and 70124.

On February 20, 2024, the Coast Guard published a notice of proposed rulemaking (NPRM) titled Security Zone; Port Valdez and Valdez narrows, Valdez, AK (89 FR 13015). There we stated why we issued the NPRM and invited comments on our proposed regulatory action related to this security zone. During the comment period that ended March 22, 2024, we received no comments.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70051 and 70124. The COTP determined that the current practice of non-enforcement within the inland portion of the security zone could create confusion for future stakeholders and the public. It would be an arbitrary and unreasonable burden upon the facility and industry employees who have freely entered the inland portion without COTP permission for decades if a COTP were to begin enforcing their authority over the inland portion of the security zone in the future. The purpose of this rule is to prevent future confusion.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received no comments on our NPRM published February 20, 2024. There are no changes in the regulatory text of this rule from the proposed rule in the NPRM.

The COTP is amending the current security zone found in 33 CFR 165.1710(a)(1) to excise the 2000-yard inland portion of the zone. This will result in the security zone encompassing only the water up to the shoreline. The regulatory text we are amending appears at the end of this document.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size and location of the current waterside portion security zone remaining the same. Moreover, the landside portion of the facility has had other security regulations in place for roughly two decades.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations

that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This regulatory change would not affect any small entities, as the COTP does not enforce the requirements for the landside portion of the security zone, and the waterside security zone coordinates will remain unchanged.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132 (Federalism), if it has 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. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect 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.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves excising the 2000-yard inland portion TAPS Terminal security zone. It is categorically excluded from further review under paragraph L60(b) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Revise § 165.1710 paragraph (a)(1) to read as follows:

§ 165.1710 Port Valdez and Valdez Narrows, Valdez, Alaska—security zones.

(a) * * *

(1) *Trans-Alaska Pipeline (TAPS) Valdez Terminal complex (Terminal), Valdez, Alaska and TAPS tank vessels.* All waters enclosed within a line beginning on the southern shoreline of Port Valdez at 61°05′03.6″ N, 146°25′42″ W; thence northerly to yellow buoy at 61°06′00″ N, 146°25′42″ W; thence east to the yellow buoy at 61°06′00″ N, 146°21′30″ W; thence south to 61°05′06″ N, 146°21′30″ W; thence west along the shoreline to the beginning point.

* * * * *

Dated: April 23, 2024.

S.K. Rousseau,

Commander, U.S. Coast Guard, Captain of the Port Prince William Sound.

[FR Doc. 2024–09103 Filed 4–26–24; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2024–0018; FRL–11714–02–R1]

Air Plan Approval; New Hampshire; Amendments to Motor Vehicle Inspection and Maintenance Program Regulation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a State Implementation Plan (SIP) revision submitted by the State of New Hampshire. This revision includes an amended regulation for the Enhanced Motor Vehicle Inspection and Maintenance (I/M) program in New Hampshire. Overall, the submittal updates and clarifies the implementation of the New Hampshire I/M program. The intended effect of this action is to approve the updated I/M program regulation into the New Hampshire SIP. This action is being taken in accordance with the Clean Air Act.

DATES: This rule is effective on May 29, 2024.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R01–OAR–2024–0018. All documents in the docket are listed on the *https://www.regulations.gov* website. Although

listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available at *https://www.regulations.gov* or at the U.S. Environmental Protection Agency, EPA Region 1 Regional Office, Air and Radiation Division, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays and facility closures due to COVID–19.

FOR FURTHER INFORMATION CONTACT: Ayla Martinelli, Air Quality Branch, U.S. Environmental Protection Agency, EPA Region 1, 5 Post Office Square—Suite 100, (Mail code 5–MI), Boston, MA 02109–3912, tel. (617) 918–1057, email: *martinelli.ayla@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

Table of Contents

I. Background and Purpose

On January 31, 2024 (89 FR 6082), EPA published a Notice of Proposed Rulemaking (NPRM) for the State of New Hampshire. The NPRM proposed approval of New Hampshire's amended regulation for the state's Enhanced Motor Vehicle Inspection and Maintenance (I/M) program. The formal SIP revision was submitted by New Hampshire on September 22, 2022. The rationale for EPA's proposed action is explained in the NPRM and will not be restated here. No public comments were received on the NPRM.

II. Final Action

EPA is approving New Hampshire's amended I/M regulation as a revision to the New Hampshire SIP.

EPA is incorporating New Hampshire's I/M program regulation, Saf–C 3200 ''Official Motor Vehicle Inspection Requirements,'' by reference into the New Hampshire SIP. New Hampshire's I/M program regulation contains enforcement provisions that detail state enforcement procedures, including administrative, civil, and criminal penalties, and administrative and judicial procedures. Such enforcement-related provisions are required elements of an I/M SIP under 40 CFR 61.364, and EPA is finalizing the approval of the provisions as meeting those requirements. However, EPA is not finalizing the incorporation of those provisions by reference into the EPA-approved federal regulations at 40 CFR part 52. In any federal action to enforce violations of the substantive requirements of the New Hampshire I/M program, the relevant provisions of Section 113 or 304 of the CAA, rather than state enforcement provisions would govern. Similarly, the applicable procedures in any federal action would be the applicable federal court rules or EPA's rules for administrative proceedings at 40 CFR part 22, rather than state administrative procedures. Since the state enforcement provisions would not be applicable in a federal action, incorporating these state-only enforcement provisions into the federal regulations would have no effect. To avoid confusion to the public and regulated parties, EPA is not incorporating these provisions by reference into the EPA-approved federal regulations in the New Hampshire plan identification in 40 CFR part 52. Specifically, EPA is not incorporating New Hampshire's regulations Saf–C 3222.04(d) and Saf–C 3248 into the federal regulations at 40 CFR 52.1520(c).

III. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the New Hampshire Department of Safety Regulation Saf–C 3200 ''Official Motor Vehicle Inspection Requirements,'' which updates and clarifies the implementation of the New Hampshire I/M program, with exceptions as described in section II of this final rule. The EPA has made, and will continue to make, these documents generally available through *www.regulations.gov* and at the EPA Region 1 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the State implementation plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[1]

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, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this 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 13563 (76 FR 3821, January 21, 2011);
- 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 an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- 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 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

[1] 62 FR 27968 (May 22, 1997).

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. 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.'' 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.''

New Hampshire 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. 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. 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.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by *June 28, 2024.* Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: April 22, 2024.

David Cash,

Regional Administrator, EPA Region 1.

Part 52 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart EE—New Hampshire

■ 2. In § 52.1520(c), the table in paragraph (c) is amended by revising the entry for ''Saf–C 3200'' to read as follows:

§ 52.1520 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED NEW HAMPSHIRE REGULATIONS

State citation	Title/subject	State effective date	EPA approval date [1]	Explanations
*	*	*	*	*
Saf–C 3200	Official Motor Vehicle Inspection Requirements.	November 26, 2019 ...	April 29, 2024 ..... [Insert **Federal Register** citation].	Replaces the SIP-approved version of Saf–C 3200 in its entirety. Specifically, amends Saf–C 3202, Saf–C 3203, Saf–C 3204, Saf–C 3205, Saf–C 3206.04, Saf–C 3207.01, Saf–C 3209, Saf–C 3210.02, and Saf–C 3222. Saf–C 3222.04(d) and section Saf–C 3248 are not being incorporated into the New Hampshire SIP.
*	*	*	*	*

[1] In order to determine the EPA effective date for a specific provision listed in this table, consult the **Federal Register** notice cited in this column for the particular provision.

[FR Doc. 2024–08928 Filed 4–26–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2023–0280; FRL–11860–01–OCSPP]

Flonicamid; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation amends the existing tolerance for residues of flonicamid in or on the raw agricultural commodity berry, low-growing, subgroup 13–07G by increasing the tolerance from 1.5 parts per million (ppm) to 2 ppm. ISK Biosciences Corporation requested this amended tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective April 29, 2024. Objections and requests for hearings must be received on or before June 28, 2024, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2023–0280, 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 and 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.*

FOR FURTHER INFORMATION CONTACT: Charles Smith, Director, Registration Division (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 566–1030; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Office of the Federal Register's e-CFR site at *https://www.ecfr.gov/current/title-40.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2023–0280, in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before June 28, 2024. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2023–0280, by one of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *https://www.epa.gov/dockets/where-send-comments-epa-dockets.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

II. Summary of Petitioned-For Tolerances

In the **Federal Register** of July 5, 2023 (88 FR 42935) (FRL–10579–05–OCSPP), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 3F9050) by ISK Biosciences Corporation, 7470 Auburn Road, Suite A, Concord, OH 44077–9703. The petition requested that 40 CFR part 180 be amended by establishing tolerances for residues of flonicamid in or on the raw agricultural commodities berry, low-growing, subgroup 13–07G, except strawberry, at 1.5 ppm and strawberry at 2.0 ppm. The petition also requested removal of the existing tolerance for residues of flonicamid in or on berry, low-growing, subgroup 13–07G at 1.5 ppm.

That document referenced a summary of the petition, which is available in the docket at *https://www.regulations.gov.* There were no comments received on the notice of filing.

Based upon review of the data supporting the petition and in accordance with its authority under FFDCA section 408(d)(4)(A)(i), EPA is amending the existing tolerance for residues of flonicamid in or on berry, low-growing, subgroup 13–07G by increasing the tolerance from 1.5 ppm to 2 ppm, rather than establishing different tolerances for berry, low-growing, subgroup 13–07G, except strawberry, and strawberry as originally requested. A revised petition was submitted by ISK Biosciences Corporation to support this change to the petitioned-for tolerance. For details, see Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will

result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue . . . .''

Consistent with FFDCA section 408(b)(2)(D), and the factors specified therein, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for flonicamid including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with flonicamid follows.

In an effort to streamline its publications in the **Federal Register**, EPA is not reprinting sections that repeat what has been previously published for tolerance rulemakings for the same pesticide chemical. Where scientific information concerning a particular chemical remains unchanged, the content of those sections would not vary between tolerance rulemakings, and EPA considers referral back to those sections as sufficient to provide an explanation of the information EPA considered in making its safety determination for the new rulemaking.

EPA has previously published tolerance rulemakings for flonicamid in which EPA concluded, based on the available information, that there is a reasonable certainty that no harm would result from aggregate exposure to flonicamid and established tolerances for residues of the chemical. EPA is incorporating previously published sections from these rulemakings as described further in this rulemaking, as they remain unchanged.

Toxicological profile. For a discussion of the toxicological profile of flonicamid, see Unit III. of the flonicamid tolerance rulemaking published in the **Federal Register** of September 20, 2023 (88 FR 64819) (FRL–11393–01).

Toxicological points of departure/levels of concern. For a summary of the toxicological points of departure/levels of concern for flonicamid used for human health risk assessment, see Table 4.0.1. of the ''Flonicamid. Human Health Risk Assessment for the Petition for Amendment of Tolerances in/on Low Growing Berry Subgroup 13–07G'' (hereafter the Flonicamid Human Health Risk Assessment) in docket ID EPA–HQ–OPP–2023–0280 at *https://www.regulations.gov.*

Exposure assessment. EPA's dietary exposure assessments have been updated to include the additional exposure from the increased tolerance for residues of flonicamid in or on berry, low-growing, subgroup 13–07G. The dietary exposure assessments were conducted with Dietary Exposure Evaluation Model software using the Food Commodity Intake Database (DEEM–FCID) Version 4.02, which uses the 2005–2010 food consumption data from the United States Department of Agriculture's (USDA's) National Health and Nutrition Examination Survey, What We Eat in America (NHANES/WWEIA). An unrefined chronic dietary exposure assessment was conducted for all proposed and registered uses of flonicamid. The analysis assumed 100 percent crop treated (100% CT) and tolerance level residues for all commodities. Separate tolerances have been established for potato granules/flakes, tomato paste, and tomato puree based on processing studies. The processing factors were set to 1.0 for these commodities. The Agency's default processing factors were used for the other processed commodities for which default processing factors are available.

Drinking water and non-occupational exposures. The estimated drinking water concentrations have not changed as a result of the increased tolerance for residues of flonicamid in or on berry, low-growing, subgroup 13–07G. For a detailed summary of the drinking water analysis for flonicamid used for the human health risk assessment, see Unit III.C.2. of the flonicamid tolerance rulemaking published in the **Federal Register** of July 23, 2018 (83 FR 34775) (FRL–9977–82).

There are no proposed residential uses at this time; however, there are existing registered residential handler uses that were previously assessed and which resulted in no risks of concern. Registered residential use patterns are expected to result in only short-term exposures to flonicamid and, as a dermal endpoint was not selected, residential risk estimates were calculated for the inhalation route only.

Cumulative exposure. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.'' Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to flonicamid and any other substances, and flonicamid does not appear to produce a toxic metabolite produced by other substances. For the purposes of this action, therefore, EPA has not assumed that flonicamid has a common mechanism of toxicity with other substances.

Safety factor for infants and children. EPA continues to conclude that there are reliable data to support the reduction of the Food Quality Protection Act (FQPA) safety factor from 10X to 1X. See Unit III. of the September 20, 2023, rulemaking for a discussion of the Agency's rationale for that determination.

Aggregate risks and determination of safety. EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing dietary (food and drinking water) exposure estimates to the acute population-adjusted dose (aPAD) and chronic population-adjusted dose (cPAD). Short- and intermediate-term risks are evaluated by comparing the estimated total food, water, and residential exposure to the appropriate points of departure to ensure that an adequate margin of exposure (MOE) exists.

No adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, flonicamid is not expected to pose an acute risk. Chronic dietary risks are below the Agency's level of concern of 100% of the cPAD; they are 91% of the cPAD for children 1 to 2 years old, the group with the highest exposure.

For short-term aggregate risk, adult residential handler exposure estimates are aggregated with adult dietary exposure estimates, which are considered background. The estimated aggregate MOE for adult handlers is 1,100 and is not of concern because it is higher than the level of concern of 100. Short-term aggregate risk estimates for children are expected to be equivalent to chronic dietary risks.

A cancer dietary assessment was not conducted as flonicamid has been determined to be ''suggestive evidence of carcinogenicity, but not sufficient to assess human carcinogenicity potential.'' The Agency has determined that quantification of risk using a non-linear approach (*i.e.,* using a chronic reference dose) adequately accounts for all chronic toxicity, including

carcinogenicity that could result from exposure to flonicamid. As stated above, the chronic risks are not of concern.

Therefore, based on the risk assessments and information described above, EPA concludes there is a reasonable certainty that no harm will result to the general population, or to infants and children, from aggregate exposure to flonicamid residues. More detailed information on this action can be found in the Flonicamid Human Health Risk Assessment in docket ID EPA–HQ–OPP–2023–0280 at *https://www.regulations.gov.*

IV. Other Considerations

A. Analytical Enforcement Methodology

For a discussion of the available analytical enforcement method, see Unit IV.A. of the July 23, 2018, rulemaking.

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4).

The tolerance expression for plant and livestock commodities are harmonized between the U.S. and Canada, but not Codex and Japan. Codex and Japanese residues of concern are expressed as flonicamid only, whereas U.S. residues of concern are flonicamid and its metabolites TFNA, TFNA–AM, and TFNG. Codex has an MRL for residues of flonicamid in or on low growing berries at 1.5 ppm, and Canada has MRLs for residues of flonicamid in or on bearberry; bilberry; blueberry, lowbush; cloudberry; cranberry; and lingonberry at 1.5 ppm. The existing U.S. tolerance for residues of flonicamid in or on berry, low-growing, subgroup 13–07G at 1.5 ppm is harmonized with Codex and Canadian MRLs. However, the petition requested that EPA increase the existing U.S. tolerance from 1.5 ppm to 2 ppm in order to harmonize with the Japanese MRL for residues of flonicamid in or on strawberry, cranberry, and other berries at 2 ppm and minimize barriers to imports of strawberries from Japan. Although this action is establishing a higher tolerance for residues of flonicamid in or on low growing berry, subgroup 13–07G that is no longer harmonized with Codex or Canadian MRLs, this is not expected to create a trade barrier to imports of these commodities from Codex countries and Canada since commodities that comply with the lower Codex and Canadian MRLs could be imported into the U.S. For these reasons, EPA has determined it is appropriate to amend the tolerance for residues of flonicamid in or on low growing berry, subgroup 13–07G from 1.5 ppm to 2 ppm, as petitioned.

C. Revisions to Petitioned-For Tolerances

EPA is amending the existing tolerance for residues of flonicamid in or on berry, low-growing, subgroup 13–07G by increasing the tolerance from 1.5 ppm to 2 ppm, rather than establishing different tolerances for berry, low-growing, subgroup 13–07G, except strawberry, and strawberry as originally requested. Because strawberry is the representative commodity for berry, low-growing, subgroup 13–07G, it may not be excepted from the crop subgroup under 40 CFR 180.40(h). A revised petition was submitted by ISK Biosciences Corporation to support this change to the petitioned-for tolerance.

V. Conclusion

Therefore, the established tolerance for residues of flonicamid in or on berry, low-growing, subgroup 13–07G is amended from 1.5 ppm to 2 ppm.

VI. Statutory and Executive Order Reviews

This action establishes a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), or to Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or Tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or Tribal Governments, on the relationship between the National Government and the States or Tribal Governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides, and pests, Reporting and recordkeeping requirements.

Dated: April 23, 2024.

Charles Smith,

Director, Registration Division, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, EPA is amending 40 CFR chapter 1 as follows:

PART 180—TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES IN FOOD

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.613, revise the entry in table 1 to paragraph (a)(1) for ''Berry, low-growing, subgroup 13–07G'' to read as follows:

§ 180.613 Flonicamid; tolerances for residues.

(a) * * *

(1) * * *

TABLE 1 TO PARAGRAPH (a)(1)

Commodity	Parts per million
* * * * * * *	
Berry, low-growing, subgroup 13–07G	2
* * * * * * *	

* * * * *

[FR Doc. 2024–09048 Filed 4–26–24; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 8360

[BLM_CA_FRN_MO4500173363]

Final Supplementary Rule for Public Lands in the Cotoni-Coast Dairies Unit of the California Coastal National Monument in Santa Cruz County, CA

AGENCY: Bureau of Land Management, Interior.

ACTION: Final supplementary rule.

SUMMARY: The Bureau of Land Management (BLM) is finalizing a supplementary rule for all public lands within the Cotoni-Coast Dairies (C–CD) unit of the California Coastal National Monument (CCNM) in Santa Cruz County, California. The final supplementary rule will allow the BLM to manage recreation, address public safety, and provide resource protection on BLM-managed public lands within the C–CD unit of the CCNM. The supplementary rule is needed to enforce the BLM's decisions established in the CCNM Resource Management Plan, as amended.

DATES: These supplementary rules are effective May 29, 2024.

ADDRESSES: You may submit inquiries by mail, hand-delivery, or electronic mail. Mail: Bureau of Land Management, California State Office, 2800 Cottage Way Suite W1623, Sacramento, CA 95825. Electronic mail: *BLM_CA_Web_SO@blm.gov.*

FOR FURTHER INFORMATION CONTACT: Sky Murphy, Planning and Environmental Coordinator, BLM Central Coast Field Office; telephone: (831) 582–2200, email: *smurphy@blm.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. Background

The BLM completed the C–CD Resource Management Plan (RMP) amendment on June 23, 2021, to establish land use decisions that protect the objects and values of the C–CD unit of the CCNM and to support responsible recreation opportunities. Public participation during planning for the use and enjoyment of the C–CD unit indicates that it will be a popular area for recreating, and a supplementary rule is needed to allow for law enforcement to enforce land-use decisions for managing recreation and to protect cultural and natural resources.

This final supplementary rule will apply to all the BLM-managed lands in the C–CD unit. Persons performing essential operations central to the BLM's mission will be exempt. Such persons include, for example, members of any organized law enforcement, rescue, or fire-fighting force.

The final supplementary rule is needed to provide consistency and uniformity for visitors to BLM-managed lands, prevent resource damage and user conflicts, and provide greater safety to the visiting public.

Resource Damage: Presidential Proclamation 9563 added the C–CD unit to the CCNM and identified objects to be protected. To ensure protection of the objects identified in Proclamation 9563, particularly biological and cultural objects, the final rule prohibits use and occupancy of the C–CD from ½ hour after sunset to ½ hour before sunrise. The final supplementary rule requires visitors to stay on roads and trails designated open for non-motorized and mechanized use. The supplementary rule requires pets to be on a leash at all times, and visitors are prohibited from leaving a pet unattended or allowing pet feces to remain on C–CD, other than within trash receptacles provided for such purposes.

Public Safety: As visitation increases among all types of recreational users, so do the conflicts between user groups. In crowded areas, conflicts among users increase risk to visitor safety. Other recreationists and nearby landowners also have concerns for their personal safety, as well as damage to property. To ensure public safety and reduce the risk of wildfire, the final supplementary rule prohibits recreational target shooting, camping, and fires of any kind. To minimize other visitor-use conflicts, the final supplementary rule prohibits leaving property unattended for more than 24 hours, building any structure, placing signs of any kind, and the possession or use of metal detecting devices. The supplementary rule prohibits taking off or landing of aircraft, including unmanned aircraft systems, paragliding, hang-gliding, and similar recreational uses within the C–CD unit of the CCNM.

At present, no supplementary rules are in effect for BLM-managed public lands in the C–CD unit. Therefore, this supplementary rule is needed to address

management issues and concerns with respect to public use of this area.

The authority for this supplementary rule is set forth at sections 303 and 310 of the Federal Land Policy and Management Act, 43 U.S.C. 1733 and 1740. The BLM is issuing this supplementary rule under the authority of 43 CFR 8365.1–6, which allows BLM State Directors to establish supplementary rules for the protection of persons, property, and public lands and resources.

II. Discussion of Public Comments and Rationale for Final Supplementary Rule

On November 29, 2022, the BLM published a proposed supplementary rule (87 FR 73276), initiating a 60-day public comment period that ended on January 29, 2023. The BLM received 16 unique comments signed by 54 individuals and organizations on the proposed supplementary rule.

Eleven of the unique comments did not specifically address the proposed supplementary rule. The BLM made no changes to the final supplementary rule based on these unrelated comments.

The remainder of the comments provided suggestions for how the BLM could make the final rule clearer and provide additional protection of resources.

Public comments expressed support for the supplementary rule and the importance of adhering to the BLM's policy and guidance for lands within the National Landscape Conservation System.

Public comments suggested the BLM clarify Rules 3, 7, 19, and 21. The BLM did not make changes to Rules 3, 7, 19, or 21 in response to these comments. The BLM disagrees with the commenters that the language needs clarifying. The proposed and final rules are written in plain language and need no further explanation.

Public comments also recommended that the BLM change Rule 17 to prohibit ''unlawfully taking or possessing wildlife, plants, or plant communities, or portions thereof, listed as Objects of the Monument.'' However, BLM law enforcement already has authority to issue citations for removal and destruction of plants, except as permitted, under 43 CFR 8365.1–5(a)(2). No changes were made to Rule 17 because the purpose of this rule is to allow the BLM to enforce hunting restrictions that are consistent with California Department of Fish and Wildlife (CDFW) regulations. As noted by the comments on Rule 17, the BLM plans to seek approval from CDFW to allow archery hunting at C–CD.

Public comments suggested that the BLM should also revise Rule 18 so that it mirrors the language of the Endangered Species Act (ESA), which would prohibit ''disturbing, harming, or harassing wildlife, plants, or plant communities, or portions thereof, listed as objects of the Monument.'' Another comment asked that proposed Rule 18 be revised to prohibit disturbing wildlife in any manner and by any means. Final Rule 18, however, is intended to address impacts from sustained loud noises because that is the particular issue that BLM believes needs to be addressed at this time. The agency does not currently believe that it is necessary to promulgate a rule that penalizes the disturbance of wildlife in any manner, and no changes were made to Rule 18. The BLM could promulgate additional wildlife-related supplementary rules in the future if the need arises.

Public comments also requested additional rules that would address problems related to fireworks; unauthorized release of translocated animals, plants, or organisms; and public interference with authorized livestock and grazing operations. The BLM did not incorporate any of these suggested additional rules into the final rule because other portions of the final rule and existing regulations already address these concerns. For example, Rule 12 will allow the BLM to enforce restrictions on fires of any kind, including fireworks. Under 43 CFR 9212.1, the BLM can also prohibit sources of ignition through its fire management and prevention rules at C–CD. Knowingly introducing weeds or pathogens is prohibited by 43 CFR 8365.1–4(a)(2) (creating a hazard or nuisance) and 43 CFR 9264.1(h). California state law CPC 597s prohibits the willful abandonment of an animal. Under 43 CFR 9264.1(e) the BLM can issue citations for molesting livestock; and 43 CFR 8365.1–5(a)(1), 43 CFR 8365.1–5(a)(2), and 43 CFR 8365.1–5(a)(3) provide additional protections for structures, natural objects, and minerals.

Ultimately, there were only two substantive changes, to proposed Rules 6 and 14, based on public comments. Proposed Rule 6 said, ''established parking areas are for the use of visitors to Cotoni-Coast Dairies unit of the California Coastal National Monument only.'' A commenter stated that those using parking lots are, by definition, visitors to the C–CD property by virtue of using a parking lot. To avoid having visitors use the lots to access beaches that are not in the C–CD, the commenter suggested Rule 6 be revised to say ''visitors leaving vehicles in parking areas shall not depart from the Cotoni-Coast Dairies unit of the California Coastal Monument while their vehicles remain in those parking areas.'' The BLM agrees with the commenter that the potential for pedestrians crossing State and County roads near the C–CD to use nearby beaches at un-marked locations is a risk to public safety. Rather than adopt the language recommended by the commenter, final Rule 6 has been reworded to clarify that ''*members of the public are prohibited from leaving the C–CD unit of the CCNM while their vehicle is parked in BLM-managed parking areas*'' Rule 6 will be prominently incorporated into the BLM's outreach and education for C–CD to inform the public that the BLM-managed parking areas are not designed to support coastal access for beach-going visitors; and the BLM's law enforcement officers will have the authority to issue citations to persons violating the rule. This change will improve public safety by reducing the frequency of visitors crossing roads at un-marked locations while attempting to use BLM-managed parking areas to access coastal beaches or adjacent lands. Similarly, another commenter suggested the BLM add a rule that would prohibit unpermitted trail improvements. Rather than include a new rule, the BLM made a minor change to final Rule 14, to explain that ''construction or building of any structure, including trails, is prohibited.'' This change will improve public awareness that unauthorized improvements to recreation facilities, including trails, would be a violation of the supplementary rule for C–CD unit of the CCNM.

The BLM determined that the remaining comments from individuals related to management of C–CD do not warrant changes to the final supplementary rule. For example, one commenter requested the addition of subheadings to the regulations, which is unnecessary because the final rule is already relatively short and is arranged in a logical order.

In another example, one commenter asked that the BLM include a definition for ''electric mobility products,'' which is used in Rule 3. The definition provided for Rule 3, which can be found in 43 CFR 8340.0–5(j), will allow the BLM to restrict the use of electric bikes. The BLM determined a definition for ''electric mobility products'' is not needed because it is written in plain language and encompasses a wide range of motor-powered personal mobility devices used for transporting an individual at speeds that do not normally exceed 20 miles per hour.

Nothing in the final rule will diminish the BLM's responsibility to provide reasonable modifications for access in accordance with Section 504 of the Rehabilitation Act and ensure that persons with disabilities receive the benefits and services of BLM programs and activities.

Restrictions on feeding wild animals can be enforced under 43 CFR 8365 (creating a hazard or nuisance).

Commenters suggested that instead of Rule 7 prohibiting the use of public lands within the C–CD starting ½ hour after sunset and ending ½ hour before sunrise, Rule 7 should prohibit use before ''sunrise'' and after ''sunset,'' or add a definition for these two terms. Neither of these changes would make Rule 7 more effective because sunrise and sunset fluctuate daily, depending on the time of the year and the latitude and longitude of a specific location. The BLM also anticipates many visitors who enjoy watching the sunrise (or sunset) will arrive (or depart) during the ½ hour grace period. The plain language of Rule 7 is simple and easy to understand, and it is common for land management agencies to restrict occupancy and use of outdoor recreation areas starting 30 minutes after sunset and ending 30 minutes before sunrise.

Similarly, one comment requested that we add a definition for ''service animal'' to Rule 8. A definition of ''service animal'' that is similar to the definition in the Americans with Disabilities Act of 1990, as amended, has been added.

One commenter asked for an additional rule that would prohibit unauthorized commercial activities. The BLM did not include this change in the final rule because unauthorized commercial activities are already prohibited under 43 CFR 2932.57.

Commenters asked the BLM to clarify the types of persons that would be exempt from this final rule and how the public would be informed of such exemptions. The BLM did not make changes in response to this request because the language of the final supplementary rule plainly states that exempt persons include any Federal, State, or local officer or employee in the scope of their duties; members of any organized law enforcement, rescue, or fire-fighting force in performance of an official duty; and any person whose activities are authorized in writing by the BLM. Based on the standard exemption language, the BLM's authorized officer can provide written approval to persons that support operations necessary to pursue the BLM's goals and objectives for C–CD. Examples include, but are not limited to, livestock operators, scientists and other researchers, Tribal members, contractors, volunteers, and existing rights holders.

Comments related to development of BLM management plans and resource inventories are outside the scope of this final supplementary rule. Accordingly, the BLM made no changes in response to those comments. As stated earlier, this final supplementary rule is based on management actions listed in the Decision Record for the C–CD RMP amendment, approved on June 23, 2021, and the original CCNM RMP completed in 2005, both of which involved extensive public involvement.

The final supplementary rule will allow the BLM to enforce portions of the C–CD RMP amendment and other existing policies that guide management and protection of monument objects and values identified in Presidential Proclamation 9563, signed January 12, 2017. The public will be informed of these restrictions with signs posted along roads, in parking areas, and other important locations. Additional public notice of the BLM final supplementary rule will be provided through local news releases, social media, and information published on maps, brochures, educational materials, and websites. As a result, the final supplementary rule is expected to promote stewardship of the public lands and increase appreciation and understanding of the resource objects and values of the C–CD unit of the CCNM.

The BLM's final supplementary rule decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR part 4.

III. Procedural Matters

Regulatory Planning and Review (Executive Orders (E.O.) 12866 and 13563)

This final supplementary rule is not a significant regulatory action and is not subject to review by the Office of Management and Budget under Executive Order 12866, as amended by E.O. 14094. The final supplementary rule will not have an annual effect of $200 million or more on the economy. It is not intended to affect commercial activity, but rather impose rules of conduct on recreational visitors for public safety and resource protection reasons in a limited area of public lands. This final supplementary rule will not adversely affect, in a material way, the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or Tribal governments or communities. This final supplementary rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. This final supplementary rule will not materially alter the budgetary effects of entitlements, grants, user fees, or loan programs, or the right or obligations of their recipients, nor does it raise novel legal or policy issues. It merely strives to protect public safety and the environment.

Regulatory Flexibility Act

Congress enacted the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, to ensure that government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. The final supplementary rule does not pertain specifically to commercial or governmental entities of any size, but to public recreational use of specific public lands. Therefore, the BLM has determined that under the RFA the final supplementary rule will not have a significant economic impact on a substantial number of small entities.

Congressional Review Act

This final supplementary rule does not meet the criteria of 5 U.S.C. 804(2). This final supplementary rule merely contains rules of conduct for recreational use of public lands. This final supplementary rule will not affect business, commercial, or industrial use of the public lands.

Unfunded Mandates Reform Act

This final supplementary rule will not impose an unfunded mandate on State, local, or Tribal governments in the aggregate, or the private sector, of more than $100 million per year; nor will it have a significant or unique effect on small governments. This final supplementary rule does not require anything of State, local, or Tribal governments. Therefore, the BLM is not required to prepare a statement containing the information required by the Unfunded Mandates Reform Act, 2 U.S.C. 1531 *et seq.*

Governmental Actions and Interference With Constitutionally Protected Property Rights—Takings (E.O. 12630)

This final supplementary rule will not affect a taking of private property or otherwise have taking implications under E.O. 12630. This final supplementary rule will not address

property rights in any form and will not impair any property rights. Therefore, the BLM has determined that this final supplementary rule will not cause a taking of private property or require further discussion of takings implications under this E.O.

Federalism (E.O. 13132)

This final supplementary rule will not have a substantial direct effect on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. This final supplementary rule will apply to a limited area of land in only one State: California. This supplementary rule contains rules of conduct for recreational use of BLM-managed public lands to protect public safety and the environment. Therefore, the BLM has determined that this final supplementary rule will not have sufficient federalism implications to warrant preparation of a federalism assessment.

Civil Justice Reform (E.O. 12988)

Under E.O. 12988, the BLM has determined that this final supplementary rule will not unduly burden the judicial system and that the requirements of sections 3(a) and 3(b)(2) of the Order are met. More specifically, this final rule meets the criteria of section 3(a), which requires agencies to review all regulations to eliminate errors and ambiguity and to write all regulations to minimize litigation. This final rule also meets the criteria of section 3(b)(2), which requires agencies to write all regulations in clear language with clear legal standards.

Consultation and Coordination With Indian Tribal Governments (E.O. 13175 and Departmental Policy)

The Department strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. The BLM evaluated this final rule under the Department's consultation policy and under the criteria in E.O. 13175 to identify possible effects of the rule on federally recognized Indian Tribes. The BLM has found that this final supplementary rule will have no substantial direct effects on federally recognized Indian Tribes and that consultation under the Department's Tribal consultation policy is not required. This final supplementary rule will not affect lands held in trust for the benefit of Native American Tribes, individual Indians, Aleuts, or others.

Paperwork Reduction Act (44 U.S.C. 3501 et seq.)

This final supplementary rule does not contain information collection requirements that the Office of Management and Budget must approve under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

National Environmental Policy Act

The final supplementary rule will facilitate implementation of management direction established in CCNM RMP, as amended, and the C–CD RMP amendment. The environmental impacts of the final supplementary rule were analyzed in the Environmental Impact Statement supporting the CCNM RMP and the environmental assessment (EA), dated September 25, 2020, supporting the C–CD RMP amendment. Therefore, additional NEPA analysis is not necessary.

Effects on the Energy Supply (E.O. 13211)

This final supplementary rule will not comprise a significant energy action. This supplementary rule will not have an adverse effect on energy supplies, production, or consumption. It only addresses rules of conduct for recreational use of BLM-managed public lands to protect public safety and the environment and has no connection with energy policy.

Author

The principal author of the final supplementary rule is Nicholas Lasher, BLM Law Enforcement Officer for the Central Coast Field Office, California.

V. Final Rule

For the reasons stated in the preamble, and under the authority for supplementary rules at 43 U.S.C. 1740 and 43 CFR 8365.1–6, the California State Director, Bureau of Land Management, establishes a final supplementary rule for all public lands included in the Cotoni-Coast Dairies (C–CD) unit of the California Coastal National Monument (CCNM) to read as follows:

Definitions

Designated roads and trails means any road or trail that the BLM has posted as open for public use.

Pet means any domestic animal that is not classified as a ''service animal.''

Public lands means any lands or interest in lands managed by the BLM.

Public road means any road, dirt or otherwise, on which public motorized vehicular traffic is permitted.

Recreational target shooting means shooting a weapon for recreational purposes when game is not being legally pursued. Weapon includes any firearm, cross bow, bow and arrow, paint gun, fireworks, or explosive device capable of propelling a projectile either by means of an explosion or by string or spring.

Service animal means a dog, or other animal, that is individually trained to do work or perform tasks for people with disabilities.

Traffic control devices means markers, signs, and signal devices used to inform, guide, and control traffic, including pedestrians, motorists, cyclists, or electronic mobility products.

Unattended pet means any pet that is unaccompanied by an owner or handler, even if on a tether, within a crate, or within an unoccupied motor vehicle.

Unmanned aircraft system means any aircraft without a human pilot on board (*e.g.,* drones).

Restrictions on public lands in the C–CD unit of the CCNM:

1. All public use is restricted to designated roads and trails.

2. Bicycles and bicycle riding are prohibited except on designated roads and trails that are posted as open for bicycle and bicycle riding use.

3. Electric bicycles, as defined in 43 CFR 8340.0–5(j), are prohibited except on roads designated for such use in accordance with applicable law. All other electric mobility products are prohibited except within established parking areas and public roads, and in accordance with applicable law.

4. Horseback riding is prohibited except on designated roads and trails that are posted as open for horseback riding use.

5. Violating any posted sign, rule, or notification, including any traffic control device, is prohibited.

6. Members of the public are prohibited from leaving the C–CD unit of the CCNM while their vehicle is parked in BLM-managed parking areas.

7. Use and occupancy of all lands within the C–CD are prohibited from ½ hour after sunset to ½ hour before sunrise.

8. Pets are prohibited except on designated roads and trails that are posted as open for their use. Service animals are exempt from this rule.

9. All pets must be physically restrained, or on a leash or cord not to exceed 6 feet in length, at all times.

10. Visitors are prohibited from leaving a pet unattended.

11. It is unlawful for the owner or person having custody of any pet to allow pet feces to remain on C–CD, either willfully or through failure to

exercise due care or control, other than within trash receptacles provided for such purposes.

12. Fires of any kind are prohibited, including open fire, wood, charcoal, and gas.

13. Abandoning property or leaving property unattended for more than 24 hours is prohibited. The BLM may remove and appropriately dispose of unattended property.

14. Construction or building of any structure, including trails, is prohibited.

15. Placing flagging, markings, or signs of any kind is prohibited.

16. Possession or use of a mineral or metal detector, magnetometer, side scan sonar, other metal detecting device, or sub-bottom profiler is prohibited.

17. The taking of wildlife, except for authorized hunting activities in accordance with California Department of Fish and Wildlife regulations, and possessing unlawfully taken wildlife or portions thereof, is prohibited.

18. Knowingly or willfully disturbing wildlife with audio devices, including speakers, air horns, and musical instruments, is prohibited.

19. Taking off or landing of aircraft, including unmanned aircraft systems, is prohibited.

20. Taking off or landings a paraglider, hang-glider, or similar recreational equipment is prohibited within the C–CD unit of the CCNM.

21. Recreational target shooting is prohibited.

Exemptions

The following persons are exempt from these final supplementary rules: Any Federal, State, or local officer or employee in the scope of their duties; members of any organized law enforcement, rescue, or fire-fighting force in performance of an official duty; and any person whose activities are authorized in writing by the BLM.

Enforcement

Any person who violates any part of the final supplementary rule may be tried before a United States Magistrate and fined in accordance with 18 U.S.C. 3571, imprisoned no more than 12 months under 43 U.S.C. 1733(a) and 43 CFR 8360.0–7, or both. In accordance with 43 CFR 8365.1–7, State or local officials may also impose penalties for violations of California and local law.

(Authority: 43 CFR 8365.1–6)

Gordon Toevs,

Acting California State Director.

[FR Doc. 2024–08608 Filed 4–26–24; 8:45 am]

BILLING CODE 4331–15–P

FEDERAL COMMUICATIONS COMMISSION

47 CFR Parts 0 and 101

[WT Docket No. 20–133; FCC 24–16; FR ID 207939]

Modernizing and Expanding Access to the 70/80/90 GHz Bands; Report and Order

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) continues to play a leading role in fostering innovation in the provisioning of broadband, including through novel technological solutions as well as fifth-generation wireless technology (5G). Meeting the non-stop growth in demand for wireless broadband connectivity is more important than ever due to the outsized impact the internet has on its work, education, health care, and personal connections. Recognizing this reality, and to help close the digital divide, the *Report and Order* adopts new rules and updates preexisting ones. The Commission also updates its rules to permit the use of smaller and lower-cost antennas to facilitate the provision of backhaul service and mandates a channelization plan . Finally, the Commission adopts changes to the link registration process in certain bands requiring certification of construction of registered links to promote more efficient use of this spectrum and improve the accuracy of the link registration database.

DATES: Effective May 29, 2024, except for the addition of § 101.147(z)(3) at instruction 9, which is effective on September 1, 2024. The amendments to §§ 101.63(b) at instruction 5, 101.1523(a) and (e) at instruction 12, and 101.1528(a)(11), (b)(10), and (d) at instruction 14 are delayed indefinitely. The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date for the amendments to §§ 101.63(b), 101.1523(a) and (e), and 101.1528(a)(11), (b)(10), and (d).

FOR FURTHER INFORMATION CONTACT: Jeffrey Tignor, Wireless Telecommunications Bureau, Broadband Division, at *Jeffrey.Tignor@fcc.gov* or 202–418–0774.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order* in WT Docket No. 20–33, FCC 24–16; adopted on January 24, 2024 and released on January 26, 2024. The full text of this document (as corrected by Erratum released on April 10, 2024) is available at *https://docs.fcc.gov/public/attachments/FCC-24-16A1.pdf.*

Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Modernizing and Expanding Access to the 70/80/90 GHz Bands, Notice of Proposed Rulemaking (70/80/90 GHz NPRM)* released in June 2020 (85 FR 40168, July 6, 2020). The Commission sought written public comment on the proposals in the *NPRM,* including comments on the IRFA. No comments were filed addressing the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Congressional Review Act

The Commission will submit the *Report and Order* to the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, for concurrence as to whether this rule is ''major'' or ''non-major'' under the Congressional Review Act, 5 U.S.C. 804(2). The Commission will send a copy of this *Report and Order* to Congress and the Government Accountability Office pursuant to 5 U.S.C. 801(a)(1)(A).

I. Background

1. In the United States, the 71–76 GHz, 81–86 GHz, 92–94 GHz, and 94.1–95 GHz bands (collectively, the 70/80/90 GHz bands) are allocated on a co-primary basis for Federal and non-Federal use, as follows.

Band	Non-Federal use	Federal use
71–74 GHz	Fixed, Fixed Satellite, Mobile, and Mobile Satellite.	Fixed, Fixed Satellite, Mobile, and Mobile Satellite.

[1] Additional allocations for Federal and non-Federal use for Space Research are on a secondary basis.

Band	Non-Federal use	Federal use
74–76 GHz [1]	Fixed, Fixed Satellite, Mobile, Broadcasting, and Broadcasting Satellite.	Fixed, Fixed Satellite, and Mobile.
81–84 GHz	Fixed, Fixed Satellite, Mobile, Mobile Satellite, and Radio Astronomy.	Fixed, Fixed Satellite, Mobile, Mobile Satellite, and Radio Astronomy.
84–86 GHz	Fixed, Fixed Satellite, Mobile, and Radio Astronomy.	Fixed, Fixed Satellite, Mobile, and Radio Astronomy.
92–94 GHz, 94.1–95 GHz	Fixed, Mobile, Radio Astronomy, and Radiolocation.	Fixed, Mobile, Radio Astronomy, and Radiolocation.

In the 71–76 GHz (70 GHz) and 81–86 GHz (80 GHz) bands Fixed, Mobile, and Broadcasting services must not cause harmful interference to, nor claim protection from, Federal Fixed-Satellite Service operations located at 28 military installations. In addition, in the 80 GHz band, and in the 92–94 GHz and 94.1–95 GHz bands (collectively, the 90 GHz band), licensees proposing to register links located near 18 radio astronomy observatories must coordinate their proposed links with those observatories. The 94–94.1 GHz frequencies are allocated for Federal use for Earth Exploration Satellite (active), Radiolocation, and Space Research (active) and for non-Federal use for Radiolocation. Additionally, the adjacent 86–92 GHz band is allocated for Federal and non-Federal Earth Exploration-Satellite (passive), Space Research (passive), and Radio Astronomy services and is subject to footnote US246.

2. In 2003, the Commission established service rules for non-Federal use of the 70/80/90 GHz bands through a two-step, non-exclusive licensing regime. Users first obtain a nationwide, non-exclusive license for the entire 12.9 gigahertz of the 70/80/90 GHz bands and then register individual links in a database administered by third-party database managers. Since 2004, the Wireless Telecommunications Bureau (WTB) has designated four entities to be database managers; there are currently two: Comsearch and Micronet Communications, Inc. In order for a link to be registered, it must be coordinated successfully with Federal operations—typically through the National Telecommunications and Information Administration's (NTIA) online, automated mechanism. If a proposed link does not interfere with existing Federal operations then it is given a ''green light;'' if it may interfere with existing Federal operations, then it is given a ''yellow light,'' indicating that the licensee must file a registration application for the link with the FCC for coordination with NTIA. The ''green light''/''yellow light'' system protects the sensitive nature of the locations of military installations. Also, the licensee must provide an analysis to the third-party database manager demonstrating that the proposed link will neither cause harmful interference to, nor receive harmful interference from, any previously registered non-government link. Licensees are afforded first-in-time priority for successfully registered links relative to links that are successfully registered at a later point in time. Registered links must be constructed within 12 months of their registration. Under part 101, non-Federal licensees may use the 70/80/90 GHz bands for any point-to-point, non-broadcast service.

3. In June 2020, the Commission adopted the aforementioned *70/80/90 GHz NPRM* in this proceeding, seeking comment on both adopting new rules and updating preexisting rules to further enable non-Federal uses of the 70/80/90 GHz bands. Among a range of issues and proposals—which the Commission said it would work with NTIA to evaluate—the *70/80/90 GHz NPRM* sought comment on requests from Aeronet Global Communications, Inc. (Aeronet) to authorize point-to-point links to endpoints in motion in the 70 GHz and 80 GHz bands to facilitate broadband service to ships and aircraft in motion, as well as on whether to classify those links as ''mobile'' service (the Aeronet Petitions). Although the Aeronet Petitions proposed that endpoints in motion operations be permitted in the 70, 80 and 90 GHz bands, several parties that commented on the Aeronet Petitions expressed concerns about co-existence with other services in the 90 GHz band. The *70/80/90 GHz NPRM* did not propose to authorize endpoints in motion in the 90 GHz band. Noting that the 70/80/90 GHz bands could provide a ''unique spectrum resource'' for ''the provisioning of broadband services to airplanes, ships, and other antennas in motion,'' the Commission sought comment on technical and operational rules to allow these new service offerings in the 70 GHz and 80 GHz bands and to mitigate interference to incumbents and other proposed users of these bands and adjacent bands.

4. The *70/80/90 GHz NPRM* also proposed several changes to the antenna standards for the 70 GHz and 80 GHz bands to provide greater flexibility in deploying wireless backhaul, noting industry's assessment of its needs. The *70/80/90 GHz NPRM* sought comment as well on whether adopting a channelization plan would promote more efficient use of the 70 GHz and 80 GHz bands. In addition, the *70/80/90 GHz NPRM* asked about whether the Commission should make changes to the link registration rules for the 70, 80, and 90 GHz bands. Parties including aeronautical and satellite companies, radio astronomy interests, equipment manufacturers, fixed and mobile wireless entities, and organizations focused on meteorology filed in response to the *70/80/90 GHz NPRM.* Commenters discussed Aeronet's proposals, the suitability of the bands for backhaul, and a range of ways to improve the bands' overall functionality (such as channelization and updates to the relevant antenna standards and link registration process).

5. Following the *70/80/90 GHz NPRM,* in October 2021 WTB issued a Public Notice seeking to further develop the record on the use of High Altitude Platform Stations (*HAPS Public Notice*) or other stratospheric-based platform services in the 70/80/90 GHz bands. The Commission's rules define a ''High Altitude Platform Station'' as a ''station located on an object at an altitude of 20 to 50 km and at a specified, nominal, fixed point relative to the earth.'' Fifteen Comments and five Reply Comments were filed in response to the *HAPS Public Notice,* with participants ranging from past commenters on the original *70/80/90 GHz NPRM* to additional governmental entities and public interest groups, among others.

6. In the *70/80/90 GHz NPRM,* the Commission committed to coordinate with NTIA prior to adopting any rules in this proceeding that would affect Federal users, given that allocations for the 70 GHz and 80 GHz bands include both Federal and non-Federal use. In response to the *70/80/90 GHz NPRM,* NTIA established a technical interchange group (TIG) with representatives from the affected Federal agencies, including National Aeronautics and Space Administration,

the National Oceanic and Atmospheric Administration, the National Science Foundation, the Department of the Air Force, and NTIA itself (collectively, the Federal Agencies) (Federal Agencies Letter). Commission staff participated in regular information exchange meetings with the TIG. The Federal Agencies, through NTIA, submitted a summary of their analyses and a set of proposed interference mitigation measures to the record. On October 18, 2023, the Bureau issued a Public Notice seeking to refresh the overall record in this proceeding and seeking comment, in particular, on the Federal Agencies' proposals (*Refresh Public Notice*). Nine parties—eight of which had already participated in the record to date—filed comments in response to the *Refresh Public Notice.*

II. Report and Order

7. After reviewing the record, the Commission adopts rules to allow for point-to-point links to endpoints in motion—specifically, links on aircraft and on ships—in the 70 GHz and 80 GHz bands under its part 101 rules. The Commission also adopts changes to its rules to facilitate the use of the 70 and 80 GHz bands for backhaul, including through the use of smaller antennas, and to improve the accuracy of the link registration database for the 70/80/90 GHz bands. Specifically, the Commission adopts proposals to increase maximum antenna beamwidth from 1.2 degrees to 2.2 degrees; reduce minimum antenna gain from 43 dBi to 38 dBi while retaining the proportional EIRP reduction requirement; eliminate the co-polar and relax the cross-polar discrimination requirements at angles less than 5 degrees; revise the co-polar and cross-polar discrimination requirements at angles between 5 degrees and 180 degrees; and allow minor modifications to registrations in the 70/80/90 GHz bands without the loss of first-in-time rights. The Commission further adopts a channelization plan consistent with Recommendation ITU–R F.2006. Finally, the Commission adopts a requirement that licensees certify that each link is constructed and operating within 12 months of successful registration in the link registration system (LRS) administered by third-party database managers.

A. Enabling Point-to-Point Communications to Aircraft and Ships

8. Pursuant to the Aeronet Petitions—one addressing aeronautical service, the other maritime service—the *70/80/90 GHz NPRM* proposed to authorize point-to-point links to endpoints in motion on aircraft and on ships in the 70 GHz and 80 GHz bands. The *70/80/90 GHz NPRM* sought comment on this proposal, with a focus on potential impacts on other services, including radio astronomy service (RAS), Earth Exploration-Satellite Service (passive) (EESS), FSS, and terrestrial fixed point-to-point links in the Fixed Service (FS).

9. As noted above, in the *70/80/90 GHz NPRM* the Commission committed to coordinate with NTIA prior to adopting any rules in this proceeding that would affect Federal users; this coordination ultimately resulted in the work of NTIA's TIG and the submission of the Federal Agencies Letter, which was one of the topics specifically noted in the Commission's *Refresh Public Notice.* Both the Federal Agencies Letter and the responsive filings in the record have advanced the Commission's efforts to enable innovative new uses of this band in both the aeronautical and the maritime contexts, while ensuring adequate interference protection for incumbents and other authorized services in these and adjacent bands.

10. In order to facilitate increased provision of broadband service and enhanced competition in the aviation and maritime markets, the Commission adopts rules authorizing point-to-point links to endpoints in motion on aircraft and on ships, pursuant to specifications and restrictions described below. These rules will permit increased broadband access in this space while protecting important incumbent and Federal operations.

1. Authorization and Framework

11. *Classification of Services.* The Aeronet Petitions requested that the Commission categorize Aeronet's proposed services as fixed services. In the *70/80/90 GHz NPRM,* however, the Commission instead proposed to classify service to endpoints in motion as a mobile service, because its rules define ''fixed service'' as a ''radiocommunication service between specified fixed points,'' which endpoints in motion inherently are not. Several commenters supported the Commission's approach, including Boeing, the Fixed Wireless Communications Coalition (FWCC), and Loon, which also requested that the Commission makes sure any definition of ''mobile'' include mobile components of HAPS systems as well. The Wireless internet Service Providers Association (WISPA) alone opposed mobile classification, on the grounds that one endpoint of the transmission is fixed, and therefore the service does not reach ''full mobility,'' and also because the appropriate comparison is with the Fixed Satellite Service, which may provide service to Earth Stations in Motion (ESIMs) without being reclassified as ''Mobile-Satellite Services.'' WISPA also argued that if the Commission does classify services to endpoints in motion as mobile, the Commission should classify them as aeronautical mobile and maritime mobile specifically, as those terms are defined in the Commission's existing rules.

12. The Commission finds WISPA's arguments unpersuasive. Other mobile services, for example cellular service, ubiquitously involve transmissions from one fixed point (the base station) to a variety of mobile points (the cell phone), without risking reclassification as a fixed service. As between ''mobile'' and ''aeronautical mobile,'' the Commission notes that a classification as simply ''mobile'' encompasses aeronautical use. Similarly, as between ''mobile'' and ''maritime mobile,'' a classification as simply ''mobile'' encompasses maritime use. Given the otherwise favorable record, and the Commission's existing rules, the Commission concludes that the service the Commission authorize, involving transmissions to and from aeronautical endpoints in motion, is a mobile service.

13. As noted in the *70/80/90 GHz NPRM,* the Commission's authorization of a mobile service in the 70 GHz and 80 GHz bands constitutes a revisiting of the Commission's previous actions in the Spectrum Frontiers proceeding. At that time, the Commission declined to authorize mobile use in the 70 GHz and 80 GHz bands, but reserved the right to revisit the issue of possible methods of promoting coexistence between fixed links and mobile operations as mobile deployments increased in other millimeter-wave bands, as technology developed, and as additional options or frameworks for coexistence of fixed and mobile services in the same band were brought forth. In the six years since the *2017 Spectrum Frontiers Order,* there have been considerable advances in both technology and sharing paradigms—and Aeronet and other parties have continued to submit new analyses on possible coexistence. The Commission therefore conclude that revisiting the Commission's previous stance on this matter is warranted and appropriate. The Commission notes that the mobile services that the Commission permits pursuant to its decisions in this *Report and Order* are subject to significantly different rules and requirements than the part 30 rules the Commission contemplated in 2017.

14. *Limitation to 70 GHz and 80 GHz Bands.* In the *70/80/90 GHz NPRM,* the

Commission noted various concerns already in the record regarding potential harmful interference to Enhanced Flight Vision Systems (EFVS) and Foreign Object Detection (FOD) systems from Aeronet's proposed service in the 90 GHz band and, on that basis, proposed to allow endpoint-in-motion operations only in the 70 GHz and 80 GHz bands, while continuing to seek comment on the issue. Since then, additional concerns have been raised by numerous other entities regarding proposed aeronautical use of the 90 GHz band, due to both potential incompatibility with proposed use by EFVS and FOD systems, and potential harmful interference to radio astronomy and remote sensing receivers in the 86–92 GHz band and at 94.0–94.1 GHz. Given the many concerns raised in the record, and the relatively greater interest expressed in expanding use of the 70 GHz and 80 GHz bands, the Commission concludes that the risk of harmful interference to incumbent and adjacent services outweighs the benefit to consumers of allowing service to aeronautical endpoints-in-motion in the 90 GHz band. As proposed in the *70/80/90 GHz NPRM,* the Commission therefore authorizes endpoint-in-motion service only in the 70 and 80 GHz bands. At this juncture, the new service covers: (1) in the aeronautical space, ground-to-air and air-to-ground transmissions between ground stations and aircraft, and air-to-air transmission between aircraft in flight; and (2) in the maritime space, ship-to-shore, shore-to-ship, shore-to-aerostat, aerostat-to-ship, aerostat-to-shore, and ship-to-ship transmissions. For purposes of both the *Report and Order* and *Further Notice,* the Commission considers the term ''aerostat'' to mean an airborne transmitter operating within a small specified area, below 1,000 feet of elevation, regardless of method of propulsion.

15. *Coordination, Licensing, and Registration.* In the *70/80/90 GHz NPRM,* the Commission sought comment generally on what changes to the 70/80/90 GHz coordination, licensing, and registration framework might be necessary in order to facilitate the operation of endpoints in motion under part 101. The Commission also proposed to incorporate such operations, to the extent ultimately authorized, into the current framework of non-exclusive, nationwide licensing used for fixed point-to-point operations in these bands. The record is fairly thin on the specifics of the appropriate licensing framework; most commenters focused on whether the Commission should authorize this service as an initial matter. However, several commenters did voice support for including any new service in the existing third-party database management system.

16. In order to allow service to aeronautical and maritime endpoints in motion to deploy efficiently and without causing harmful interference to incumbent operations and other services in these bands, the applicable licensing mechanism must support adequate coordination with those other services without being unduly burdensome on both incumbent and new operators. To this end, the Commission will require prospective operators of service to aeronautical and maritime endpoints in motion to first apply for and receive a nationwide, non-exclusive license. This license will establish the prospective operator's qualification to be a licensee and will serve as a blanket license for: (1) on the aeronautical side, air-to-air operations, and as a prerequisite to register ground-to-air (GTA) stations and associated air-to-ground (ATG) transmission; and (2) on the maritime side, as a prerequisite to register ship-to-shore, shore-to-ship, shore-to-aerostat, aerostat-to-ship, and aerostat-to-shore transmissions. The Commission clarifies that as of the effective date of the rules, the Commission is adopting, all nationwide, non-exclusive licenses for the 70/80/90 GHz service will include the service areas set forth in section 101.1501, as revised.

17. In the matter of coordinating and registering individual aeronautical stations and links, the Commission proposed in the *70/80/90 GHz NPRM* to require coordination and registration for not only GTA stations and ATG transmissions, but also air-to-air links between two aircraft in motion. The Commission also sought comment on how all types of links should be represented or described in their registrations, as the current system, designed for fixed point-to-point links on the ground, does not account for potential differences in altitude or the varying orientation of links to endpoints in motion. Several commenters noted the potential difficulty of coordinating air-to-air links, due not only to these different characteristics, but also their temporary and transient nature. Aeronet proposed coordinating three-dimensional polyhedrons for air-to-air links, which DSA supports, within a horizontal altitude band from 10,000 to 50,000 feet. However, concerns in the record about potential harmful interference from air-to-air transmissions stem mainly from such transmissions' specific angle, direction, or distance from specific sites (most of which would not be addressed by registration of polyhedrons) that can be addressed directly with specific limitations. Due to the difficulties of adequately representing the potential interference from these links in the existing database structure, and in light of the various interference mitigation measures the Commission also adopts (discussed below) to answer those concerns, the Commission will not require registration or coordination of individual air-to-air links.

18. In the matter of coordinating and registering individual maritime stations and links, the Commission proposed in the *70/80/90 GHz NPRM* to require coordination and registration for not only ship-to-shore and shore-to-ship transmissions, but also ship-to-ship and ship-to-node (*i.e.,* as described in this item ship-to-aerostat). The Commission also sought comment on how all types of links should be represented or described in their registrations, as the current system—designed for two-dimensional fixed point-to-point links on the ground—does not account for potential differences in three-dimensional space-to-endpoints in motion. As explained immediately above, commenters focused on the potential difficulty of coordinating air-to-air links, and Aeronet proposed a system of three-dimensional polyhedrons for the same. Similar in-depth discussion around maritime-related links did not develop in the record.

19. After receiving the nationwide license, aeronautical operators will coordinate with Federal operators and register GTA stations and associated ATG transmissions and must not operate such facilities until registration has successfully been completed. Air-to-air operations will not be separately registered but may only operate under a nationwide license if the communication is associated with a registered GTA or ATG registration. All GTA and ATG operations, including operations transmitting to or from aeronautical endpoints in motion and associated ground stations, will be afforded protection from other operations on a first-in-time basis, and must afford those other operations the relevant first-in-time protections in turn.[2]

[2] The Commission notes the request of CTIA and others that the Commission grants priority to fixed service in these bands over new uses. Fixed service in these bands has been co-primary with other services, including mobile service, for some time. Adopting new service rules for these existing allocations does not change the co-primary status of

Continued

20. After receiving the nationwide license, maritime operators will coordinate with Federal operators and register shore-to-ship transmitters, shore-to-aerostat transmitters, ship-to-shore transmitters, and aerostat relay stations. As with GTA and ATG transmissions, all such maritime operators must not operate any facilities until registration has successfully been completed. All such maritime operations will be afforded protection from other operations on a first-in-time basis and must afford those other operations the relevant first-in-time protections in turn.

21. The Commission delegates authority to WTB to establish specific procedures to be followed for coordinating and registering aeronautical and maritime stations and their associated transmissions, to be set forth in a future publication or publications. The Commission note, in relation to technical discussion raised by certain parties in the docket, that validation of new aeronautical and maritime systems' ability to not cause interference may involve processes beyond the third-party database system. Additionally, the Commission delegates authority to WTB and the Office of Engineering and Technology (OET) to establish a process, in coordination with NTIA, for demonstrating that technologies for point-to-endpoint-in-motion communications to aircraft and ships are capable of meeting the specific technical and operating requirements adopted in this *Report and Order.* The Commission instructs WTB and OET to take such actions as authorized by sections 0.241(l) and 0.331(g) of its rules, which the Commission adopts, and to do so expeditiously.

2. Technical and Operational Rules

22. In the *70/80/90 GHz NPRM,* the Commission sought comment on what changes to its current rules might be necessary to facilitate the contemplated aeronautical and maritime services, while protecting incumbent and Federal operations. The Commission also sought comment generally on any interference mitigation measures not specifically mentioned that might be necessary to protect other operations.

23. In response to the *70/80/90 GHz NPRM,* some commenters argued—focusing on the aeronautical context in particular—that a more developed record would be necessary to support the authorization of aeronautical mobile service along the lines proposed by Aeronet, given the potential for interference to incumbent and other potential services. Other commenters disagreed. Maritime service was largely unaddressed in the record. A small number of parties—including SpaceX, T-Mobile, and Verizon—raised more specific, albeit still highly generalized, objections to the *70/80/90 GHz NPRM*'s proposed maritime authorizations, citing in part concerns over potential impacts on fixed wireless backhaul, among other issues. Others generally endorsed the adoption of the proposed maritime regime.

24. Since the initial comment period to the *70/80/90 GHz NPRM,* additional submissions to the record, including detailed contributions from NTIA and other Federal agencies, have enhanced the depth of the record. The Commission's increased understanding of potential interactions between Aeronet's proposed service and incumbent, adjacent, and other potential operations (including sensitive operations such as weather satellites in the EESS) now allows us to set forth a series of technical and operational rules calculated to protect all services from harmful interference within the 70 GHz and 80 GHz bands and adjacent to them.

25. Except as noted below, the aeronautical and maritime mobile services the Commission authorize will be governed by part 101 of its rules. Though part 101 currently encompasses only fixed services, the Commission finds it appropriate to place the service rules governing aeronautical and maritime mobile services in the 70 GHz and 80 GHz bands within the same rule part. In addition, operators of these new services must coordinate with operators in the existing FS, and part 101 is the logical home for rules related to that coordination. The technical and operational rules the Commission sets forth below are sufficient to accommodate the different technical characteristics of these aeronautical and maritime transmissions.

26. *Guard Bands.* The Commission did not specifically seek comment in the *70/80/90 GHz NPRM* on the potential use of guard bands as means of protecting services in adjacent bands from harmful interference. Several commenters suggest them, particularly to protect both EESS satellites and RAS facilities in the 86–92 GHz band. However, the analysis submitted by the Federal Agencies, which includes NASA and NOAA, instead relies upon specified out of band emissions (OOBE) limits to protect EESS. Because the Federal Agencies' analysis supports coexistence between the new aeronautical and maritime services and services in adjacent bands without the use of a guard band, no commenters objected to the lack of guard bands in response to the *Refresh Public Notice,* and based on the Commission's engineering analysis of the Federal Agencies' recommendations, the Commission declines to adopt guard bands as an interference protection measure here.

27. *Transmission Power Levels.* In the *70/80/90 GHz NPRM,* the Commission sought comment on Aeronet's request to increase the maximum allowable mobile equivalent isotropically radiated power (EIRP) for the 70 GHz and 80 GHz bands from +55 dBW to +57 dBW. CORF and satellite operators objected to this proposal, on the grounds that an increased power level would unacceptably increase the risk of harmful interference to FSS and RAS operations. Qualcomm supported the increase, arguing that atmospheric attenuation in these bands should be sufficient to mitigate interference concerns. Aeronet argues that the proposed increase is minimal and that the highly directional nature of transmissions in its proposed service will work to avoid incidents of harmful interference. The Federal Agencies' analysis of potential interference into Federal operations assumes +57 dBW, and suggests that the recommended interference mitigation measures in its report would be sufficient to protect Federal operations from an aeronautical mobile service operating at that power level.

28. The Commission acknowledges the concerns of satellite operators and the RAS community about potential interference from the services that this item contemplates, as discussed in more detail below. However, the Federal Agencies' analysis addresses potential harmful interference to both RAS and FSS operations, and the Commission find it persuasive based on its review of the record and its independent analysis. As the Commission also adopts the interference mitigation measures recommended in that report, the Commission adopts a maximum EIRP level of +57 dBW for transmissions in these new aeronautical and maritime mobile services.

a. Transmissions Between Aircraft and Ground Stations

29. In introducing a new aeronautical mobile service to these bands, care must be taken to ensure compatibility with

the fixed service. Additionally, incorporating these new aeronautical and maritime services into the existing registration regime with first-in-time protection effectively protects all existing operations, including fixed operations, from all deployments in these services. That subsequent deployments will be protected from each other on a first in time basis is also consistent with the co-primary nature of the allocations.

existing and other authorized services, both in the 70 GHz and 80 GHz bands, and adjacent to them. The record reflects a variety of concerns about the potential impact on these other services. To address these concerns, the Commission adopts a number of interference mitigation measures specifically related to transmissions between ground stations and aircraft in flight, described below. Ground-to-air and air-to-ground transmissions are limited to the 80 GHz and 70 GHz bands, respectively; ground stations must be located a minimum distance away from RAS facilities, fixed stations, and FSS earth stations; specific OOBE limits above 86 GHz must be observed; and minimum and maximum elevation angles for ground-to-air transmissions are required.

30. Several commenters expressed concern regarding air-to-ground transmissions in the 80 GHz band, due to the potential for such transmissions to cause harmful interference to RAS operations. No party, including Aeronet, has argued that downlink transmissions in the 80 GHz band are necessary to provide aeronautical service, provided that the 70 GHz band is available for that purpose. AT&T notes in its comments that a channel plan that designates different parts of the 70 GHz or 80 GHz bands for uplink versus downlink signals would be beneficial to reduce self-interference to air-to-ground and ground-to-air mobile systems. In addition, having air-to-ground transmissions in the 70 GHz band and ground-to-air transmissions in the 80 GHz band creates directional consistency with the bands designated for space-to-Earth (71–76 GHz) and Earth-to-space (81–86 GHz) in the FSS service. Aeronet's technical study indicates compatibility with the FSS services while assuming air-to-ground transmissions in the 70 GHz band and ground-to-air transmissions in the 80 GHz band. SpaceX supported Aeronet's study. The Commission therefore authorizes air-to-ground transmissions only in the 70 GHz band.

31. Many commenters suggested that some separation distance between aeronautical ground stations and operations of other services, including RAS stations, FSS earth stations, and fixed point-to-point links, would be either advisable or necessary to reduce the risk of harmful interference. The Federal Agencies' analysis provides specific values for such separation distances: greater than 10 km for licensed FSS earth stations, 10 km for fixed point-to-point transmitters, and 150 km for RAS operations. That analysis also asserts that in order to protect RAS operations, ground stations should not transmit in the direction of an RAS facility, or receive transmissions from aircraft in that direction, such that the transmission enters the appropriate ''zone of avoidance'' around the facility. In response to the *Refresh Public Notice,* NRAO raised concerns that this 150 km separation distance may be inadequate to protect RAS operations in the 76–81 GHz band specifically.

32. The Commission finds the conclusions of the Federal Agencies' analysis persuasive. No other party has submitted alternative suggestions for separation distances with respect to Federal operations. With regard to NRAO's concerns, the Commission notes that as the Technical Interchange Group that produced the Federal Agencies Letter specifically considered interference into the 76–81 GHz band, and as NSF, with which NRAO is affiliated, participated in the TIG and endorsed its output, the Commission will defer to the expertise of NSF in this matter. Accordingly, the Commission adopts a minimum separation distance of 150 km between RAS facilities and aeronautical ground stations.

33. With respect to FS and FSS, although the 10 km distances were calculated specifically with Federal operations in mind, the Commission finds that a 10 km distance separation should apply with respect to non-Federal operations in these services. With respect to FSS, the record generally supports the 10 km separation distance without objection. For example, Aeronet's study showing compatibility between its system and FSS concluded that a 10 km separation distance would be sufficient to prevent interference, and SpaceX supports this conclusion. With respect to FS, Aeronet contends that applying a 10 km separation requirement for ground stations is unnecessary and possibly counterproductive given that Aeronet expects to, in some cases, be able to co-locate with backhaul links. FWCC and CTIA, on the other hand, assert that the 10 km separation distance is necessary to protect non-Federal FS stations. Based on the Commission's assessment of the record, the Commission does not find any technical reason to adopt a different separation distance between ground stations and non-Federal FS stations than the Commission adopts for the separation between ground stations and Federal FS stations. Moreover, in response to Aeronet's concern that a 10 km separation distance could preclude co-location of ground stations with backhaul links, the Commission notes that ground stations can be separated less than 10 km from backhaul links pursuant to coordination agreements, and the Commission encourages all parties to explore more efficient interference protection parameters in the context of those discussions. The Commission finds that a 10 km coordination requirement strikes the appropriate balance for sharing between the longstanding use of the bands under the fixed allocation and the new uses under the co-primary mobile allocation—including ground stations with antennas that are not static.

34. While Comsearch assumed a larger coordination area around FS stations than 10 km, the Commission notes that its analysis uses conservative assumptions to calculate an area on the ground that could be illuminated by an aircraft antenna (for example, the Comsearch analysis assumes an aircraft altitude of 50,000 ft, whereas most commercial aircraft typically fly between 31,000 and 38,000 feet). This worst-case calculation does not take into account a number of factors that would reduce the interference potential, most notably the directional nature of transmissions from the aircraft. Considering the relative potential interference between ground stations and FSS versus FS, the Commission notes the following: (1) the elevation angle of FSS earth station receive antennas makes them more likely to be co-linear with the air-to-ground link; (2) due to the long path from space-to-Earth, the desired signal at a satellite earth station from a satellite would typically be weaker than the desired signal at an FS receiver from its transmitter (in other words, the C in the C/I ratio would be higher for any FS station); and (3) the Federal FSS study assumed an interference threshold of I/N = −12.2 dB would be required to protect FSS, whereas the typical interference threshold for FS is 1.0 dB of degradation of the static threshold of the protected receiver, which equates to an I/N of −6 dB. These factors all indicate that FS would be less susceptible to interference from air-to-ground or ground-to-air links than FSS. The Commission therefore concludes that there is no need for the separation distance between ground stations and FS stations to be any greater than the separation distance between ground stations and FSS stations. Accordingly, the Commission adopts a minimum separation distance 10 km between proposed aeronautical ground stations and any registered fixed point-to-point transmitter or FSS earth station, Federal or non-Federal, in the absence of a coordination agreement with the fixed station or FSS earth station operator.

35. Commenters in the record evidenced significant concern regarding protection of EESS sensors above 86 GHz from harmful interference due to spurious emissions from the 80 GHz band. The Commission sought comment on what interference mitigation measures might be necessary to protect EESS services operating in the 86–92 GHz band. CORF, ESA/EUMETSAT, and the World Meteorological Organization suggest that the OOBE limits in the Commission's rules should be updated to conform to the standard set forth in ITU–R Resolution 750. The Federal Agencies, based on an independent analysis incorporating specific details of Aeronet's proposed system, recommend an OOBE limit of −38.5 dBW in any 100 megahertz of the passive band 86–92 GHz for ground-to-air transmissions.

36. The Commission finds the recommendation of the Federal Agencies to be persuasive. The Commission acknowledges that this OOBE limit is slightly more lenient than that urged by CORF and others. However, the Federal Agencies' analysis takes into account specific characteristics of Aeronet's proposed system. The Commission is therefore confident that their resulting conclusions are sufficient to adequately protect EESS operations. The Commission adopts an OOBE limit of −38.5 dBW in any 100 megahertz of the passive band 86–92 GHz for ground-to-air transmissions.

37. *Minimum and Maximum Elevation Angles.* In the *70/80/90 GHz NPRM,* the Commission sought comment on a minimum elevation angle of five degrees for transmissions from ground stations, consistent with the parameters in Aeronet's initial petition. Some commenters suggest that lower elevation angles, such as three or even 1.5 degrees, would be sufficient to prevent harmful interference. Hughes argues that lower elevation angles might require larger separation distances between these aeronautical ground stations and FSS ground stations, thereby hampering future deployment of FSS service. Geneva Communications is generally supportive of some minimum elevation angle in order to protect incumbent Fixed users, and FWCC supports a 5 degree minimum specifically. Loon argues that any minimum elevation angle would favor some systems or business models over others, and thereby restrict competition. Comsearch's analysis of the potential impact of Aeronet's proposed service on other services in the 70/80/90 GHz bands concludes that a minimum elevation angle of five degrees significantly mitigates the potential for interference into fixed point-to-point links. Aeronet subsequently indicated that a minimum elevation angle of five degrees could impact deployment timing and costs compared to a lower angle such as three degrees.

38. The Commission adopts a minimum elevation angle of five degrees for ground stations in this aeronautical service. This is consistent with Aeronet's initial petition and with the record before us. The Commission notes that the Federal Agencies Clarification Letter stated that one study initially conducted by the Federal Agencies assumed 3 degree minimum elevation angles. However, in the record before the Commission, Aeronet has only proposed a 5 degree minimum elevation angle, both in its own Petition and in studies that Aeronet commissioned. The OOBE limit of −38.5 dBW in any 100 megahertz of the passive band 86–92 GHz for ground-to-air transmissions, as recommended in the Federal Agencies Clarification Letter, accounts for a 5 degree minimum elevation angle.

39. The Commission finds Loon's argument against any minimum elevation angle unpersuasive. Elevation angle is routinely an area of potential concern in bands where terrestrial service coexists with services operating at altitude; for example, part 25 of the Commission's rules, which provides the default rules for satellite operations, requires that satellite earth stations not transmit at elevation angles below five degrees in any band shared with a terrestrial radio service. Adopting a similar restriction on aeronautical services is motivated by similar interference protection concerns and remains a technology-neutral requirement. Given the concerns raised in the record about lower elevation angles, the Commission concludes that five degrees is the most appropriate value. That said, the Commission recognizes the benefits to efficient spectrum use, and ultimately consumers, of permitting parties to agree to less stringent interference mitigation measures than required under its rules. Accordingly, WTB will consider any request for waiver of this rule through the Commission's existing regulatory processes, subject to coordination with NTIA to ensure that Federal incumbents are protected from harmful interference and, as Aeronet suggests, ''coordination with other potentially impacted parties based on real-world data.''

40. The Commission also adopts a maximum elevation angle of forty-five degrees for aeronautical ground stations. Though this parameter was not included in Aeronet's petition, it is the maximum elevation angle used by the Federal Agencies in their analysis of potential harmful interference to Federal operations, and these assumptions about likely operational parameters were based on input from Aeronet. Because this analysis shows that elevation angles of up to forty-five degrees can (under certain other parameters) coexist successfully with Federal operations, and because the Commission lacks evidence in the record that transmissions above that angle of elevation will not cause harmful interference to Federal or other satellite operations, the Commission adopts a maximum elevation angle of forty-five degrees.

41. Together, these technical parameters and interference mitigation measures will ensure that operators in this aeronautical mobile service will be able to successfully operate, while also protecting operators in other services.

b. Transmissions Between Aircraft in Flight

42. Air-to-air transmissions present a unique set of characteristics in terms of the potential for interaction with other services, in both the same and adjacent bands, and accordingly, considerable attention has been paid to how harmful interference from such transmissions might be avoided. In the *70/80/90 GHz NPRM,* the Commission sought comment generally on potential interference mitigation measures. Many commenters raised concerns about the potential for harmful interference into other services, particularly RAS sites above 86 GHz. In response to these concerns, Aeronet, Comsearch, and other commenters suggested a variety of potential mitigation measures. In particular, the Federal Agencies submitted a report with both suggested interference mitigation measures and underlying analysis supporting them, which they suggest would be sufficient to protect Federal operations both in the 70/80 GHz bands and in adjacent bands from harmful interference from air-to-air transmissions.

43. After reviewing the record, and as discussed in more detail below, the Commission adopts the following technical and operational restrictions on transmissions between aircraft in flight, in order to reduce the risk of harmful interference to other services. Air-to-air transmissions will be authorized in both the 70 GHz and 80 GHz bands. The Commission establishes an OOBE limit of −29.7 dBW in any 100 megahertz of the passive band 86–92 GHz, to protect EESS (passive) operations. In the 80 GHz band, the Commission sets a

maximum allowed EIRP signal level towards any of a specified list of RAS sites, varying by transmission frequency and distance from the site. In the 70 GHz band, the Commission adopts a similar limit on EIRP signal levels toward specified military installations. Finally, the Commission adopts both altitude restrictions and a minimum slant path distance requirement in order to reduce the risk of harmful interference to in-band services, particularly fixed point-to-point links.

44. Several commenters raised concerns in the record that air-to-air transmissions in the 80 GHz band might produce unwanted emissions into the band above 86 GHz that might cause harmful interference to services in that band, particularly RAS observatories and EESS operations. The Commission agrees with commenters on the importance of protecting RAS and EESS operations in the 86–92 GHz band. However, based on the analysis by the Federal Agencies, the Commission concludes that the interference mitigation measures the Commission adopts, which include restrictions on transmissions in the direction of RAS sites, are sufficient to allow air-to-air transmissions in both the 70 GHz and 80 GHz bands.

45. In the *70/80/90 GHz NPRM,* the Commission sought general comment on what interference mitigation measures might be necessary to protect EESS and RAS services operating in the 86–92 GHz band. Among the measures proposed by commenters relating to air-to-air transmissions were limiting those transmissions to the 70 GHz band and updating the OOBE limits to reflect recent ITU standards. Several commenters also discussed the need for any air-to-air transmissions to avoid pointing directly at an RAS receiver. The Federal Agencies' analysis recommends an OOBE limit of −29.7 dBW in any 100 megahertz of the passive band 86–92 GHz for air-to-air transmissions in order to protect EESS sensors, and a set of restrictions on EIRP levels toward any RAS site depending on the distance of the transmitter to the site. Aeronet has represented both in the Commission's record and to the Federal Agencies that their proposed system has the capability to automatically avoid transmission towards specified stationary areas or coordinates corresponding to RAS sites, which would enable them to comply with such a requirement.

46. The Commission adopts an OOBE limit of −29.7 dBW in any 100 megahertz of the passive band 86–92 GHz for air-to-air transmissions, as suggested by the Federal Agencies. The Commission also adopts a requirement that air-to-air transmissions, in both the 70 GHz and 80 GHz bands, not take place within the main beam of an RAS observatory, and that if this cannot be assured, no transmissions should take place within the radio horizon of the observatory. This restriction was also suggested by the Federal Agencies. The Commission adopts these requirements in order to protect passive services in the adjacent bands (*i.e.,* 76–81 GHz, and above 86 GHz). The Federal Agencies' analysis uses ITU recommendations as their starting point, and comprehensively considers various factors that may influence both harmful interference from aeronautical operations specifically, and aggregate interference from those operations, in addition to previously authorized services. Accordingly, the Commission concludes that the resulting recommendations will be sufficient to protect EESS operations.

47. The Commission takes protection of RAS operations very seriously, and accordingly assign significant weight to the concerns expressed in the record, and especially in the Federal Agencies' analysis, which discusses protection of RAS operations in detail. In order to safeguard these operations, the Commission will follow the recommendations of the Federal Agencies in requiring the following interference protection measures. First, as a general matter no transmissions may occur within the main beam of an RAS station. In addition, aircraft within the radio horizon of any RAS station must limit the EIRP level towards the RAS stations of any air-to-air transmission, as set forth in Fig. 1.

FIG. 1—LIST OF MAXIMUM ALLOWABLE EIRP LEVELS TOWARD RAS SITES, IN DBW

Frequency (GHz)	Horizontal distance (km)									
	150	175	200	225	250	275	300	325	350	375
81	−11.2	−8.8	−6.5	−4.2	−1.5	1.1	3.9	6.7	10	13.5
82	−11.5	−9.2	−6.9	−4.6	−2	0.5	3.2	6	9.2	12.6
83	−11.7	−9.5	−7.3	−5	−2.4	0	2.7	5.4	8.6	11.9
84	−11.9	−9.7	−7.5	−5.3	−2.8	−0.4	2.3	4.9	8	11.3
85	−12.1	−9.9	−7.8	−5.5	−3	−0.7	1.9	4.5	7.6	10.8
86	−12.2	−10	−7.9	−5.7	−3.3	−0.9	1.7	4.2	7.3	10.5

48. In addition to concerns regarding adjacent band services, the Federal Agencies also raised concerns about potential harmful interference to co-primary services in the 70 GHz band. Protection of fixed point-to-point links, both Federal and non-Federal, is addressed below. For protection of Federal FSS operations, the Federal Agencies suggest that, similar to protections for RAS stations, EIRP levels from air-to-air transmissions within 375 km of a specified military installation should not exceed 20 dBW/1000 megahertz toward that installation, unless the aeronautical operator has coordinated some other allowable level with the Department of Defense. In response to the *Refresh Public Notice,* no commenter objects to these interference mitigations measures, nor argues that they are insufficient to protect co-primary services in the 70 GHz band. As with protections for RAS operations, the Commission finds the Federal Agencies' analysis on this point persuasive, particularly since no other commenter touches on the interest of Federal FSS operations. Accordingly, the Commission adopts the suggested requirement that air-to-air transmitters within 375 km of any of the specified military installations [3] must limit the EIRP of their transmissions to 20 dBW toward the military installation site.

49. *Altitude Restrictions.* In its petition for rulemaking, Aeronet specified that its proposed service would operate only with aircraft at altitudes between 10,000 and 50,000 feet. The Commission does not seek specific comment in the *70/80/90 GHz NPRM* on this point. DSA suggested that

[3] This list, which includes specific coordinates for each site, may be found in the Final Rules of the *Report and Order* at 47 CFR 101.1528(c). The Department of Navy also seeks to add an additional FSS site in Miramar, CA, which is not currently reflected in US389, to the list of protected sites in the Commission's part 101 rules. The Commission is not taking any action in this proceeding to modify US389, and thus defer on this request at this time.

altitude restrictions are unnecessary because the risk of interference into other services is already low, while Loon argued against any altitude caps on the theory that they would be harmful to potential competition. Geneva Communications suggests that altitude restrictions are unnecessary so long as links are adequately and dynamically coordinated. FWCC supports a restriction to between 10,000 and 50,000 feet of altitude.

50. The Commission rejects Loon's assertion that altitude restrictions favor certain technologies or business models over others. The record demonstrates that, together with other restrictions, air-to-air transmissions between 10,000 and 50,000 feet may be accomplished without harmful interference to incumbent and adjacent operations; it does not demonstrate that transmissions at higher or lower altitudes would be similarly successful. As the Commission is unpersuaded that mandating dynamic coordination of all air-to-air links is necessary, the Commission rejects Geneva Communications' argument as well. Consistent with Aeronet's petition, the Commission adopts a minimum altitude of 10,000 feet for all air-to-air transmissions in these bands, and a maximum altitude of 50,000 feet. Together with the minimum slant path distance requirement that the Commission also adopts, these altitude restrictions will reduce the risk of harmful interference into other services by limiting the area on the ground with line of sight to the airborne transmitter, restricting the angle at which air-to-air transmissions may enter receivers on the ground, and setting a minimum vertical distance (and therefore a minimum amount of atmospheric attenuation) between air-to-air transmissions and both terrestrial and satellite services.

51. *Minimum Slant Path Distance.* In the *70/80/90 GHz NPRM,* the Commission asked what mitigation measures might be necessary to address the risk of harmful interference from air-to-air transmissions between aircraft of significantly different altitudes. That risk of interference arises from the resulting steep angle of the signal, and therefore the increased risk that the transmission ultimately illuminates a receiver in another service, especially a fixed point-to-point receiver along the boresight. Aeronet and Comsearch suggest that a minimum slant path distance would reduce any potential harmful interference from air-to-air links. Qualcomm argues that a minimum horizontal distance between aircraft would be sufficient to render potential harmful interference into fixed links negligible. No commenters argue against adopting a minimum separation between aircraft. Given the state of the record on this point, the Commission adopts a minimum slant path distance of 50 kilometers between aircraft involved in air-to-air transmissions.

c. Transmissions Between Ships, Shore, and Aerostat Stations

52. The record generally supports technical and operational restrictions on transmissions to and from ship, shore, and aerostat stations that are parallel to those adopted for airborne transmissions. Shore-to-ship transmissions are only permitted in the 70 GHz band, and ship-to-shore transmissions are only permitted in the 80 GHz band. Shore-to-aerostat transmissions and aerostat-to-ship transmissions are only permitted in the 70 GHz band. Aerostat-to-shore transmissions are only permitted in the 80 GHz band. The Commission adopts an OOBE limit of −29.7 dBW in any 100 megahertz of the passive band 86–92 GHz for ship-to-shore and aerostat-to-shore transmissions in order to protect EESS (passive) operations.

53. Ship-to-ship communications are limited to ships located more than 30 km offshore, or closer only where the main beam of the transmit antenna is oriented at least 15 degrees away from any point on the shore. Ship stations and aerostat stations must only operate when there is a minimum separation of 150 km to the Federal facilities listed in table 3 to § 101.1528(c)(1) of the Final Rules in this *Report and Order,* absent a coordination agreement with the Federal operator. Shore-to-ship, shore-to-aerostat, aerostat-to-shore, and ship-to-shore transmission must only occur between stations that are located at least 10 km from the Federal military installations listed in table 4 to § 101.1528(c)(2) of the Final Rules in this *Report and Order,* absent a coordination agreement with the Federal operator. Ship-to-shore, shore-to-ship, shore-to-aerostat, aerostat-to-ship, and aerostat-to-shore operations must coordinate with Federal FS operations using the NTIA web-based coordination mechanism to prevent interference. The Commission notes that ship-to-aerostat operation has not been sufficiently studied, and thus is not permitted at this time, although the Commission seeks comment in the *Further Notice* below on its potential implementation. Aeronet, through filings submitted in the record, has outlined the important role of bidirectional transmissions between ships and aerostats to the two-way maritime broadband services otherwise authorized in this *Report and Order.* During the pendency of the *Further Notice,* WTB will consider requests for waiver with respect to specific ship-to-aerostat implementation deployment proposals through the Commission's existing regulatory processes, subject to coordination with NTIA to ensure that Federal incumbents are protected from harmful interference and coordination with any other potentially impacted parties.

54. The same engineering principles that underpin the Commission's adoption of technical and operational restrictions for transmissions between aircraft and ground stations and aircraft in flight serve as a baseline in the maritime context as well, subject to certain modifications as set forth herein and in the Final Rules of this *Report and Order.* For example, the Commission clarifies that the Final Rules do not establish a minimum elevation angle in the maritime context. Opponents of transmissions between ships, shore, and aerostat stations predominantly assert the need for further examination of whether incumbent or future operations in the bands might suffer interference from by maritime operations. The exhaustive TIG process led by the Federal Agencies provides the requested examination. Each of the restrictions described above finds specific support in the collective Federal Agencies Letter, reflecting extensive interagency collaboration—collaboration focused in part on ensuring non-interference with current and future uses of the bands in question—as promised by the Commission in the *70/80/90 GHz NPRM.* No parties objected to adopting the proposed maritime regime the Commission describes above following the solicitation of comment on the Federal Agencies Letter in the Commission's *Refresh Public Notice.* The Commission finds that the combination of the: (1) Commission's own engineering expertise; (2) initial general support for a maritime regime found in responses to the *70/80/90 GHz NPRM;* (3) further examination of specific analyses undertaken in the Federal Agencies Letter, and the studies underpinning it; and (4) silence on maritime issues in particular in the *Refresh Public Notice* comment cycle, demonstrate that the above-described regime for transmissions between ships, shore, and aerostats will protect current and future operations both in the 70 GHz and 80 GHz bands, and in adjacent bands.

B. Facilitating Use of the Bands for Backhaul

55. To promote more intensive use of spectrum in the 70 GHz and 80 GHz bands, including use for backhaul for high-capacity 5G service, the Commission adopt several changes to its antenna standards that will allow licensees to use smaller, lower-cost antennas in these bands, and the Commission adopt a channelization plan for the band.

56. *Antenna Standards.* The *70/80/90 GHz NPRM* proposed several changes to the antenna standards for the 70 GHz and 80 GHz band to promote flexibility. In particular, the *70/80/90 GHz NPRM* proposed to reduce minimum antenna gain from 43 dBi to 38 dBi while retaining the requirement to proportionally reduce maximum EIRP in a ratio of 2 dB of power per 1 dB of gain. It also proposed to reduce the co-polar and cross-polar discrimination requirements applicable to 70 GHz and 80 GHz band antennas. Further, the *70/80/90 GHz NPRM* sought comment on whether to allow +/− 45 degree polarization (also known as slant polarization) and whether to adopt a second, more flexible set of antenna standards in these bands. Commenters generally supported reducing antenna gain and co-polar and cross-polar discrimination requirements.

57. Although the Commission does not regulate the size of antennas directly, minimum antenna size is constrained by technical factors including the intended operating bands and requirements governing beamwidth, gain, and polarization discrimination. Based on the Commission's analysis of the record, the Commission determine to relax those requirements for the 70 GHz and 80 GHz bands to standards more in line with the requirements for point-to-point operations for other part 101 bands. The Commission acknowledge Fiberless Networks' concern that ''[a]ny reduction in antenna sizes must ultimately impact the number of wireless links using the 71–76 and 81–86 GHz bands that may be deployed in any metro area,'' but the Commission are persuaded by the FWCC's long-stated advocacy that such changes ''will allow for the use of smaller, lighter, lower cost, less susceptible to pole sway, and more visually attractive antennas'' that may enable more intensive use of the 70 GHz and 80 GHz bands for point-to-point backhaul services. Additionally, commenters agree that relaxing these antenna standards will also enable the use of smaller antennas for backhaul that will be needed to facilitate densified 5G networks. Accordingly, the Commission raise the maximum beamwidth to 2.2 degrees and reduce the minimum antenna gain to 38 dBi for antennas in the 70 GHz and 80 GHz bands. In order to maintain consistency and minimize the risk of interference, the proportional power reduction requirement will continue to be applicable to antennas in these bands with a gain less than 50 dBi down to the new minimum antenna gain of 38 dBi. Lower-gain antennas have more energy in their sidelobes as compared to a higher-performance antenna, so imposing a proportional reduction in EIRP for antennas with a gain less than 50 dB helps to compensate for the additional power in the sidelobes—thereby ensuring that a lower-performance antenna does not create any greater risk of off-axis interference than a higher-performance antenna.

58. The Commission also adopt its proposal to remove the co-polar discrimination requirement below 5 degrees and modify the cross-polar discrimination requirements below 5 degrees to 21 dB. Some commenters argue that both the co-polar and cross-polar discrimination requirements are obsolete and propose eliminating those requirements entirely. FWCC contends that some of the smaller, lighter antennas its members contemplate using cannot meet the existing co-polar requirement. In order to maximize the flexibility the Commission seek to achieve by relaxing the antenna standards, the Commission eliminate the co-polar discrimination requirement at angles less than 5 degrees. However, the Commission decline to eliminate the cross-polar discrimination requirements below 5 degrees in their entirety. The Commission agree with commenters, including the third-party database manager Comsearch, that cross-polar discrimination requirements are proven to be effective in maximizing frequency reuse in the 70 GHz and 80 GHz bands. The Commission agrees with Comsearch that reducing the cross-polar discrimination requirement for angles less than 5 degrees to 21 dB brings its rules closer to conformity with international standards without sacrificing the frequency reuse advantages of having some cross-polar requirement. The Commission agree with Comsearch that a cross-polar discrimination requirement of 21 dB is not ''difficult to meet[.]''

59. Further, the Commission adopt corresponding changes to the co-polar and cross-polar discrimination requirements at angles between 5 degrees and 180 degrees. Physics dictates that smaller antennas will have less sidelobe suppression. Therefore, corresponding adjustments to the discrimination requirements between 5 and 180 degrees are also necessary to facilitate the use of smaller antennas. FWCC proposed antenna standards for this band that are consistent with the Commission's proposed minimum gain of 38 dbi and maximum beamwidth of 2.2 degrees and also proposed co-polar and cross-polar discrimination values for angles between 5 degrees and 180 degrees. FWCC's proposals are consistent with ESTI Class 3 antenna standards, and are supported by the 5G Wireless Backhaul Advocates and Comsearch. Comsearch emphasizes that it is appropriate to provide antenna performance requirements between 5 and 180 degrees, as proposed by FWCC. The Commission believe that the changes proposed by FWCC and the 5G Backhaul Advocates strike a balance, allowing for the use of smaller antennas which will promote and expedite backhaul deployment, while also preserving an appropriate co-polar and cross-polar advantage between paths to promote frequency re-use.

60. In the *70/80/90 GHz NPRM,* the Commission sought comment on a proposal to allow +/− 45 degree polarization (slant polarization) in the 70 GHz and 80 GHz bands. At this time, the Commission decline to modify its rules to adopt slant polarization because the Commission agree with most commenters that slant polarization will increase the risk of interference and make the coordination of links more difficult. As Comsearch notes, allowing slant polarization would ''take away the cross-polarization advantage between paths'' which has ''proven to be effective in maximizing frequency reuse in the 70 and 80 GHz bands . . . .''

61. The Commission also decline to adopt a second category of antenna standards for the 70 GHz and 80 GHz bands. The Commission's rules for some other services regulated under part 101 allow for two categories of antennas, Category A and Category B; Category A performance standards are more stringent than Category B.[4] In the *70/80/90 GHz NPRM,* the Commission sought comment on whether to adopt a similar framework for the 70 GHz and 80 GHz bands by designating the existing antenna standards the ''Category A'' standards and adopting new, less restrictive ''Category B'' standards.

[4] Category B antennas may be used in areas not subject to frequency congestion. Category B antennas must be replaced if they are shown to cause interference to (or receive interference from) any other authorized station where a higher performance antenna is not likely to cause such interference.

Although some commenters, including Scientel Solutions and T-Mobile, support adding a Category B standard that does not exist for these bands in the current rules, others, including 5G Americas, Ericsson, and Nokia, do not believe a Category B standard is necessary. Comsearch argues that there is no reason to define two categories of antennas because database managers would not be able to compel antenna upgrades based on predicted interference. The Commission also agree with commenters that adding a Category B standard is unnecessary, given its decision in this *Report and Order* to allow smaller antennas in these bands.

62. *Channelization Plan.* The *70/80/90 GHz NPRM* sought comment on whether adopting a channelization plan would promote more efficient use of the 70 GHz and 80 GHz bands. It further asked about what channel plan should be considered, noting the existence of the plan contained in ITU Recommendation F.2006—see International Telecommunications Union (ITU), Recommendation ITU–R F.2006, ''Radio-Frequency Channel and Block Arrangements for Fixed Wireless Systems Operating in the 71–76 and 81–86 GHz Bands'' (2012), *https://www.itu.int/dms_pubrec/itu-r/rec/f/R-REC-F.2006-0-201203-I!!PDF-E.pdf* (ITU–R F.2006)—which the Commission describe in greater detail below. The *70/80/90 GHz NPRM* also solicited comment on a range of issues including the impact of a channel plan on existing equipment, whether to continue to apply the standard emission limit rules in section 101.1011, whether any specific channel plan and direction of service would be particularly conducive to protecting the other co-primary services from interference, and the costs and benefits of channelization.

63. The Commission are persuaded that the Commission should adopt a channelization plan consistent with ITU–R F.2006. The Commission acknowledge that the Commission decided in 2003 that a specific channel plan was unnecessary in the context of adopting new rules to facilitate greater use of the bands by nascent fixed services. Given the development of these fixed services since 2003 and its adoption of rules to permit additional services into the band, the Commission agree with commenters that a standardized channel plan will make interference mitigation between licensees easier to manage. Adopting the ITU F.2006 plan will also harmonize the Commission's rules with international standards, and is consistent with a majority of commenters' recommendations.

64. After reviewing the record, including responses to the *HAPS Public Notice* and *Refresh Public Notice,* while some commenters are neutral on the issue of channelization others specifically state that if the Commission introduces new services into the band—such as the services contemplated by Aeronet—there will be a greater need to have a standardized channel plan in order to make interference mitigation between licensees more manageable. On balance, most commenters support adopting a standardized plan specifically if new services are introduced into the band. Moreover, Aeronet supports the adoption of a standardized channel plan.

65. There is near-unanimous agreement among commenters that if the Commission adopts a channel plan, the Commission should adopt a plan consistent with ITU–R F.2006, which provides different channel sizes from 250 megahertz up to 5 gigahertz, and includes a plan for 1.25 gigahertz segmentation. This channelization plan is consistent with what the Commission proposed, but ultimately did not codify in the original 70–80 GHz rulemaking. Comsearch notes that a majority of licensees already conform with the ITU–R F.2006 channel plan. Even commenters that advocate against adopting a standardized channel plan, such as WISPA, support adopting the ITU F.2006 channel plan if the Commission decides that it should adopt a standardized plan.

66. To provide adequate lead time for manufacturers to modify their equipment lines to comply with the new channel plan, the Commission will make the new channel plan effective on September 1, 2024. Considering that there are incumbents in the band who have deployed under the current rules and may not be operating consistent with a channel plan that the Commission adopt, the Commission will permit licensees that are registered prior to the effective date of the new channel plan to continue to operate under nonconforming channel plans as long as their pre-existing operations remain in good standing. With the exception of de minimis modifications to registered links discussed below, all links registered on or after September 1, 2024, will be required to comply with the new channel plan.

C. Improving the Link Registration System

67. In the *70/80/90 GHz NPRM,* the Commission solicited input on whether it should make changes to the link registration rules for the 70/80/90 GHz bands.[5] Specifically, the Commission sought comment on how to amend its rules to improve the accuracy of the link registration database. The Commission also asked whether it should require licensees in these bands to certify that their links have been timely constructed—and, if so, how an efficient and effective certification process would operate. Among other things, the Commission asked whether ''certifications should be filed when the links become operational, at any time prior to the construction deadline, or whenever a licensee seeks to renew its license?'' The Commission also sought comment on whether to allow de minimis modifications to certain information filed in the registration database.

1. Construction and Operational Status

68. To promote the efficient use of the high-capacity 70/80/90 GHz bands, in this *Report and Order* the Commission adopt a requirement that licensees certify that each link is constructed and operating within 12 months of successful registration in the link registration system (LRS) administered by third-party database managers. Under the Commission's rules in place since 2003, licensees must construct their links within 12 months of registering them in the LRS and failure to timely begin operation means the authorization cancels automatically. Under the hybrid license/registration approach adopted for these bands, however, the Commission decided ''at [that] time'' not to require licensees to affirmatively report link construction and instead relied on licensees to ask a database manager to remove unconstructed links from the database. As such, the Commission instructed the database managers to remove a link from the registry if it is found to be unconstructed after the required timeframe. The Commission note that in 2003 the bands were ''essentially undeveloped and available for new uses'' and that the Commission reserved the discretion to revisit this issue if experience indicated that additional measures were necessary.

69. As in 2003, the overarching purpose of the Commission's requirements concerning link construction, as well as modification

[5] The 90 GHz band has different antenna rules, but the same link registration process as the 70 GHz and 80 GHz bands. Although in this *Report and Order* the Commission does not modify the antenna rules in the 90 GHz band, in the Commission's consideration of changes to the link registration process, the Commission does include the 90 GHz band to maintain a harmonized approach to link registration for all of the bands included in the link registration system.

and discontinuance, is to ensure that spectrum is put to use and to maintain the ''integrity of the information in the relevant databases by correctly reflecting the actual record concerning these issues.'' Based on the Commission's experience, including the development of the bands since 2003, and the record before us, the Commission finds that requiring licensees to certify in the LRS that each link is timely constructed will significantly improve the accuracy of the database, thereby increasing opportunities for additional, efficient use of the bands. Failure to begin operations in a timely manner pursuant to a part 101 authorization results in the automatic cancelation of an authorization.

70. In the 70/80/90 GHz bands, the nationwide license serves as a prerequisite to registering links, each registration in the LRS is the licensee's authorization to operate the individual link, and the 12-month construction period commences on the registration date of each individual link. Because 70/80/90 GHz links are registered in the LRS, the provision in paragraph (f) stating that ''construction of any authorized facility or frequency must be completed by the date specified in the license'' is inapplicable to 70/80/90 links. Under the current rules, ''[f]ailure to timely begin operation means the authorization cancels automatically'' as of the construction deadline. Similar to the timeline for construction notifications filed in ULS, however, the Commission will allow 70/80/90 GHz licensees 15 days after the 12-month construction deadline for each link to certify in the LRS that the link was timely constructed and operating. Accordingly, if a 70/80/90 GHz licensee does not certify in the LRS within 15 days after the 12-month construction deadline for a link, the link will be deemed to be unconstructed and the licensee's authority to operate the link shall be terminated automatically without further Commission action as of the 12-month construction deadline for the link. The Commission also agrees with commenters that after the certification requirement becomes effective, it should apply to all uncertified links even if the 12-month construction deadline date occurred prior to the effective date of the certification requirement. For uncertified links registered 12 months or longer before the effective date, licensees will have until 15 days after the effective date to certify that their links were constructed on or before the effective date. Thus, for uncertified links registered less than 12 months before the effective date, licensees will have to file a certification within 15 days from the end of the 12-month construction period following registration.

71. Once the certification requirement is in effect, the Commission instructs the third-party database managers, as a matter of database accuracy and integrity, to remove uncertified registrations from the LRS that have terminated automatically under the Commission's rules. Because licensees will have until 15 days after the 12-month construction deadline to certify in the LRS that a link is constructed and operating, the Commission instructs database managers to remove a link from the LRS on the 16th day after the 12-month construction deadline for a link if the licensee has not certified in the LRS that the link was timely constructed and operating.

72. Imposing the certification requirement on licensees and having the third-party database managers update the LRS accordingly will allow all licensees, and the Commission, to track link cancellations through the LRS. Parties considering the 70/80/90 GHz bands and licensees seeking to register links after implementation of this requirement will have a more accurate database to use to judge spectrum availability. In this setting, if a licensee's authority to operate a link is automatically terminated because the construction requirement was not met, the licensee will not be barred from attempting to register the link again, and if successful, constructing it later. The licensee, however, will lose the original registration date for the purpose of interference protection procedures.

73. There is broad support in the record for implementing the certification requirement. FWCC argues that construction certifications will help maintain a reliable database at a low cost to licensees. Commenters broadly agree that the database should consist only of links that are actually constructed or that have been successfully registered but are within their one-year construction period, and that requiring construction certifications would be an effective way to maintain an accurate database and promote efficient access to the bands. Other commenters, including Comsearch, agree that the existing database managers are well suited to administer the certification requirement. Micronet's database provides information about links that have been registered and not constructed, but there is no requirement that Micronet provide this information and there is no requirement that licensees inform Micronet when links are built. Therefore, links that appear in Micronet's database as unconstructed may be constructed.

74. Although some parties would have the Commission manage construction certifications through ULS, the Commission believes that the hybrid license/registration approach that has governed these bands since the database managers developed and began operating the LRS in 2005 has worked reasonably well and should not be displaced. Industry members are already accustomed to working with the database managers on spectrum management matters and have established access to the database managers' platforms. The Commission agrees with FWCC and Comsearch that using ULS for certification would add unnecessary complexity to the link registration process. The Commission agrees, however, with commenters who suggest that additional measures are warranted to ensure that registered links remain operational on an ongoing basis long after satisfaction of the 12-month construction deadline. Accordingly, when a 70/80/90 GHz band licensee seeks to renew its nationwide license, the Commission will require the licensee to certify as part of the license renewal application that each link registered under the license more than twelve months prior to the filing date of the renewal application is constructed and operating on an ongoing basis as of the filing date of the license renewal application. The Commission disagrees with AT&T that requiring licensees to certify every ten years that they are still operating their registered links is unnecessary given that the Commission is requiring licensees to certify each link shortly after the 12-month construction deadline. The Commission clarifies, however, that the Commission is not requiring renewal applicants to ''list links, whether constructed or not, in renewal applications for 70/80/90 GHz licenses.''

75. *Implementation Matters.* The Commission authorizes and directs WTB to consult each database manager on the timing of modifications to the LRS necessary to accommodate rule changes. WTB will also announce by public notice the details and dates for implementing a construction certification requirement. Additionally, the Commission understands that each database manager periodically sends its registrants email reminders of their upcoming and recently past construction deadlines and that each database manager plans to send email alerts to its relevant registrants about these rule changes. The Commission

applauds the database managers' past efforts to improve the accuracy of the database and encourage them to continue sending email alerts to licensees. The Commission emphasizes, however, that each licensee is responsible for timely filing its construction certifications in the LRS regardless of whether a courtesy reminder email may have been sent or received. Finally, the Commission reminds licensees that they should only certify as constructed links that are operational, and that non-operational links should be deleted from the database. Licensees are reminded that links that are not actually constructed by the construction deadline cancel automatically on the date of the construction period expires, and are not entitled to first-in-time protection regardless of whether they may appear in the registration database.

2. De Minimis Modifications to Registrations

76. The *70/80/90 GHz NPRM* sought comment on whether licensees should be allowed to amend their registered links without losing first-in-time status—*i.e.,* on what date should a link be considered registered and given protected status for purposes of these rule—and what amendments, if any, should be allowed without losing first-in-time status. The Commission finds support in the record for allowing de minimis modifications to registrations that are exclusively for the purpose of repairing or replacing installed and operating equipment, provided that there are no changes to any registered technical parameters that would change the potential for a link to cause or receive interference. Modifications that are consistent with these requirements can be implemented without affecting a registrant's first-in-time rights for the particular link. Such modifications may be implemented if the modified registration is successful without affecting a registrant's first-in-time rights for the particular link. By allowing these de minimis modifications to registrations without changing the interference-protection date, the Commission allows licensees to maintain the existing operation of their links without sacrificing either the accuracy of the database or the licensee's interference-protection rights. The Commission emphasizes that ''de minimis'' modifications to registrations that commenters discuss in this proceeding are distinct from the Commission's part 1 rules that govern major or minor modifications to station authorizations. To avoid confusion, the Commission refers to modifications to registrations that licensees can make without losing first-in-time status as de minimis. Most parties support de minimis modifications to the extent that they will not change the interference landscape, though parties' ideas of what would constitute a de minimis modification differ. Some parties argue that de minimis modifications should include changes to some technical specifications. For example, WISPA argues that minor modifications should include changes to geographic coordinates within +/− 15 meters of latitude or longitude and +/− 3 meters of elevation. Others, however, believe that de minimis modifications should be only those changes that do not affect any technical parameters relevant for coordination. The Commission agrees with commenters that modifications that change ''interference potential'' should not be treated as de minimis modifications and will result in a new date for first-in-time purposes.

77. The Commission finds that many of the proposals by commenters, such as those involving changes to location, could change the interference landscape and therefor are not de minimis. In addition, changes to parameters that typically would not be considered major in other contexts, like increases to receive antenna height, could make an existing link more susceptible to interference. Given the sensitivity of the first-in-time rights to changes in the interference environment, the Commission believes that it is prudent to define de minimis modifications in this context very narrowly. Based on the Commission's analysis of the comments in the record the Commission will define de minimis modifications as those that meet all of the following criteria: The modification is necessary to repair or replace registered, constructed, and operating equipment; the modification does not increase the EIRP of a digital system or change the EIRP of an analog system; [6] the modification does not increase the channel bandwidth; the modification does not change the power density; the modification does not increase the receiver sensitivity; the modification does not increase the antenna beamwidth; the modification does not increase the antenna gain, except where there is a corresponding reduction transmitter power so that there is no increase in EIRP; the modification does not involve a change to antenna with less off-axis attenuation at any angle; and the modification does not change any other technical parameters not mentioned above.

78. Under the definition adopted above, any modification to a registration that could make a link more susceptible to interference or more likely to cause interference will result in a new date for first-in-time coordination purposes. The Commission finds that the limited definition of a de minimis modification adopted in this *Report and Order* will minimize the risk of harmful interference and promote efficient access to these bands.

D. Other Issues

79. The Commission does not take action at this time on several other issues raised in the Commission's inquiries in this proceeding, or by commenters in the record owing to absence of notice, an inadequate record, or lack of consensus on a path forward. To wit, in the *70/80/90 GHz NPRM,* the Commission sought comment on a proposal relating to authorizing mobile operations on a non-interference basis to fixed operations along the United States' international borders with Canada and Mexico, subject to future international agreements. This specific issue was not addressed by any filers. In the absence of a developed record on this issue, the Commission does not address it at this time.

80. Separately, in the *HAPS Public Notice* WTB sought to supplement the record on the possibility of bringing HAPS and/or other stratospheric-based platform services into the 70/80/90 GHz bands. The record, including analysis provided by the Federal Agencies, contains highly divergent claims regarding the possibility of integrating HAPS operations into the 70/80/90 GHz bands, with limited actual data to support such action. The Commission therefore declines at this time to adopt rules for HAPS operations in the 70/80/90 GHz bands. The Commission does note that any party—including HAPS providers—can engage in operations consistent with the rules of general applicability for aeronautical services adopted in this *Report and Order.*

81. Beginning in *ex parte* presentations, and later in other filings in this docket, SpaceX requested that the Commission amends its rules to allow the registration of FSS earth stations in the third-party link registration database for the 70 GHz and 80 GHz bands. While FSS has a co-primary shared allocation, the Commission has not yet developed

[6] For analog systems the interference criteria in rule section 101.105 is specified as a C/I ratio, so decreases in EIRP could change the C/I ratio and potentially make a link more susceptible to interference. Therefore, for analog systems any modification that changes the EIRP will not be considered de minimis, and a new date will be applied for first-in-time purposes.

service rules for FSS operations in these bands. As FSS operations differ in significant ways from the FS operations that the third-party database system was originally designed to accommodate, adding FSS to this system would likely require development of different coordination parameters, and possibly additional interference mitigation techniques to protect Federal operations in the bands. The Commission notes that the Commission's rules for authorization of proposed non-Federal fixed terrestrial links in the 71.0–76.0 GHz and 81.0–86.0 GHz bands do not address co-band, non-Federal FSS Earth stations and thus non-Federal terrestrial licensees are not required to analyze the potential for harmful interference to or from a proposed link to non-Federal gateway Earth stations previously authorized or pending in ICFS under the default service rules. Moreover, SpaceX notes that the interference mitigations proposed in the Federal Agencies Letter, which inform the rules to accommodate airborne and maritime point-to-endpoints-in-motion in the third-party database system that the Commission adopts would not be appropriate for FSS operations in the 70 GHz and 80 GHz bands. Without the development of a record on the specifics required to include FSS earth stations in the third-party database, or Federal inter-agency discourse on this prospect, the Commission is not in a position to take this step. However, the Commission seeks further input on these issues in the *Further Notice* portion of this item immediately below.

82. The fact that the Commission is not adding FSS to the third-party database registration system does not impair the ability of FSS operators to continue to deploy and operate new earth stations in the 70/80/90 GHz bands,[7] subject to prior coordination with existing incumbents.[8]

83. In response to certain concerns raised in the record, the Commission emphasizes that the allocations in the 70/80/90 GHz bands have not changed. FSS and FS remain co-primary, and the Commission continues to have policies in place that allow for coexistence. First-in-time priority rights serve as the foundation for such coexistence in the 70/80/90 GHz bands, as they do in other spectrum bands shared by FS and FSS; nothing the Commission adopts disturbs this status quo.

III. Final Regulatory Flexibility Analysis

84. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Modernizing and Expanding Access to the 70/80/90 GHz Bands, Notice of Proposed Rulemaking (NPRM)* released in June 2020. The Federal Communications Commission (Commission) sought written public comment on the proposals in the *NPRM,* including comments on the IRFA. No comments were filed addressing the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for, and Objectives of, the Report and Order

85. In the *Report and Order,* the Commission seeks to further its goals of fostering innovation in provisioning broadband and on meeting the rapidly increasing demand for its related services by small and other entities through the adoption of new rules and modernizing current rules for the 71–76 GHz, 81–86 GHz, 92–94 GHz, and 94.1–95 GHz bands (collectively, the 70/80/90 GHz bands).

86. The adopted rules take several approaches towards achieving these goals. One approach is authorizing certain point-to-point links to endpoints in motion in the 70 GHz and 80 GHz bands under the Commission's part 101 rules to further the use of these frequencies for access to broadband services on aircraft and ships. In the *Report and Order,* the Commission authorizes certain point-to-point links to endpoints in motion in the 71–76 GHz (the 70 GHz band) and 81–86 GHz (the 80 GHz band) bands under its part 101 rules. Another approach is updating the Commission's rules to permit the use of smaller and lower-cost antennas to facilitate the provisioning of backhaul service in the 70 GHz and 80 GHz bands, and mandates a channelization plan in those bands. Finally, the *Report and Order* adopted changes to the link registration process in the 70/80/90 GHz bands to promote prompt construction of registered links, thereby fostering more efficient use of this spectrum and improving the accuracy of the link registration database.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

87. There were no comments filed that specifically addressed the proposed rules and policies presented in the IRFA.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

88. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

89. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.'' A ''small business concern'' is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

90. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* The Commission's actions, over time, may affect small entities that are not easily categorized at present. The Commission therefore describes, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the Small Business

[7] The Commission notes, for example, that SpaceX has filed earth and space station applications to authorize its operations in the 70/80/90 GHz bands pursuant to the part 25 default service rules, and is currently operating under special temporary authorizations (STAs) pending completion of Federal coordination on its applications for final authorization.

[8] Satellite operations were not yet permitted in the E-band in 2003 when the Commission adopted the license/registration approach for non-Federal terrestrial links. The Commission recognized, however, that there were co-primary satellite allocations in various portions of the E-band and decided to maintain multiple services in the allocation table and address possible sharing criteria in the future stating that ''all terrestrial 71–76 GHz and 81–86 GHz band entities are hereby made aware that future operations of satellite and satellite earth stations could be permitted in the 71–76 GHz and 81–86 GHz bands. Once the Commission considers and adopts technical standards for terrestrial and satellite operations to share this spectrum, all licensees will be expected to satisfy these and any other Part 101 requirements.''

Administration's (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States, which translates to 33.2 million businesses.

91. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' The Internal Revenue Service (IRS) uses a revenue benchmark of $50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenues of $50,000 or less according to the registration and tax data for exempt organizations available from the IRS.

92. Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2017 Census of Governments indicate there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number, there were 36,931 general purpose governments (county, municipal, and town or township) with populations of less than 50,000 and 12,040 special purpose governments—independent school districts with enrollment populations of less than 50,000. Accordingly, based on the 2017 U.S. Census of Governments data, the Commission estimates that at least 48,971 entities fall into the category of ''small governmental jurisdictions.''

93. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 594 providers that reported they were engaged in the provision of wireless services. Of these providers, the Commission estimates that 511 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

94. *Fixed Microwave Services.* Fixed microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. They also include the Upper Microwave Flexible Use Service (UMFUS), Millimeter Wave Service (70/80/90 GHz), Local Multipoint Distribution Service (LMDS), the Digital Electronic Message Service (DEMS), 24 GHz Service, Multiple Address Systems (MAS), and Multichannel Video Distribution and Data Service (MVDDS), where in some bands licensees can choose between common carrier and non-common carrier status. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with a SBA small business size standard applicable to these services. The SBA small size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of fixed microwave service licensees can be considered small.

95. The Commission's small business size standards with respect to fixed microwave services involve eligibility for bidding credits and installment payments in the auction of licenses for the various frequency bands included in fixed microwave services. When bidding credits are adopted for the auction of licenses in fixed microwave services frequency bands, such credits may be available to several types of small businesses based average gross revenues (small, very small and entrepreneur) pursuant to the competitive bidding rules adopted in conjunction with the requirements for the auction and/or as identified in part 101 of the Commission's rules for the specific fixed microwave services frequency bands.

96. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time the Commission is not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

97. *Satellite Telecommunications.* This industry comprises firms ''primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' Satellite telecommunications service providers include satellite and earth station operators. The SBA small business size standard for this industry classifies a business with $38.5 million or less in annual receipts as small. U.S. Census Bureau data for 2017 show that 275 firms in this industry operated for the entire year. Of this number, 242 firms had revenue of less than $25 million. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 65 providers that reported they were engaged in the provision of satellite telecommunications services. Of these providers, the Commission estimates that approximately 42 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, a little more than half of these providers can be considered small entities.

98. *All Other Telecommunications.* This industry is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Providers of internet services (*e.g.,* dial-up ISPs) or Voice over Internet Protocol (VoIP) services, via client-supplied telecommunications connections are also included in this industry. The SBA small business size standard for this industry classifies firms with annual receipts of $35

million or less as small. U.S. Census Bureau data for 2017 show that there were 1,079 firms in this industry that operated for the entire year. Of those firms, 1,039 had revenue of less than $25 million. Based on this data, the Commission estimates that the majority of ''All Other Telecommunications'' firms can be considered small.

99. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment. The SBA small business size standard for this industry classifies businesses having 1,250 employees or less as small. U.S. Census Bureau data for 2017 show that there were 656 firms in this industry that operated for the entire year. Of this number, 624 firms had fewer than 250 employees. Thus, under the SBA size standard, the majority of firms in this industry can be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

100. The rule changes adopted in the *Report and Order* will impose some new and/or additional reporting, recordkeeping, or other compliance requirements on small entities who obtain licenses in the 70/80/90 GHz bands. These requirements are consistent with the requirements the Commission has adopted for other mmW bands; as a result, small entities will potentially have less of a learning curve in their efforts to comply with the adopted rules.

101. In 2003, the Commission established service rules for non-Federal use of the 70/80/90 GHz bands through a two-step, non-exclusive licensing regime. Small entities and other applicants obtain a nationwide, non-exclusive license for the entire 12.9 gigahertz of the 70/80/90 GHz bands, and then register individual links in a database administered by third-party database managers. Since 2004, the Wireless Bureau has designated the Commission's entities to be database managers but there are currently two database managers: Comsearch and Micronet Communications, Inc. In order for a link to be registered, it must be coordinated successfully with Federal operations, typically through the National Telecommunications and Information Administration's (NTIA) online, automated mechanism. If a proposed link does not interfere with existing Federal operations then it is given a ''green light;'' if it may interfere with existing Federal operations, then it is given a ''yellow light,'' indicating that the licensee must file a registration application for the link with the FCC for coordination with NTIA. The ''green light''/''yellow light'' system protects the sensitive nature of the locations of military installations. Also, the licensee must provide an analysis to the third-party database manager demonstrating that the proposed link will neither cause harmful interference to, nor receive harmful interference from, any previously registered non-government link. Licensees are afforded first-in-time priority for successfully registered links relative to links that are successfully registered at a later point in time. Registered links must be constructed within 12 months of their registration. Under part 101, non-Federal licensees may use the 70/80/90 GHz bands for any point-to-point, non-broadcast service.

102. Many of the rule changes adopted in the *Report and Order* are consistent with and mirror existing Commission policies and requirements used in other part 101 spectrum bands, which the Commission expects will help minimize some of the compliance burdens associated with the adopted rules. For example, while the Commission does add a construction certification requirement that licensees certify that each link is constructed and operating within 12 months of successful registration in the link registration system (LRS) administered by third-party database managers, small entities with existing licenses in other bands may already be familiar with similar policies and requirements and have the processes and procedures already in place to facilitate compliance, resulting in minimal incremental costs to comply with the Commission's requirements for the 70/80/90 GHz bands. The Commission also adopts de minimis modifications to link registrations, which allow licensees to amend their registered links without losing their first-in-time rights for those links. Adopting this rule allows small and other licensees to maintain the existing operation of their links without sacrificing either the accuracy of the database or the licensee's interference-protection rights. Additionally, the Commission believes small entities will continue to benefit from their ability to obtain more information than was previously available to them, such as access to the third-party databases and FCC rulemakings, but with improvements to the data within the database that will result from the construction certification requirement.

F. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

103. The RFA requires an agency to provide ''a description of the steps the agency has taken to minimize the significant economic impact on small entities . . . including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.''

104. In the *Report and Order,* the Commission adopts measures to meet the great demand for wireless broadband connectivity in an efficient and effective manner. While doing so, the Commission is mindful that small licensees and service providers will incur some new and/or additional compliance requirements that may also result in increased costs. In adopting the proposed rules, the Commission weighed the impact of these obligations on small entities against the public interest benefits gained from them and have determined that the benefits outweigh the costs. Both the specific steps the Commission has taken to minimize costs and reduce the economic impact for small entities and the alternatives considered are discussed below.

105. For example, through the adopted rules, the Commission took the step of changing its antenna standards to allow licensees, some of which are small entities, to use smaller, lower-cost antennas in the 70 GHz and 80 GHz bands for 5G backhaul. Taking this approach will allow for more intensive use of these bands by small and other entities, thus allowing them to further develop and expand their businesses. Alternatively, the Commission considered not utilizing this approach, due to a concern that reducing antenna size would impact the number of links using the 71–76 GHz and 81–86 GHz bands in metro areas. However, the benefit of allowing for greater use of the bands outweighed this concern. The Commission also minimized the economic impact on small and other entities through its adoption of the de minimis modification requirement, which ensures that licensees can amend their registrations and not lose their

first-in-time status for their registered links, as long as their modifications are consistent with the adopted requirements. The adopted de minimis standard for modifications will be a particular boon to small entities, who may already have limited resources and would likely be disproportionately burdened if their need to repair or replace installed and operating equipment did not change the potential risk of a link causing or receiving interference, yet still caused them to ''lose their place in line.'' The Commission considered, but declined to adopt, proposals from commenters that the Commission determined were beyond a de minimis modification, such as those that would change the interference landscape.

106. The Commission also considered but rejected arguments requiring construction certifications be filed in the Universal Licensing System (ULS). The Commission instead focused on targeted changes to improve efficiency in high-capacity bands critical to accelerating the deployment of 5G services nationwide. The Commission expects its approach of opting to modify existing rules as minimally as possible instead of creating numerous new and/or additional rules, should minimize the economic impact for small entities and promote greater use of the band among all providers.

107. To the extent the cost of complying with these burdens is relatively greater for smaller entities than for large ones, the Commission believes equal application of the rules is necessary to effectuate the purpose of the Communications Act, namely, to further the efficient use of spectrum and to prevent spectrum warehousing. Likewise, equal application of compliance with the Commission's technical rules and coordination requirements for all licensees is necessary for the furtherance of the Commission's goals of protecting the public while facilitating the provision of interference-free services by licensees.

IV. Ordering Clauses

108. *It is ordered* that, pursuant to sections 4(i), 301, 302, 303(c), 303(f), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301, 302a, 303(c), 303(f), and 303(r), that this *Report and Order is adopted* as set forth above.

109. *It is further ordered* that the amendments of the Commission's rules as set forth in Final Rules *are adopted,* effective thirty days from the date of publication in the **Federal Register**, except for: (1) section 101.147(z)(3), which will take effect on September 1, 2024; and (2) sections 101.63(b), 101.1523(a), (e), and 101.1528 (a)(11), (b)(10), and (d), which contain new or modified information collection requirements that requires approval by the Office of Management and Budget under the Paperwork Reduction Act and will take effect after the Commission publishes a notice in the **Federal Register** announcing such approval and the relevant effective date(s).

110. *It is further ordered* that the Commission's Office of the Secretary, *shall send* a copy of this *Report and Order,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

111. *It is further ordered* that the Office of the Managing Director, Performance and Program Management, *shall send* a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A).

List of Subjects

47 CFR Part 0

Authority delegations (Government agencies); Classified information; Communications; Communications common carriers.

47 CFR Part 101

Administrative practice and procedure; Communications; Communications equipment; Radio; Reporting and recordkeeping requirements; Satellites; Telecommunications.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of Secretary.

Final Rules

For the reasons discussed in preamble, the Federal Communications Commission amends 47 CFR parts 0 and 101 as follows:

PART 0—COMMISSION ORGANIZATION

■ 1. The authority citation for part 0 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, and 409, unless otherwise noted.

■ 2. Effective May 29, 2024, § 0.241 is amended by adding paragraph (l) to read as follows:

§ 0.241 Authority delegated.

* * * * *

(l) The Chief of the Office of Engineering and Technology is delegated authority, jointly with the Chief of the Wireless Telecommunications Bureau, to establish and administer a process for review of proposed technologies for point-to-endpoint-in-motion communications to aircraft and ships in the 71–76 GHz and 81–86 GHz bands to ensure compliance with the requirements adopted by the Commission.

■ 3. Effective May 29, 2024, § 0.331 is amended by revising the introductory text and adding paragraph (g) to read as follows:

§ 0.331 Authority delegated.

The Chief, Wireless Telecommunications Bureau, is hereby delegated authority to perform all functions of the Bureau, described in § 0.131, subject to the exceptions and limitations in paragraphs (a) through (d) of this section, and also the functions described in paragraphs (e) through (g) of this section.

* * * * *

(g) *Authority concerning review of certain proposed technologies in the 71–76 and 81–86 GHz bands.* The Chief of the Wireless Telecommunications Bureau is delegated authority, jointly with the Chief of the Office of Engineering and Technology, to establish and administer a process for review of proposed technologies for point-to-endpoint-in-motion communications to aircraft and ships in the 71–76 GHz and 81–86 GHz bands to ensure compliance with the requirements adopted by the Commission. The Chief of the Wireless Telecommunications Bureau is also delegated authority to establish and administer specific procedures to be followed for coordinating and registering aeronautical and maritime stations and their associated transmissions.

PART 101—FIXED MICROWAVE SERVICES

■ 4. The authority citation for part 101 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

■ 5. Delayed indefinitely, § 101.63 is amended by revising paragraph (b) to read as follows:

§ 101.63 Period of construction; certification of completion of construction.

* * * * *

(b) For the 70 GHz, 80 GHz, and 90 GHz bands, the 12-month construction period will commence on the date of each registration of each individual link; adding links will not change the overall renewal period of the license. For each individual link, a licensee who

commences operations within the construction period must certify in the third-party link registration database, such as those established pursuant to section 101.1523, that the link is constructed and operational. The certification must be filed within 15 days of the expiration of the applicable construction period for each individual link. If operations have begun using some, but not all, of the authorized transmitters, the certification must show to which specific transmitters it applies. After 15 days of the end of the construction period for each individual link, if the licensee has not certified that the link is constructed and operational, the third-party database managers will delete the registration from the database.

* * * * *

■ 6. Effective May 29, 2024, § 101.111 is amended by adding paragraph (a)(2)(vi) to read as follows:

§ 101.111 Emission limitations.

(a) * * *

(2) * * *

(vi)(A) In order to protect Federal Earth Exploration-Satellite Service (passive), aeronautical and maritime endpoints in motion operating in the 70 and 80 GHz bands must comply with the following limits:

(*1*) Ground-to-air transmissions shall not exceed an unwanted emission level of –38.5 dBW per 100 MHz in any portion of the 86–92 GHz passive band;

(*2*) Air-to-air, ship-to-shore, and aerostat-to-shore transmissions shall not exceed an unwanted emission level of −29.7 dBW per 100 MHz in any portion of the 86–92 GHz passive band.

(B) Any changes to system specifications, operations, or deployment scenarios for aeronautical or maritime end points in motion shall be pre-coordinated with NTIA and affected Federal agencies, and licensees of aeronautical or maritime end points in motion must cooperate fully with any updates to the required unwanted emission limits that may result from these modifications.

* * * * *

■ 7. Effective May 29, 2024, § 101.113 is amended in the table in paragraph (a) by revising entries for ''71,000 to 76,000'' and ''81,000 to 86,000'' to read as follows:

§ 101.113 Transmitter power limitations.

(a) * * *

Frequency band (MHz)	Maximum allowable EIRP [1] [2]	
	Fixed [1] [2] (dBW)	Mobile (dBW)
* * * * *	*	*
71,000–76,000 [13] [14]	+55	+55
81,000–86,000 [13] [14]	+55	+55
* * * * *	*	*

[1] Per polarization.

[2] For multiple address operations, see *§ 101.147*. Remote alarm units that are part of a multiple address central station projection system are authorized a maximum of 2 watts.

* * * * *

[13] The maximum transmitter power is limited to 3 watts (5 dBW) unless a proportional reduction in maximum authorized EIRP is required under *§ 101.115*. The maximum transmitter power spectral density is limited to 150 mW per 100 MHz.

[14] The EIRP limit for fixed and mobile stations used for aeronautical and maritime endpoints in motion is 57 dBW.

* * * * *

■ 8. Effective May 29, 2024, § 101.115 is amended in the table in paragraph (b)(2) by revising the entries for ''71,000 to 76,000 (co-polar)'', ''71,000 to 76,000 (cross-polar)'', ''81,000 to 86,000 (co-polar)'', and ''81,000 to 86,000 (cross-polar)'' to read as follows:

§ 101.115 Directional antennas.

* * * * *

(b) * * *

(2) * * *

ANTENNA STANDARDS

Frequency (MHz)	Category	Maximum beamwidth to 3 dB points [1] (included angle in degrees)	Minimum antenna gain (dBi)	Minimum radiation suppression to angle in degrees from centerline of main beam in decibels						
				5° to 10°	10° to 15°	15° to 20°	20° to 30°	30° to 100°	100° to 140°	140° to 180°
*	*	*		*	*	*	*	*		
71,000 to 76,000 (co-polar) [14]	N/A	2.2	38	22	28	32	35	37	55	55
71,000 to 76,000 (cross-polar) [14]	N/A	2.2	38	35	35	40	42	47	55	55
81,000 to 86,000 (co-polar) [14]	N/A	2.2	38	22	28	32	35	37	55	55
81,000 to 86,000 (cross-polar) [14]	N/A	2.2	38	35	35	40	42	47	55	55
*	*	*		*	*	*	*	*		

[1] If a licensee chooses to show compliance using maximum beamwidth to 3 dB points, the beamwidth limit shall apply in both the azimuth and the elevation planes.

* * * * *

[14] Antenna gain less than 50 dBi (but greater than or equal to 38 dBi) is permitted only with a proportional reduction in maximum authorized EIRP in a ratio of 2 dB of power per 1 dB of gain, so that the maximum allowable EIRP (in dBW) for antennas of less than 50 dBi gain becomes +55–2(50–G), where G is the antenna gain in dBi. In addition, antennas in these bands must meet the following additional standard for minimum radiation suppression: At angles of less than 5 degrees from the centerline of main beam, cross-polar discrimination must be at least 21 dB.

* * * * *

■ 9. Effective September 1, 2024, § 101.147 is amended by adding paragraph (z)(3) to read as follows:

§ 101.147 Frequency assignments.

* * * * *

(z) * * *

(3) The following channel plans apply to the 71,000–76,000 MHz and 81,000–86,000 MHz bands:

(i) *250 MHz authorized bandwidth.*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
71250	81250
71500	81500
71750	81750
72000	82000
72250	82250
72500	82500
72750	82750
73000	83000
73250	83250
73500	83500
73750	83750
74000	84000
74250	84250
74500	84500
74750	84750
75000	85000
75250	85250
75500	85500
75750	85750

(ii) *500 MHz authorized bandwidth.*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
71375	81375
71875	81875
72375	82375
72875	82875
73375	83375
73875	83875
74375	84375
74875	84875
75375	85375

(iii) *750 MHz authorized bandwidth.*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
71500	81500
72250	82250
73000	83000
73750	83750
74500	84500
75250	85250

(iv) *1 GHz authorized bandwidth.*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
71625	81625
72625	82625
74125	84125
75125	85125

(v) *1.25 GHz authorized bandwidth.*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
71750	81750
73000	83000
74250	84250

(vi) *1.5 GHz authorized bandwidth.*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
71875	81875
74375	84375

(vii) *1.75 GHz authorized bandwidth.*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
72000	82000
74500	84500

(viii) *2.0 GHz authorized bandwidth.*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
72125	82125
74625	84625

(ix) *2.25 GHz authorized bandwidth.*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
72250	82250
74750	84750

(x) *2.5 GHz authorized bandwidth.*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
72375	82375

(xi) *2.75 GHz authorized bandwidth.*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
72500	82500

(xii) *3 GHz authorized bandwidth.*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
72625	82625

(xiii) *3.25 GHz authorized bandwidth.*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
72750	82750

(xiv) *3.5 GHz authorized bandwidth.*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
72875	82875

(xv) *3.75 GHz authorized bandwidth.*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
73000	83000

(xvi) *4 GHz authorized bandwidth.*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
73125	83125

(xvii) *4.25 GHz authorized bandwidth.*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
73250	83250

(xviii) *4.5 GHz authorized bandwidth.*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
73375	83375

■ 10. Effective May 29, 2024, § 101.1501 is revised to read as follows:

§ 101.1501 Service areas.

The 70/80/90 GHz bands are licensed on the basis of non-exclusive nationwide licenses. There is no limit to the number of non-exclusive nationwide licenses that may be granted for these bands, and these licenses will serve as a prerequisite for registering individual point-to-point links. In the 71–76 GHz and 81–86 GHz bands, nationwide non-exclusive licenses also serve as a blanket license for air-to-air and ship-to-ship operations, and as a prerequisite to register ground-to-air (GTA) stations and to operate associated GTA and air-to-ground (ATG) transmissions; and as a prerequisite to register shore stations and aerostat relay stations and to operate associated ship-to-shore, shore-to-ship, shore-to-aerostat, aerostat-to-

ship, and aerostat-to-shore transmissions.

■ 11. Effective May 29, 2024, § 101.1507 is revised to read as follows:

§ 101.1507 Permissible operations.

Licensees may use the 70 GHz, 80 GHz, and 90 GHz bands for any point-to-point, non-broadcast service. Licensees may use the 70 GHz and 80 GHz bands for aeronautical and maritime service as set forth in § 101.1528. The segments may be unpaired or paired, but pairing will be permitted only in a standardized manner (*e.g.,* 71–72.25 GHz may be paired only with 81–82.25 GHz, and so on). The segments may be aggregated without limit.

■ 12. Delayed indefinitely, § 101.1523 is amended by revising paragraph (a) and adding paragraph (e) to read as follows:

§ 101.1523 Sharing and coordination among non-government licensees and between non-government and government services.

(a) Each individual point-to-point link must be registered in a third-party database. Registration of aeronautical ground stations, maritime shore stations, and aerostats for operation of aeronautical or maritime links to end points in motion in the 71–76 GHz and 81–86 GHz bands will be in a third-party database after the Wireless Telecommunications Bureau announces by public notice the details of the implementation of a third-party database for such links to endpoints in motion.

* * * * *

(e) A licensee must successfully complete the requirements of this section prior to modifying the technical parameters of a registered link. Except for de minimis modifications, any change to the technical data on a link registration will result in a new interference protection date. A modification to link registration in the 71–76 GHz and 81–86 GHz bands is de minimis, and the registration will retain its existing interference protection date and not lose its existing first-in-time rights, if the modification meets all of the following criteria:

(1) The licensee certifies that the modification is necessary to repair or replace equipment specified in the registration that was constructed and operating under the registration, and;

(2) The modification does not increase the EIRP of a digital system or change the EIRP of an analog system;

(3) The modification does not increase the channel bandwidth;

(4) The modification does not change the power density;

(5) The modification does not increase the receiver sensitivity;

(6) The modification does not increase the antenna beamwidth;

(7) The modification does not increase the antenna gain, except where there is a corresponding reduction transmitter power so that there is no increase in EIRP;

(8) The modification does not involve a change to antenna with less off-axis attenuation at any angle; and

(9) The modification does not change any other technical parameters not mentioned in paragraphs (e)(1) through (e)(8) of this section.

■ 13. Effective May 29, 2024, § 101.1528 is added to subpart Q to read as follows:

§ 101.1528 Requirements for aeronautical and maritime links to, from, or between endpoints in motion.

(a) *Requirements for aeronautical ground stations and endpoints in motion.* (1) Air-to-ground transmissions are permitted only in the 71–76 GHz band.

(2) Ground-to-air transmissions are permitted only in the 81–86 GHz band.

(3) Air-to-air transmissions are permitted only between aircraft that are separated by a minimum slant path distance of 50 km.

(4) Transmissions are only permitted to and from aircraft at altitudes between 10,000 ft and 50,000 ft.

(5) Ground stations must operate with a minimum elevation angle of 5 degrees and a maximum elevation angle of 45 degrees.

(6) Ground stations must be located at least 10 km from any existing Non-Federal FSS earth station or Federal facility listed in table 4 to paragraph (c)(2) of this section, absent a coordination agreement with the FSS operator.

(7) Ground stations must be located at least 150 km from the specific Federal facilities and not within the areas listed in table 3 to paragraph (c)(1) of this section, absent a coordination agreement with the Federal operator.

(8) Ground stations must be located at least 10 km from any existing Federal or non-Federal fixed station receiver, absent a coordination agreement with the fixed station operator.

(9) Air-to-air transmissions are permitted in 81–86 GHz subject to the following limitations;

(i) EIRP signal levels radiated along a line between the airborne transmitter and the latitude and longitude of the observatories in table 3 to paragraph (c)(1) of this section, which must be maintained as the airborne transmitter moves, cannot exceed the levels shown in table 1 to this paragraph (a)(9)(i). Within the range of 150 km and 375 km, the maximum allowable EIRP levels for horizontal distances not listed in table below may be approximated by linear interpolation.

TABLE 1 TO PARAGRAPH (a)(9)(i)—LIST OF MAXIMUM ALLOWABLE EIRP LEVELS, IN dBW

Frequency (GHz)	Horizontal distance (km)									
	150	175	200	225	250	275	300	325	350	375
81	−11.2	−8.8	−6.5	−4.2	−1.5	1.1	3.9	6.7	10	13.5
82	−11.5	−9.2	−6.9	−4.6	−2	0.5	3.2	6	9.2	12.6
83	−11.7	−9.5	−7.3	−5	−2.4	0	2.7	5.4	8.6	11.9
84	−11.9	−9.7	−7.5	−5.3	−2.8	−0.4	2.3	4.9	8	11.3
85	−12.1	−9.9	−7.8	−5.5	−3	−0.7	1.9	4.5	7.6	10.8
86	−12.2	−10	−7.9	−5.7	−3.3	−0.9	1.7	4.2	7.3	10.5

(ii) A licensee of aeronautical end points in motion must have a capability to target specific areas which can be added to a ''block list'' as part of a dynamic link management system. If air-to-air transmission within the main beam of the radio astronomy receiver cannot be avoided, air-to-air transmissions within the radio horizon of the radio astronomy site (as specified in table 2 to this paragraph (a)(9)(ii)) should not occur.

TABLE 2 TO PARAGRAPH (a)(9)(ii)—APPROXIMATE RADIO HORIZON, IN HORIZONTAL DISTANCE

[km]

Altitude (m)	Approximate radio horizon (km) (horizontal distance)
10,360	375
8,000	315
6,000	260
5,000	220
4,000	180
3,000	125

(iii) The list of radio astronomy sites may be periodically updated by the NTIA and the FCC. This rule may be superseded by a coordination agreement between the licensee and NSF, in which case the coordination agreement will specify the technical restrictions.

(10) Air-to-air transmissions in the 71–76 GHz band are subject to the following restrictions:

(i) EIRP signal levels shall be limited to 20 dBW/1000 MHz towards each military installation listed in table 4 to paragraph (c)(2) that is within 375 km of the airborne transmitter. This 20 dBW/1000 MHz EIRP applies to the power radiated along a line between the airborne transmitter and the latitude and longitude of the military installations in table 4 to paragraph (c)(2) of this section and must be maintained as the airborne transmitter moves. An EIRP of 57 dBW/1000 MHz is allowed in other directions. The list of military installations in table 4 to paragraph (c)(2)of this section may be periodically updated by the NTIA and the FCC. This rule may be superseded by a coordination agreement between the licensee and the Department of Defense (DoD), in which case the coordination agreement will specify the technical restrictions and allow the licensee and DoD to update the list of protected installations in the agreement. The locations of all aeronautical end-point-in-motion ground stations will be provided to NTIA and DoD as part of the coordination process.

(ii) A licensee of aeronautical end points in motion must have a capability to target specific areas which can be added to a ''block list'' as part of a dynamic link management system. If air-to-air transmission within the main beam of the radio astronomy receivers associated with the observatories in table 3 to paragraph (c)(1) of this section cannot be avoided, air-to-air transmissions within the radio horizon of the radio astronomy site (as specified in table 2 to paragraph (a)(9)(ii) of this section) should not occur.

(iii) The list of radio astronomy sites may be periodically updated by the NTIA and the FCC. This rule may be superseded by a coordination agreement between the licensee and NSF, in which case the coordination agreement will specify the technical restrictions.

(b) *Requirements for maritime shore stations, aerostats, and endpoints in motion.* (1) Ship-to-shore transmissions are only permitted in the 81–86 GHz band.

(2) Shore-to-ship transmissions are only permitted in the 71–76 GHz band.

(3) Shore-to-aerostat transmissions are only permitted in the 71–76 GHz band.

(4) Aerostat-to-ship transmissions are only permitted in the 71–76GHz band.

(5) Aerostat-to-shore transmissions are only permitted in the 81–86GHz band.

(6) Aerostat must not operate above an altitude limit of 1000 ft.

(7) Ship-to-ship communications are limited to ships located more than 30 km offshore, or closer only where the main beam of the transmit antenna is oriented at least 15 degrees away from any point on the shore.

(8) Ship stations and aerostat stations must only operate when there is a minimum separation of 150 km to the specific Federal facilities and not within the areas listed in table 3 to paragraph (c)(1) of this section, absent a coordination agreement with the Federal operator.

(9) Shore-to-ship and ship-to-shore transmission must only occur between stations that are located at least 10 km from the Federal military installations listed in table 4 to paragraph (c)(2) of this section, absent a coordination agreement with the Federal operator.

(c) *Protected Federal sites.* (1) RAS and VLBA sites:

TABLE 3 TO PARAGRAPH (c)(1)

RAS station name	North latitude	West longitude
Arizona Radio Observatory (ARO) 12-meter	31°57′11.9″	111°36′53.6″
Green Bank Observatory	38°25′59″	79°50′23″
Very Large Array (VLA), Socorro, NM	34°04′44″	107°37′06″
Owens Valley Radio Observatory (OVRO), Big Pine, CA	37°14′02″	118°16′55″
Haystack Observatory, Westford, MA	42°37′24″	071°29′18″
National Radio Astronomy Observatory, Very Long Baseline Array Stations:		
Brewster, WA	48°07′52″	119°41′00″
Fort Davis, TX	30°38′06″	103°56′41″
Hancock, NH	42°56′01″	71°59′12″
Kitt Peak, AZ	31°57′23″	111°36′45″
Los Alamos, NM	35°46′30″	106°14′44″
Mauna Kea, HI	19°48′05″	155°27′20″
North Liberty, IA	41°46′17″	91°34′27″
Owens Valley, CA	37°13′54″	118°16′37″
Pie Town, NM	34°18′04″	108°07′09″
Saint Croix, VI	17°45′24″	64°35′01″
National Radio Quiet Zone	Rectangular area between latitudes 37°30′ N and 39°15′ N, and longitudes 78°30′ W and 80°30′ W.	

TABLE 3 TO PARAGRAPH (c)(1)—Continued

RAS station name	North latitude	West longitude
Next-generation Very Large Array (ngVLA)	Rectangular area between latitudes 31°22′1.9″ N and 34°23′10″ N, and longitudes 109°1′53.4″ W and 103°4′39″ W.	

(2) Military installations:

TABLE 4 TO PARAGRAPH (c)(2)

Military installation	Latitude	Longitude
Redstone Arsenal, AL	34°41′42″ N	086°39′04″ W
Fort Huachuca, AZ	31°33′18″ N	110°20′59″ W
Yuma Proving Ground, AZ	33°01′02″ N	114°15′05″ W
Beale AFB, CA	39°06′41″ N	121°21′36″ W
Camp Parks Reserve Forces Training Area, CA	34°43′00″ N	121°54′08″ W
China Lake Naval Air Weapons Station, CA	35°41′05″ N	117°41′19″ W
Edwards AFB, CA	34°54′58″ N	117°56′07″ W
Fort Irwin, CA	35°16′22″ N	116°41′05″ W
Marine Corps Air Ground Combat Center, CA	34°13′54″ N	116°03′42″ W
Buckley AFB, CO	39°42′36″ N	104°45′29″ W
Schriever AFB, CO	38°48′12″ N	104°31′32″ W
Fort Gordon, GA	33°25′14″ N	082°09′09″ W
Naval Satellite Operations Center, GU	13°34′55″ N	144°50′50″ E
Naval Computer and Telecomm Area Master Station, Pacific, HI	21°31′16″ N	157°59′57″ W
Fort Detrick, MD	39°26′08″ N	077°25′38″ W
Nellis AFB, NV	36°14′29″ N	115°03′03″ W
Nevada Test Site, NV	38°33′41″ N	116°42′30″ W
Tonapah Test Range Airfield, NV	37°47′56″ N	116°46′51″ W
Cannon AFB, NM	34°23′23″ N	103°19′06″ W
White Sands Missile Range, NM	32°56′38″ N	106°25′11'' W
Dyess AFB, TX	31°10′10″ N	099°41′01″ W
Fort Bliss, TX	31°48′45″ N	106°25′17″ W
Fort Sam Houston, TX	29°26′34″ N	098°26′33″ W
Goodfellow AFB, TX	31°26′05″ N	100°24′11″ W
Kelly AFB, TX	29°22′51″ N	098°34′40″ W
Utah Test and Training Range, UT	40°12′00″ N	112°54′00″ W
Fort Belvoir, VA	38°43′08″ N	077°09′15″ W
Naval Satellite Operations Center, VA	36°34′00″ N	076°14′00″ W

■ 14. Delayed indefinitely, § 101.1528 is amended by adding paragraphs (a)(11), (b)(10), and (d) to read as follows:

§ 101.1528 Requirements for aeronautical and maritime links to, from, or between endpoints in motion.

(a) * * *

(11) Aeronautical operators must coordinate with Federal operators and register ground-to-air stations, and must not operate such facilities or any associated air-to-ground transmissions until registration has successfully been completed.

(b) * * *

(10) Maritime operators must coordinate with Federal operators and register shore and aerostat transmitters, and must not operate such facilities or any associated ship-to-shore transmissions until registration has successfully been completed.

* * * * *

(d) *Review of certain proposed technologies in the 71–76 and 81–86 GHz bands.* Prior to registration of any aeronautical or maritime links—to, from, or between endpoints in motion—each licensee must demonstrate, in accordance with the process to be established by the Wireless Telecommunications Bureau and Office of Engineering and Technology, *see* 47 CFR 0.241(l), 0.331(g) of this title, that its technologies for point-to-endpoint-in-motion communications to aircraft and ships are capable of meeting specific technical and operating requirements set forth in this section.

[FR Doc. 2024–05390 Filed 4–26–24; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 192, and 195

[Docket No. PHMSA–2016–0002; Amdt. Nos. 192–135, 195–107]

RIN 2137–AF13

Pipeline Safety: Periodic Updates of Regulatory References to Technical Standards and Miscellaneous Amendments

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Final rule.

SUMMARY: PHMSA is amending the Federal pipeline safety regulations (PSRs) to incorporate by reference all or parts of more than 20 new or updated voluntary, consensus industry technical

standards. This action allows pipeline operators to use current technologies, improved materials, and updated industry and management practices. Additionally, PHMSA is clarifying certain regulatory provisions and making several editorial corrections.

DATES: The effective date of this final rule is June 28, 2024. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of June 28, 2024.

FOR FURTHER INFORMATION CONTACT:

Technical Information: Rod Seeley by phone at 281 513–1741 or by email at *rodrick.m.seeley@dot.gov*.

Regulatory Information: Brianna Wilson by phone at 771–215–0969 or by email at *brianna.wilson@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. Purpose of This Rule

This final rule incorporates by reference more than 20 new or updated voluntary, consensus industry technical standards (updated industry standards) within the PSRs (49 Code of Federal Regulation (CFR) parts 190–199). These updated standards will maintain or improve public safety and environmental protection, prevent regulatory confusion, reduce compliance burdens on stakeholders, and satisfy a mandate in the National Technology Transfer and Advancement Act (NTTAA) of 1995 (15 United States Code (U.S.C.) 272 (note)) directing Federal agencies to, ''when practical and consistent with applicable laws, use technical standards developed by voluntary consensus standard bodies instead of government-developed technical standards.''

PHMSA incorporates more than 80 industry standards by reference into the PSRs; however, many standards become outdated over time as new editions become available. By updating these standards, PHMSA ensures better alignment of the PSRs with the latest innovations in operational and management practices, materials, testing, and technological advancements; enhances compliance by avoiding conflict between different versions of the same industry standards; and facilitates safety-focused allocation of resources by pipeline operators. PHMSA consequently concludes that each of the updated standards in this final rule will either maintain or enhance the protection of public safety and the environment—including avoidance of greenhouse gas emissions in the form of methane releases from gas pipelines. PHMSA further concludes that each of the final rule's updated standards are technically feasible, reasonable, cost-effective, and practicable because of their respective anticipated commercial, public safety, and environmental benefits; and because the benefits better support PHMSA's safety and environmental priorities compared to alternatives, thereby justifying any associated compliance costs.

B. History of Incorporation by Reference

The Office of Management and Budget (OMB) sets the policy for Federal use and development of voluntary, consensus industry technical standards in OMB Circular A–119 (''Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities'').[1] Material that is incorporated by reference (IBR) is treated as if it were published in full in the **Federal Register** and the PSRs. Therefore, like any other rule issued in the **Federal Register**, a voluntary, consensus industry technical standard that has been incorporated by reference has the full force and effect of the law. As specified in 1 CFR 51.1(c), the Director of the Federal Register has the authority to determine whether material that is proposed for IBR serves the public interest. If a provision of an incorporated standard conflicts with a regulation, the regulation takes precedence unless the regulation expressly provides otherwise.

PHMSA has incorporated more than 80 industry standards by reference into the PSRs. The lists of publications that PHMSA has incorporated into parts 192 (which regulates the transportation of gas by pipeline) and 195 (which regulates the transportation of hazardous liquids and carbon dioxide by pipeline) are found in §§ 192.7 and 195.3, respectively. Previous rules that incorporated updated industry standards by reference were published on May 24, 1996 (61 FR 26121); February 17, 1998 (63 FR 7721); June 14, 2004 (69 FR 32886); June 9, 2006 (71 FR 33402); February 1, 2007 (72 FR 4655 (correction)); August 11, 2010 (75 FR 48593); January 5, 2015 (80 FR 168); and August 6, 2015 (80 FR 46847 (correction)).[2]

The voluntary, consensus industry technical standards related to pipeline facilities that are incorporated within the PSRs are developed or adopted by domestic and international standard-development organizations (SDOs). Approximately every two to five years, these organizations use agreed-upon procedures to update and revise their published standards to reflect the latest developments in technology, testing, and operational practices. New or updated industry standards often incorporate new technologies, materials, management practices, and other innovations that can improve the physical integrity, and the safe and environmentally protective operation of pipeline facilities.

PHMSA employees participate in meetings held by 25 domestic SDOs that address the design, construction, maintenance, inspection, operation, and repair of pipeline facilities. PHMSA's subject-matter experts represent the Agency in all dealings with the SDOs; participate in discussions and technical debates; register opinions; and vote in accordance with the procedures of the SDOs at each stage of the standards-development process (unless prohibited from doing so by law). PHMSA participates in this process to ensure the Agency's safety and environmental priorities are considered, and to avoid the need to develop separate, government-unique standards.

PHMSA also regularly reviews updated editions of currently referenced industry standards and amends the PSRs to partially or fully incorporate updated standards that will enhance or maintain pipeline and environmental safety. This ensures that the PSRs incorporate and facilitate the use of the latest technologies, materials, management and operational practices, testing, and other innovations. The adoption of more recent editions of industry standards also prevents conflicts between the standards referenced in the PSRs and updated versions of the same standards with which operators and suppliers may voluntarily comply, thereby (1) avoiding the confusion and expense associated with ensuring compliance with competing versions of the same standard; and (2) improving compliance and allowing the allocation of more operator resources toward safety and

[1] OMB, Circular No. A–119 (Feb. 10, 1998), available at: *https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-119-1.pdf.*

[2] PHMSA is also pursuing another periodic standards update rulemaking (under RIN2137–AF48) in parallel with issuance of this final rule. See PHMSA, ''Pipeline Safety: Periodic Standards Update II—Proposed Rule,'' 87 FR 52713 (Aug. 29, 2022).

environmental protection. PHMSA reviewed the updated standards discussed in this final rule and finds them appropriate for IBR within the PSRs.

C. Availability of Materials to Interested Parties

Pursuant to section 24 of the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (Pub. L. 112–90, 49 U.S.C. 60102(p), as amended), ''the Secretary may not issue a regulation pursuant to this chapter that incorporates any documents or portions thereof unless the documents or portions thereof are made available to the public, free of charge.'' On November 7, 2014, the Office of the Federal Register issued a final rule that revised 1 CFR 51.5 to require every Federal agency to ''[d]iscuss, in the preamble of the proposed rule, the ways that the materials it proposes to incorporate by reference are reasonably available to interested parties or how it worked to make those materials reasonably available to interested parties[.]'' [3]

PHMSA consequently has negotiated agreements to make viewable copies of the standards available to the public at no cost with all but two of the SDOs whose updated standards PHMSA now incorporates by reference in the PSRs in this final rule. The organizations that agreed to the public access requirements of the statutory mandate discussed above are: the American Petroleum Institute (API), the American Gas Association (AGA), ASTM International (formerly the American Society for Testing and Materials), the Gas Technology Institute (GTI), the Manufacturers Standardization Society of the Valve and Fittings Industry, Inc. (MSS), the Association for Materials Protection and Performance (AMPP), the National Fire Protection Association (NFPA), and the Plastics Pipe Institute (PPI).[4] Each organization's mailing address and website is listed in 49 CFR parts 192 and 195. As of the date of publication of this final rule, PHMSA was not able to reach a general agreement with the American Society of Mechanical Engineers (ASME) to make the standards readily available online as ASME relies heavily on the revenue the standards generate.[5] Individuals and organizations may temporarily access the ASME standards incorporated by reference in this final rule, as well as any other standard in this final rule that is not otherwise available from the relevant SDO, by contacting PHMSA at the following email address: *phmsaphpstandards@dot.gov.* Such requests should include a phone number, physical address, and an email address.

The API standards incorporated in this final rule are available from the following website: *https://publications.api.org/IBR-Documents-Under-Consideration.aspx.*

The ASTM standards incorporated in this final rule are available from the following website: *https://www.astm.org/products-services/reading-room.html.*

The MSS standards incorporated in this final rule are available from the following website: *https://ibr.ansi.org/standards/mss.aspx.*

The AMPP: NACE standards incorporated in this final rule are available from the following website: *https://ibr.ansi.org/Standards/nace.aspx.*

Finally, the NFPA standards incorporated in this final rule are available from the following website: *https://www.nfpa.org/Codes-and-Standards/All-Codes-and-Standards/List-of-Codes-and-Standards.*

In addition, the ASME standards incorporated in this final rule are available by contacting PHMSA at the following email address: *phmsaphpstandards@dot.gov.*

Additional information regarding standards availability can be found at *https://www.phmsa.dot.gov/standards-rulemaking/pipeline/standards-incorporated-reference.*

II. Notice of Proposed Rulemaking

On January 15, 2021, PHMSA published a notice of proposed rulemaking to incorporate by reference new or updated editions of voluntary, consensus industry technical standards into the PSRs.[6] PHMSA proposed to incorporate by reference all or parts of more than 20 updated industry standards and make editorial corrections to certain regulations. The NPRM described with respect to each proposed industry standard (1) the provisions within the PSR in which it is incorporated by reference; (2) how each such standard contributed to pipeline safety or environmental protection; and (3) if the standard was an update to a standard previously incorporated by reference in the PSR, any material changes between the previous version of that industry standard and the updated version proposed for incorporation in the PSR. PHMSA requested comment from the public, state pipeline safety regulators, and other stakeholders, and considered this input when drafting the final version of this rule.

III. Pipeline Advisory Committee Meeting

On October 20 and 21, 2021, PHMSA discussed the NPRM with the Technical Pipeline Safety Standards Committee (also known as the Gas Pipeline Advisory Committee (GPAC)), and the Technical Hazardous Liquid Pipeline Safety Standards Committee (also known as the Liquid Pipeline Advisory Committee (LPAC)). These committees are statutorily mandated advisory committees that, respectively, advise PHMSA on proposed gas and hazardous liquid (including carbon dioxide) pipeline facility regulatory amendments and associated risk assessments.[7] These committees are comprised of equal representation from the government, industry, and the general public. The members of these committees review standards proposed in an NPRM for incorporation within the PSRs for cost-effectiveness, reasonableness, practicability, and technical feasibility, and provide recommendations that PHMSA considers in adopting this or any other final rule.

The Joint GPAC/LPAC Transcript from that meeting and all presentation materials are available both in the docket for the rulemaking and on the web page that PHMSA created for the meeting.[8] Additional information

[3] Office of the Federal Register, ''Incorporation by Reference—Final Rule,'' 79 FR 66267 (Nov. 7, 2014).

[4] ASTM updates some of its more widely used standards every year, and sometimes SDOs publish multiple editions of a standard in a given year. NACE International and the Society for Protective Coatings merged to form AMPP, which is why NACE standards are listed under AMPP.

[5] At the joint October 2021 GPAC/LPAC meeting, the committees raised concerns regarding the availability of ASME standards. The committees recommended PHMSA work with the pipeline advisory committees and other pipeline safety representatives to establish an agreement with ASME to provide viewable copies of the standards incorporated by reference in the PSRs permanently available on the internet for free to the general public. Joint Gas and Liquid Pipeline Advisory Committee Meeting Transcript, Docket No. PHMSA–2021–0069–0005 at 86:2–11, (Oct. 21, 2021) (Joint GPAC/LPAC Transcript).

[6] PHMSA, ''Pipeline Safety: Periodic Updates of Regulatory References to Technical Standards and Miscellaneous Amendments—Proposed Rule,'' 86 FR 3938 (Jan. 15, 2021) (NPRM).

[7] PHMSA established these committees in accordance with its enabling statute (49 U.S.C. 60115) and the Federal Advisory Committee Act (5 U.S.C. App. 2, as amended), its implementing regulations (41 CFR parts 101–106), and DOT policies (Department of Transportation (DOT) Order 1120.3C).

[8] Gas Pipeline Advisory Committee (GPAC) and Liquid Pipeline Advisory Committee (LPAC) Meeting (Oct. 21, 2021), available at: *https://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=156.*

regarding the GPAC and LPAC recommendations on the NPRM may be found in section IV below.

IV. Summary of Comments, GPAC/LPAC Discussion, and PHMSA Response

On January 15, 2021, PHMSA published the NPRM proposing to incorporate by reference all or parts of more than 20 new or revised consensus standards and to make several miscellaneous editorial or technical amendments.

The comment period for the NPRM ended on March 16, 2021. PHMSA received 10 comments on the NPRM, including five late-filed comments.[9] Pursuant to 49 CFR 190.323, PHMSA considered late-filed comments along with timely-received comments, as PHMSA's consideration of those late-filed was practicable in that their review did not add additional expense or delay to PHMSA's issuance of this final rule. The commenters on the NPRM who filed before the joint GPAC/LPAC meeting are as follows: Aaron Adamczyk; the Alyeska Pipeline Service Company; an anonymous commenter; the American Fuel & Petrochemical Manufacturers; the American Petroleum Institute; ASME; the National Propane Gas Association; and a joint comment from a number of organizations, hereafter referred to as ''the Associations'' (the American Petroleum Institute, Interstate Natural Gas Association of America (INGAA), GPA Midstream Association, American Gas Association, and American Public Gas Association). The commenters on the NPRM who filed after the joint GPAC/LPAC meeting are as follows: a joint comment from the American Gas Association, American Petroleum Institute, American Public Gas Association, GPA Midstream Association, and Interstate Natural Gas Association of America (collectively ''AAAGI''), and a joint comment from Association of Oil Pipelines, American Petroleum Institute, and GPA Midstream Association (collectively ''AAG'').

PHMSA discusses below comments received from stakeholders (in written comments or during the GPAC/LPAC meeting) on a handful of specific industry standards and editorial and technical corrections proposed by the NPRM for incorporation in the PSRs. In connection with those and any other industry standards, technical corrections, and editorial corrections proposed in the NPRM, PHMSA incorporates by reference within this final rule its NPRM discussions of those proposed regulatory amendments—including but not limited to, its description in the NPRM of the content of any updated standards and corrections, and the safety and environmental benefits anticipated from those amendments. After evaluating its preliminary assessments of those proposed regulatory amendments against stakeholder comments discussed below, as well as pertinent discussion during and recommendations of the GPAC/LPAC, PHMSA concludes that adoption of its proposed regulatory amendments (as modified below) will better align the PSRs with the latest innovations in operational and management practices, materials, testing, and technological advancements; enhance compliance by avoiding conflict between different versions of the same industry standards; and facilitate safety-focused allocation of resources by pipeline operators. PHMSA therefore concludes that the each of the amendments to the PSR adopted in this final rule are technically feasible, cost-effective, reasonable, and practicable in light of their respective anticipated commercial, public safety, and environmental benefits that justify any associated compliance costs.

A. Stakeholder Comments and GPAC/LPAC Discussion

PHMSA received a number of comments generally supportive of its proposed IBR of updated industry standards and codification of technical and editorial corrections, with several comments calling on PHMSA to update the standards referenced in the PSRs more frequently than historical practice. A number of other comments PHMSA received on the NPRM or during the GPAC/LPAC meeting concerned retroactive application of the proposed updated industry standards; compliance timelines; minor editorial corrections to the PSR or the NPRM's proposed regulatory amendments; as well as some matters that were outside of the scope of this rulemaking.

PHMSA received one comment on the NPRM from the Alyeska Pipeline Service Company regarding the proposed IBR of an updated version of API Spec 6D.[10] API Spec 6D, whose 23rd edition is currently incorporated by reference in §§ 192.145 and 195.116, defines the design, manufacturing, assembly, testing, and documentation requirements for valves used in pipeline systems. The 24th edition of API Spec 6D includes several clarifications, safety improvements, and editorial revisions, including clarified bore tolerance specifications for full-opening valves; new procedures for installers when no minimum bore tolerances are listed in the specification; and updates specifying that calibration intervals should not exceed one year. Alyeska recommended that PHMSA should, when incorporating by reference the 24th edition of API Spec 6D, include allowances for legacy designs that incorporate flanged valves with intermediate design pressures since the 24th edition of API Spec 6D prohibits designing flanged valves with intermediate pressure ratings. Alyeska stated that that its own flange connections exceed ASME B16.47 [11]—but not API Spec 6D—because they ''us[e] special bolting dimensions as an extra safety measure not required.'' Because of this, they stated that PHMSA's safety concerns regarding installing lower-pressure-rated valves motivating its proposed IBR of the updated version of API Spec 6D would not apply to its pipeline facilities. PHMSA notes, however, that the updated version of API Spec 6D will not apply retroactively; it will apply only to the design, installation, or construction of valves as they are new, replaced, relocated, or otherwise changed.

Additionally, the Associations' joint comment requested that PHMSA continue to allow operators to install pipe that is compliant with the 45th edition of API Spec 5L until January 1, 2022, since the 46th edition of API Spec 5L PHMSA proposed to IBR in the NPRM is relatively recent and thus the supply chain is not yet fully stocked with the compliant materials.[12] API Spec 5L is the primary manufacturing specification for seamless and welded steel pipe used in gas, hazardous liquid, and carbon dioxide pipeline transportation systems. This comment also requested that PHMSA continue to allow operators to install flanges that are compliant with the 2019 edition of MSS SP–44 [13] until January 1, 2022. PHMSA

[9] Two of the five late-filed comments were submitted after the October 2022 joint GPAC/LPAC meeting. Comments in Response to the PHMSA Public Meeting, PHMSA–2021–0069–0006 (Nov. 16, 2021); Comments on the Oct. 2021 Joint Gas and Liquid Pipeline Advisory Committee Meeting, PHMSA–2021–0069–0008 (Nov. 22, 2021).

[10] API Specification 6D, ''Specification for Pipeline and Piping Valves,'' 24th edition (Aug. 2014) (API Spec 6D).

[11] ASME B16.47, ''Large Diameter Steel Flanges: NPS 26 through NPS 60, Metric/Inch Standard'' (2020).

[12] API Specification (Spec) 5L, ''Specification for Line Pipe,'' 45th edition (July 2013); API Specification (Spec) 5L, ''Specification for Line Pipe,'' 46th edition (Apr. 2018) (API Spec 5L).

[13] MSS SP–44–2019, Standard Practice, ''Steel Pipeline Flanges'' (Apr. 2020) (MSS SP–44).

notes that the date the Associations anticipate the supply chain will be stocked with compliant materials has passed; because this final rule is publishing nearly two years after the projected date, PHMSA understands that there is no need for a delayed compliance date unique to its adoption of an updated version of API Spec 5L.

PHMSA also received comments that were inapplicable for a variety of reasons. Some of those comments were inapplicable because they assumed potential application to existing pipeline facilities of updated voluntary industry standards that would be incorporated by reference within design, testing, or installation standards that are subject to the statutory retroactivity prohibition at 49 U.S.C. 60104(b). The retroactivity prohibition restricts the application of certain new standards to an existing pipeline facility unless that pipeline facility is new, replaced, relocated, or changed. Other comments were inapplicable because this final rule did not publish before alternative compliance dates proposed by the comments. Further, many of the comments that PHMSA received were outside of the scope of this rulemaking as defined by the proposals in the NPRM. For example, the Associations' joint comment requested that PHMSA incorporate by reference a number of updated voluntary, consensus industry technical standards not proposed in the NPRM, including the following: API Recommended Practice (RP) 1181 (to implement section 109 of the Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2020 (Pub. L. 116–260)); the second edition of API RP 80 (to enhance operators' understanding and compliance with safety requirements); Addendum 2 to the 12th edition of API Standard (Std.) 620 Errata 1 to the 13th edition of API Std. 650; and a more recent edition of API Std. 653.[14] Although PHMSA is considering incorporating these standards for inclusion in the future in a separate rulemaking after evaluation, it declines to adopt those standards in this rulemaking without providing the public an opportunity to review and comment upon those standards. One exception is PHMSA's incorporation of Errata 1 (January 2021) to the 13th edition of API Std. 650 since the errata only contains editorial changes. PHMSA is also incorporating errata to each of API Spec 6D (Errata 10, July 2021) and the 5th edition of API 2350 (Errata 1, April 2021) since they also only contain technical edits. PHMSA further notes that, pursuant to § 190.331, any interested person (including the Associations) may petition PHMSA to establish, amend, or repeal a substantive regulation, to include the IBR of updated voluntary industry standards.

The Associations' joint comment also asked PHMSA to correct an allegedly erroneous reference to API RP 1130 in § 195.3(b)(7).[15] The joint comment specified that the PSRs currently reference the third edition of API RP 1130 while the most recent edition of API RP 1130 is the first edition. PHMSA has reviewed the history of API RP 1130 and its incorporation into the PSRs and determined that the reference in § 195.3(b)(7) is correct. On January 5, 2015, PHMSA replaced the second edition of API 1130 (which had been issued in 2002) with the third edition of API RP 1130 (which had been issued in 2007). However, PHMSA notes that API subsequently in 2017 reaffirmed the 2007 version of API RP 1130 and re-characterized it as the first edition of API RP 1130. PHMSA will therefore retain the current reference to the third edition of API RP 1130.

Both the GPAC and LPAC discussions and voting were broadly supportive of the proposed amendments in the NPRM. The GPAC voted unanimously to endorse as ''technically feasible, reasonable, cost-effective, and practicable'' almost all of PHMSA's proposed IBR of the updated industry standards and miscellaneous amendments within part 192. However, as discussed further in section IV.C. below, the GPAC qualified its endorsement of PHMSA's proposed IBR of the 2016 edition of ASME B31.8S by calling on PHMSA to IBR a more recent (2018) version of that standard and to make conforming revisions to the PSR provisions (including § 192.11(m)) referencing that newer version of the standard. The GPAC also called on PHMSA to work towards an agreement with ASME to make its standards available for free on the internet to the public.

The LPAC also voted unanimously to endorse as ''technically feasible, reasonable, cost-effective, and practicable'' almost all of PHMSA's proposed IBR of the updated industry standards and miscellaneous amendments within part 195. However, as discussed further in sections IV.B. and D below, the LPAC qualified its endorsement of PHMSA's proposed IBR of the 5th edition of API Std. 2350 and the 4th edition of API RP 651. And like the GPAC, the LPAC also called on PHMSA to work towards an agreement with ASME to make its standards available for free on the internet to the public.

B. API Std 2350

API Std 2350 applies to overfill and damage-prevention practices for aboveground storage tanks associated with facilities that receive flammable and combustible petroleum liquids, such as refineries, marketing terminals, bulk plants, and pipeline terminals. The PSRs currently reference the third edition of this document in § 195.428(c) governing aboveground breakout tanks.[16] Material changes introduced between the 3rd and 5th editions of API Std 2350 are described at length in the NPRM and include the development of policies and procedures for overfill protection processes and risk assessments.

PHMSA received a comment from the American Fuel & Petrochemical Manufacturers regarding its proposed IBR of the 5th edition of API Std 2350. The American Fuel & Petrochemical Manufacturers expressed concern that it is unclear which provision of API Std 2350 applies to existing tank overfill systems, and that the current wording of the regulatory text would require operators to significantly expand their physical programs and make numerous changes to their operational parameters if PHMSA incorporated the updated API Std 2350. They specifically noted that § 195.428(c) states that operators must only install overfill systems in accordance with API RP 2350, but that provision fails to specify which sections of API Std 2350 operators should reference for such installations—a potential source of confusion for regulated entities because API Std 2350 contains elements pertaining to installation as well as maintenance and operation. They consequently requested that PHMSA amend the text of § 195.428(c) to identify precisely which sections of API Std 2350 govern installing an overfill protection system.

At the GPAC/LPAC meeting, an LPAC committee member representing industry noted in discussion of the proposed standard that they supported moving forward with API Std 2350 as proposed but recommended that, because of the significant changes

[14] For more information on these standards, please see the Associations' joint comment. Comment from API et al., Docket No. PHMSA–2016–0002–0005 (March 15, 2021).

[15] API Recommended Practice 1130, ''Computational Pipeline Monitoring for Liquids: Pipeline Segment,'' 3rd edition (Sept. 2007) (API RP 1130).

[16] PHMSA notes that the version of this document currently referenced in the PSRs was characterized by API as a ''recommended practice.'' API now characterizes this document as a ''standard.''

between the 3rd and 5th editions of this standard noted in the NPRM, PHMSA consider a longer timeline to aid in its implementation by operators. However, the LPAC voted unanimously to endorse the IBR of the updated version of API Std 2350 without any explicit condition on a longer compliance timeline. Because API Std 2350 was not referenced within part 192, the GPAC neither discussed nor voted on this standard. After the GPAC/LPAC meeting, the AAG submitted a joint comment on API Std 2350 echoing the comments of the industry stakeholders during the LPAC and calling on PHMSA to extend the compliance deadline for this updated industry standard beyond the 60-day effective and compliance period PHMSA had suggested for this rulemaking during the GPAC/LPAC meeting.

In response to the American Fuel and Petrochemical's comments regarding the applicability of API Std 2350, PHMSA notes that § 195.428(c) states that ''[o]ther aboveground breakout tanks with 600 gallons (2271 liters) or more of storage capacity that are constructed or significantly altered after October 2, 2000, must have an overfill protection system installed according to API RP 2350.'' The requirements in § 195.428(c) are specific to installation, not to the operation or maintenance of the relevant aboveground breakout tanks. However, PHMSA also notes that the PSRs elsewhere at § 195.402 require that operators have a procedural manual for operating and maintenance for their systems—including any related breakout tanks, which are defined broadly in § 195.2 to include overfill protection systems that contribute to the pressure relief function of those breakout tanks. Therefore, an operator of a breakout tank that has installed an overfill protection system per API Std 2350 should consider also having a procedural manual to maintain the system in a manner that is consistent with API RP Std 2350.

PHMSA understands that operators will have adequate time to implement the installation requirements in API Std 2350, as specified in § 195.428(c), and implement any conforming revisions to their operations and maintenance procedural manuals given the following: (1) the extended period of time between the GPAC/LPAC meeting and publication of the final rule; (2) API Std 2350 is an industry-created standard, which, presumably, is already implemented by responsible operators; and (3) the IBR API Std 2350 standard will only apply to new, replaced, relocated, or otherwise changed overfill prevention systems. PHMSA also notes that—notwithstanding that a longer compliance timeline was presented to it—the LPAC declined to condition its endorsement of IBR of the 5th edition of API Std 2350 on a longer compliance timeline. Therefore, PHMSA did not adopt the longer implementation timeframe requested.

C. ASME B31.8S

ASME B31.8S provides guidance on various risk assessment approaches covering design, construction, operational prevention, mitigation, and assessment, ensuring the safe operation of gas pipelines. ASME B31.8S also describes the foundations for an effective integrity management (IM) program for gas transmission pipelines. Along with subpart O of part 192, ASME B31.8S provides the essential features of an IM program. The standard applies to onshore gas pipeline systems constructed with ferrous materials (such as iron and steel) that transport gas and is frequently referenced throughout subpart O. ASME B31.8S provides operators with the information necessary to develop and implement an effective IM program utilizing proven industry practices and processes. The PSRs currently IBR the 2004 version of AMSE B31.8S; the NPRM proposed to IBR the 2016 version of the standard, which incorporates a number of edits, additions, and clarifications that will improve the effectiveness of the gas transmission IM programs.

PHMSA did not originally propose regulatory text incorporating the 2018 edition of ASME B31.8S, as PHMSA explained in the NPRM that it had reviewed the 2018 edition and understood that the updated standard had removed nearly all communications plan requirements found in the portion of that standard (Section 10) explicitly mentioned in § 192.911(m). As a result, PHMSA proposed the 2016 edition for incorporation, as that version retained the Section 10 communications plan requirements. However, PHMSA explicitly requested comments regarding incorporation of the 2018 edition of ASME B31.8S.

PHMSA received two comments in response. Both the ASME and the Associations' joint comment recommended that PHMSA incorporate the 2018 edition of this standard. They noted that the communications plan requirements formerly located in Section 10 had not (as PHMSA believed) been removed, but instead been relocated from Section 10 to Chapter V, Paragraph 850.9, of the 2018 version of ASME B31.8, which is the companion standard to ASME B31.8S. Additionally, B31.8S includes a reference in Section 10 that points to the communications plan requirements in the 2018 version of ASME B31.8. The commenters therefore requested that PHMSA revise § 192.911(m) to directly reference the communications plan requirements in Paragraph 850.9 of the 2018 edition of ASME B31.8. The GPAC voted unanimously to endorse the 2018 edition of ASME B31.8S with a recommendation to revise § 192.911(m) to directly reference the communications plan requirements in Paragraph 850.9 of the 2018 edition of ASME B31.8. Because ASME B31.8S was not referenced within part 195, the LPAC neither discussed nor voted on this standard.

In response to the GPAC's recommendations and the public comments received, PHMSA, in this final rule, is incorporating the 2018 edition of ASME B31.8S within its part 192 regulations. Further, PHMSA has revised § 192.911(m) to directly reference the communications-plan requirements in Paragraph 850.9 of the 2018 edition of ASME B31.8.

PHMSA is also in this final rule making conforming revisions in the PSRs to match the relevant sections in the 2018 edition of ASME B31.8S. PHMSA updated the relevant sections as follows:

- § 192.714(c): Removed ''section 7, Figure 4'' and replaced it with ''Section 7, Figure 7.2.1–1'';
- § 192.917(e)(1): Removed ''Appendix A7'' and replaced it with ''Appendix A–8'';
- § 192.917(e)(4): Removed ''ASME/ANSI B31.8S, Appendices A4.3 and A4.4, and any'' and replaced it with ''ASME B31.8S, Appendices A–5.3 and A–5.4, and any'';
- § 192.921(a)(2): Removed ''specified in Table 3 of section 5'' and replaced it with ''specified in Table 5.6.1–1 of Section 5'';
- § 192.923(b)(1): Removed ''section 6.4'' and replaced it with ''Section 6.4'';
- § 192.933(c): Removed ''section 7, Figure 4'' and replaced it with ''Section 7, Figure 7.2.1–1'';
- § 192.937(c)(2): Removed ''table 3 of section 5'' and replaced it with ''Table 5.6.1–1 of Section 5'';
- § 192.939(a)(1)(ii): Removed ''section 5, Table 3'' and replaced it with ''Table 5.6.1–1 of Section 5''; and
- § 192.939(a)(3): Removed ''section 5, Table 3'' and replaced it with ''Table 5.6.1–1 of Section 5.''

PHMSA also notes that in August 2022, it concluded a rulemaking (first proposed in 2016) that amended, or introduced, several provisions referencing the ASME B31.8S industry standard being updated in this final

rule.[17] Pertinent provisions introduced or amended by the RIN2 Final Rule include the following: §§ 192.13(d); 192.714(c) and (d); 192.917(a) through (e); and 192.933(d)(1) and (d)(2)(iv)). PHMSA has compared the pertinent sections of each of those currently-referenced versions of ASME B31.8S against the updated version incorporated within the PSR by this final rule, and has concluded that application of that update to the regulatory provisions added or amended by the RIN2 Final Rule is technically feasible, reasonable, cost-effective, and practicable because it entails no additional compliance burdens for pipeline operators, while at the same time offering the same safety and environmental benefits (better alignment of the PSRs with the latest innovations in operational and management practices, materials, testing, and technological advancements; enhanced compliance by avoiding conflict between different versions of the same industry standards; and facilitation of safety-focused allocation of resources by pipeline operators) as other amendments adopted in this final rule. PHMSA notes that two of those provisions—specifically, §§ 192.714(d) and 192.933(d)(1) and (d)(2)(iv)—are the subject of a pending legal challenge brought by INGAA against the RIN2 Final Rule. PHMSA, therefore, has determined that in this final rule, it will not update references within §§ 192.714(d) and 192.933(d)(1) and (d)(2)(iv) to ASME B31.8S to reflect the 2018 version of that standard, but will in those two provisions continue to reference the 2004 version of ASME B31.8S. PHMSA may update those provisions to reference the 2018 version of ASME B31.8S in the future.

D. API RP 651

PHMSA proposed to IBR the 4th edition of API RP 651 (Cathodic Protection of Aboveground Petroleum Storage Tanks) referenced in §§ 195.565 and 195.573(d). The PSRs currently reference the 3rd edition of this document, which describes practices and procedures regarding the use of cathodic protection to effectively control corrosion on aboveground storage-tank bottoms. It also includes provisions for the application of cathodic protection to new and existing aboveground storage tanks, and information and guidance regarding cathodic protection for aboveground metallic storage tanks in hydrocarbon service.

Both the American Fuel & Petrochemical Manufacturers and the Associations submitted comments regarding the 4th edition of API RP 651. The American Fuel & Petrochemical Manufacturers stated that it is concerned with the way the 4th edition of API RP 651 is being interpreted during field inspections, as it understood that some state regulatory authorities were interpreting API RP 651 as requiring all breakout tanks to have cathodic protection, even tanks not in direct contact with soil. The American Fuel & Petrochemical Manufacturers and the Associations stated that PHMSA should not consider double-bottomed tanks with an interstitial fill of concrete (not soil) or tanks on continuous concrete pads to be ''buried'' such that they would require cathodic protection pursuant to § 195.563. They stated that such tanks do not allow any part of the pipe through which hazardous liquid moves to come into contact with the upper layer of the earth and would like PHMSA to state definitively that cathodic protection is not required, consistent with their understanding of recommendations in the 4th edition of API RP 651 against it. Additionally, the Associations' joint comment asked PHMSA to clarify requirements in § 195.563 for the cathodic protection of double-bottom breakout tanks by referencing the 4th edition of API RP 651 and to allow operators to protect these tanks without requiring cathodic protection.

At the joint GPAC/LPAC meeting, an industry committee member from API requested that PHMSA clarify that the design of double-bottom tanks precludes the use of cathodic protection and asked that PHMSA allow operators to use alternative methods to protect these tanks form corrosion. Although the LPAC unanimously voted to recommend IBR of the updated version of API RP 651, it recommended that PHMSA include in the final rule preamble the suggestion by the industry stakeholder during the meeting. Because API RP 651 is not referenced within part 192, the GPAC neither discussed nor voted on this standard. After the GPAC/LPAC meeting, the AAG submitted a joint comment that included a discussion on the 4th edition of API RP 651. AAG stated that they supported LPA's recommendation to clarify appropriate application of the 4th edition of API RP 651. The AAG in particular called on PHMSA to state explicitly that the 4th edition of API RP 651 would not apply to El Segundo double-bottom tanks[18] or tanks on concrete not using cathodic protection to prevent corrosion. The AAG stated that they do not believe these tanks are ''buried''—which they characterize § 195.553 as defining to mean ''covered or in contact with soil''—and that therefore those tanks would not be required to have cathodic protection pursuant to § 195.563 or the risk-based framework in the most recent (5th edition) of API RP 653. The AAG called on PHMSA to IBR that most recent version of API RP 653.

PHMSA has considered those comments and the discussion during the GPAC/LPAC meeting and understands the application of § 195.563 by some state regulatory authorities is beyond the scope of this standards update rulemaking. PHMSA in the NPRM proposed simply to incorporate the 4th edition of API RP 651 into §§ 195.565 and 195.573(d) and did not propose changes in the regulatory text or interpretations affecting existing cathodic protection requirements for breakout tanks pursuant to a different PSR provision (§ 195.563) that does not explicitly reference API RP 651. PHMSA similarly did not propose to update the version of API RP 653 referenced in part 195. PHMSA notes, however, that it recently responded to a request for interpretation of §§ 195.553 and 195.563 that provides additional information on this issue as applied to specific pipeline facilities operated by Chemoil.[19]

V. Summary of Final Rule and 1 CFR 51

This final rule incorporates the following updated industry standards and amendments into 49 CFR parts 192 and 195. Availability information for each standard is specified in Section I of this preamble, and a summary of each standard is detailed below and in Section II of the NPRM.

These updated industry standards are developed through agreed-upon procedures and adopted by domestic and international standard development organizations, ensuring the voluntary,

[17] PHMSA, ''Pipeline Safety: Safety of Gas Transmission Pipelines: Repair Criteria, Integrity Management Improvements, Cathodic Protection, Management of Change, and Other Related Amendments—Final Rule,'' 87 FR 52224 (Aug. 24, 2022) (RIN2 Final Rule). The RIN2 Final Rule is currently the subject of a petition for judicial review. *See* INGAA v. PHMSA, et al., DC Cir. Case No. 23–1173.

[18] AAG, in the joint comment, describes an El Segundo double-bottom tank as one ''where the active tank floor is on contact with a concrete interstitial fill, and the secondary, inactive bottom is in contact with the soil.'' For more information, please see the AAG joint comment. AAG Joint Comment, Docket No. PHMSA–2021–0069–0008 (Nov. 22, 2021), available at: *https://www.regulations.gov/comment/PHMSA-2021-0069-0008.*

[19] PHMSA Interp. Resp. No. PI–20–0014 (Oct. 7, 2021), available at: *https://www7.phmsa.dot.gov/regulations/title49/interp/PI-20-0014.*

consensus industry standards reflect modern technology and technology practices. PHMSA understands that reasonably prudent operators employ industry standards and best practices even when not required by PHMSA regulations. Thus, PHMSA finds that the new or updated editions of voluntary, consensus industry technical standards may already be observed and implemented voluntarily by reasonably prudent operators in order to protect the public, environment, and their commercially valuable product. PHMSA also notes that should an operator identify a compelling need for regulatory flexibility, the PSR provides for special permit procedures at § 190.341 to request a deviation from specific requirements.

Viewed against the considerations herein and the compliance costs estimated in the cost-benefit analysis in Section VI of this final rule, PHMSA finds the proposed amendments will be a cost-effective approach to achieving the commercial, public safety, and environmental benefits discussed in this final rule and its supporting documents. Lastly, PHMSA believes that operator compliance timelines—based on an effective date of the final requirement (60 days after the effective date of the final rule, which the timeline would necessarily be in addition to the time since issuance of the January 2021 NPRM) would provide operators ample time to implement requisite systems and manage any related compliance costs.

Thus, PHMSA finds that the discussion herein—in addition to the NPRM's discussion of the safety, environmental, and other benefits and detriments incorporated herein by reference—supports its conclusion that each of the regulatory amendments in this final rule are technically feasible, reasonable cost-effective, and practicable.

A. AMPP

• NACE SP0204–2015, ''Stress Corrosion Cracking (SCC) Direct Assessment Methodology,'' March 14, 2015.

This standard provides a process and a series of required steps for operators to use to assess the extent of stress-corrosion cracking on a section of buried pipeline. The methodology is designed as a screening tool to determine whether stress corrosion cracking is a substantial risk on a pipeline system.

[Replaces incorporated by reference (IBR): NACE SP0204–2008, ''Standard Practice, Stress Corrosion Cracking (SSC) Direct Assessment Methodology,'' September 18, 2008; Referenced in 49 CFR 195.588(c).]

B. API

• API RP 651, ''Cathodic Protection of Aboveground Petroleum Storage Tanks,'' 4th edition, September 2014.

Cathodic protection is a method of protecting metallic pipelines from corrosion. This recommended practice contains: (1) procedures and practices for effective corrosion control on aboveground storage tank bottoms using cathodic protection; (2) provisions for the application of cathodic protection to existing and new aboveground storage tanks; and (3) information and guidance for cathodic protection specific to aboveground metallic storage tanks in hydrocarbon service.

[Replaces ANSI/API RP 651, ''Cathodic Protection of Aboveground Petroleum Storage Tanks,'' 3rd edition, January 2007; Referenced in 49 CFR 195.565 and 195.573(d).]

• API RP 2026, ''Safe Access/Egress Involving Floating Roofs of Storage Tanks in Petroleum Service,'' 3rd edition, June 2017.

The 3rd edition of API RP 2026 (formerly API Publication 2026) addresses the hazards associated with access/egress onto external and internal floating roofs of in-service petroleum storage tanks. In a floating roof tank, the roof floats on top of product in the tank and rises and lowers with the level of product in the storage tank. Floating roofs minimize the creation of hazardous vapors above the product. A floating roof can be designed for use on a tank with no fixed roof (an external floating roof) or inside a tank with a fixed roof (internal floating roof).

[Replaces API Publication 2026, ''Safe Access/Egress Involving Floating Roofs of Storage Tanks in Petroleum Service,'' 2nd edition, issued April 1998, reaffirmed June 2006; Referenced in 49 CFR 195.405(b)].

• API Spec 5L, ''Line Pipe,'' 46th edition, April 2018; including Errata 1 (May 2018).

API Spec 5L is the primary manufacturing specification for seamless and welded steel pipe for use in gas, hazardous liquid, and carbon dioxide pipeline transportation systems. The specification does not cover cast pipe and non-steel pipe. The specification includes requirements for pipe material, manufacturing, quality control and testing, inspection, and pipe marking.

[Replaces API Spec 5L, ''Specification for Line Pipe,'' 45th edition, July 2013; Referenced in 49 CFR 192.55(e); 192.112(a), (b), (d), (e); 192.113; Section I of Appendix B in part 192; and 49 CFR 195.106(b), (e).]

• API Spec 6D, ''Specification for Pipeline and Piping Valves,'' 24th edition, August 2014, including Errata 1 (October 2014), Errata 2 (December 2014), Errata 3 (February 2015), Errata 4 (June 2015), Errata 5 (July 2015), Errata 6 (September 2015), Errata 7 (June 2016), Errata 8 (August 2016), Errata 9 (March 2017), Errata 10 (July 2021), Addendum 1 (March 2015), and Addendum 2 (June 2016).

API Spec 6D defines the design, manufacturing, assembly, testing, and documentation requirements for valves used in pipeline systems. PHMSA requires all valves on gas pipeline systems, other than those made of cast iron or plastic, to meet the requirements of API Spec 6D, or a national or international standard that provides an equivalent performance level of safety. Hazardous liquid and carbon dioxide pipeline valves must be shell-tested and seat-tested in accordance with API Spec 6D.

[Replaces ANSI/API Spec 6D, ''Specification for Pipeline Valves,'' 23rd edition, October 1, 2008, including Errata 1 (June 2008), Errata 2 (November 2008), Errata 3 (February 2009), Errata 4 (April 2010), Errata 5 (November 2010), Errata 6 (August 2011), Addendum 1 (October 2009), Addendum 2 (August 2011), and Addendum 3 (October 2012); Referenced in 49 CFR 192.145(a) and 195.116(d).]

• API Std 620, ''Design and Construction of Large, Welded, Low-Pressure Storage Tanks,'' 12th Edition, October 2013, including Addendum 1 (November 2014).

API Std 620 specifies design, construction, and testing requirements for large, field assembled, welded steel tanks used to store petroleum, petroleum products, or other liquids used in the petrochemical industry. Tanks designed, constructed, and tested in accordance with API Std 620 are rated to operate with a vapor pressure up to 15 psig and a metal temperature below 250 °F.

[Replaces API Std 620, ''Design and Construction of Large, Welded, Low-Pressure Storage Tanks,'' 11th Edition, February 2008; including Addendum 1 (March 2009), Addendum 2 (August 2010), and Addendum 3 (March 2012); Referenced in 49 CFR 195.132(b); 195.205(b); 195.264(b) and (e); 195.307(b); 195.565; and 195.579(d).]

• API Std 650, ''Welded Tanks for Oil Storage,'' 13th edition, March 1, 2020, including Errata 1 (January 2021).

This standard establishes minimum requirements for material, design, fabrication, erection, and inspection for

vertical, cylindrical, aboveground, closed- and open-top, welded storage tanks in various sizes and capacities for internal pressures approximating atmospheric pressure. This standard applies only to tanks whose entire bottom is uniformly supported and to tanks in non-refrigerated service that have a maximum design temperature of 93°C (200 °F) or less. In part 195, breakout tanks associated with the transportation of hazardous liquids that are included in the scope of this standard must be designed, constructed, tested, and repaired in accordance with API Std 650.

[Replaces API Std 650, ''Welded Steel Tanks for Oil Storage,'' 11th edition, June 2007; including Addendum 1 (November 2008), Addendum 2 (November 2009), Addendum 3 (August 2011), and Errata (October 2011); Referenced in 49 CFR 195.132(b); 195.205(b); 195.264(b) and (e); 195.307(c) and (d); 195.565; and 195.579(d).]

• API Std 1104, ''Welding of Pipelines and Related Facilities,'' 21st edition, September 2013; including Errata 1 (2013), Errata 2 (2014), Errata 3 (2014), Errata 4 (2015), Errata 5 (2018), Addendum 1 (2014), and Addendum 2 (2016)—except for Note 2 in Section 5.4.2.2.

API Std 1104 is the primary standard for welding steel piping and for testing welds on steel pipelines. It covers the requirements for welding and nondestructive testing of pipeline welds. In the PSRs, this standard is used for qualifying welders, welding procedures, and welding operators, and interpreting the results of non-destructive tests.

[Replaces API Std 1104, ''Welding of Pipelines and Related Facilities,'' 20th edition, October 2005; including Errata/Addendum (July 2007) and Errata 2 (2008); Referenced in 49 CFR 192.225(a); 192.227(a); 192.229(b) and (c); 192.241(c); Section II of Appendix B in part 192; 195.214(a); 195.222(a) and (b); and 195.228(b).]

• API Std 2000, ''Venting Atmospheric and Low-pressure Storage Tanks'' 7th edition, March 2014.

This standard contains vapor-venting requirements for aboveground liquid petroleum product storage tanks, and aboveground and/or underground refrigerated storage tanks, all of which are designed for operation at pressures from full vacuum through 103.4 kPa (or 15 psig). Normal vapor venting refers to the inflow and outflow of vapor related to pressure changes inside the storage tanks. Emergency vapor venting relates to the inflow or outflow of vapor that may occur due to unforeseen circumstances. Vapor-venting requirements deal with the operation of vapor vents in response to temperature and pressure changes both inside and outside of a tank. Pressure normally accumulates inside most production or breakout storage tanks that contain various types of hazardous liquid. The new edition of this standard provides more information on equipment that stabilizes pressure within the tank by venting or depressurizing once the pressure within the tank reaches a certain level. The vapor-venting requirements in this standard elaborate on pipeline owners' obligations, including providing vapor-venting equipment guidelines.

[Replaces ANSI/API Std 2000, ''Venting Atmospheric and Low-pressure Storage Tanks,'' 6th edition, November 2009; Referenced in 49 CFR 195.264(e).]

• API Std 2350, ''Overfill Prevention for Storage Tanks in Petroleum Facilities,'' 5th Edition, September 1, 2020, including Errata 1 (April 2021).

This standard is intended for storage tanks associated with facilities that receive flammable and combustible petroleum liquids, such as refineries, marketing terminals, bulk plants, and pipeline terminals. It addresses minimum overfill and damage-prevention practices for aboveground storage tanks in petroleum facilities, including refineries, marketing terminals, bulk plants, and pipeline terminals that receive flammable and combustible liquids.

[Replaces API RP 2350, 3rd Edition (January 2005): Overfill Protection for Storage Tanks in Petroleum Facilities (API RP 2350); Referenced in 49 CFR 195.428(c).]

C. ASME

• ASME B31.8–2018, ''Gas Transmission and Distribution Piping Systems,'' November 20, 2018.

This standard covers safety requirements associated with the design, fabrication, installation, inspection, testing, and operation and maintenance of pipeline facilities used for the transportation of natural gas and liquefied petroleum gases when they are vaporized and used as gaseous fuels.

[Replaces ASME/ANSI B31.8–2007, ''Gas Transmission and Distribution Piping Systems,'' November 30, 2007; Referenced in 49 CFR 192.112(b); 192.619(a); 192.911(m); 195.5(a); and 195.406(a).]

• ASME B31.8S–2018, ''Managing System Integrity of Gas Pipelines,'' November 28, 2018.

ASME B31.8S describes the foundations for an effective integrity management (IM) program for gas transmission pipelines. Along with subpart O of part 192, ASME B31.8S provides the essential features of an integrity management program. Section 3.2 of B31.8S addresses the potential impact factor for gases other than standard quality natural gas that may be transported through a gas transmission pipeline. Other sections are as follows: Section 4—Gathering, Reviewing and Integrating Data; Section 5—Risk Assessment and Reassessment Intervals; Section 6.2—Selection of In-line Inspection Tools (ILI); Section 6.4—Direct Assessment Requirements for External Corrosion and Internal Corrosion; Section 7—Remediation Schedule and Immediate Repair Requirements; Section 9—Performance Plan and Program Effectiveness; Section 10—Communications Plan; Section 11—Management of Change Process; Section 12—Quality Assurance Process; Appendix A—Data Requirements of Each Threat; Appendix A3—Direct Assessment Requirements for the Stress Corrosion Cracking (SCC) Threat; Appendix 4.3 and 4.4—Criteria and Risk Assessment and Integrity Assessment for the Manufacturing Threat; and Appendix A7—Criteria and Risk Assessment and Integrity Assessment, Response, and Mitigation and Performance Measures for the Third Party Damage Threat.

[Replaces ASME/ANSI B31.8S–2004 ''Supplement to B31.8 on Managing System Integrity of Gas Pipelines,'' January 14, 2005; Referenced in 49 CFR 192.13(d); 192.712(b); 192.714(c); 192.903; 192.907; 192.907(b); 192.911; 192.911(i), and (k) through (m); 192.913(a) through (c); 192.917(a) through (e); 192.921(a); 192.923(b); 192.925(b); 192.933(c); 192.935(b); 192.937(c); 192.939(a); and 192.945(a).]

As explained in section IV.C. above, PHMSA will retain existing references to the 2004 version of ASME B31.8S within §§ 192.714(d), and 192.933(d)(1) and (d)(2)(iv).

• ASME B36.10M–2018 ''Welded and Seamless Wrought Steel Pipe,'' October 12, 2018.

ASME B36.10M specifies standards for dimensions of welded and seamless wrought steel pipe for high or low temperatures and pressures. This standard replaces the current reference in § 192.279 to Table C1 of ASME/ANSI B16.5. The 2003 and subsequent editions of ASME/ANSI B16.5 remove Table C1; that information is now in ASME B36.10M–2018. Therefore, PHMSA is revising § 192.279 to replace the phrase ''listed in Table C1 of ASME/ANSI B16.5'' with ''listed in ASME B36.10M.''

[Replaces Table C1 of ASME/ANSI B16.5; Referenced in 49 CFR 192.279.]

D. ASTM International

• ASTM A53/A53M–20, ''Standard Specification for Pipe, Steel, Black, and Hot-Dipped, Zinc-Coated, Welded and Seamless,'' July 1, 2020.

ASTM A53/A53M specifies the design for seamless and welded black and hot-dipped galvanized steel pipe in nominal pipe size (NPS) ⅛ to NPS 26. The standard also specifies requirements for tests of material properties, hydrostatic tests, and non-destructive tests.

[Replaces ASTM A53/A53M–10, ''Standard Specification for Pipe, Steel, Black and Hot-Dipped, Zinc-Coated, Welded and Seamless,'' October 1, 2010; Referenced in 49 CFR 192.113; Section II of Appendix B in part 192; and 195.106(e).]

• ASTM A106/A106M–19A, ''Standard Specification for Seamless Carbon Steel Pipe for High-Temperature Service,'' November 1, 2019.

ASTM A106/A106M specifies standards for seamless carbon steel pipe appropriate for high-temperature service. Pipe meeting this specification is suitable for bending, flanging, and welding. The updates added since the 2010 edition currently incorporated by reference include clarifying the supplementary requirements in the ordering information, as well as the definition of single or double random lengths of pipe with single random joints allowed from 17 to 24-foot lengths and double random joints being between 36 and 44 feet.

[Replaces ASTM A106/A106M–10, ''Standard Specification for Seamless Carbon Steel Pipe for High-Temperature Service,'' October 1, 2010; Referenced in 49 CFR 192.113; Section I of Appendix B in part 192; and 195.106(e).]

• ASTM A333/A333M–18, ''Standard Specification for Seamless and Welded Steel Pipe for Low-Temperature Service and Other Applications with Required Notch Toughness,'' November 1, 2018.

ASTM A333/A333M specifies standards for nominal (average) wall seamless and welded carbon and alloy steel pipe intended for use at low temperatures. The standard addresses chemical, tensile strength, mechanical testing, and other requirements.

[Replaces ASTM A333/A333M–11, ''Standard Specification for Seamless and Welded Steel Pipe for Low-Temperature Service,'' April 1, 2011; Referenced in 49 CFR 192.113; Section I of Appendix B in part 192; and 49 CFR 195.106(e).]

• ASTM A381/A381M–18, ''Standard Specification for Metal-Arc-Welded Carbon or High-Strength Low-Alloy Steel Pipe for Use with High-Pressure Transmission Systems,'' November 1, 2018.

ASTM A381/A381M specifies standards for straight seam, double-submerged arc-welded steel pipe (commonly referred to as DSAW pipe as opposed to spiral-welded or electric-resistance-welded pipe) that is intended for the fabrication of fittings and accessories for compressor or pump-station piping and is suitable for high-pressure service at outside diameters of 16 inches or greater.

[Replaces ASTM A381–96, ''Standard Specification for Metal-Arc Welded Steel Pipe for Use with High-Pressure Transmission Systems,'' reaffirmed October 1, 2005; Referenced in 49 CFR 192.113; Section I of Appendix B in part 192; and 195.106(e).]

• ASTM A671/A671M–20, ''Standard Specification for Electric-Fusion-Welded Steel Pipe for Atmospheric and Lower Temperatures,'' March 1, 2020.

ASTM A671/A671M specifies the design, fabrication, and testing requirements for electric-fusion-welded (as opposed to arc-welded) steel pipe with added filler metal. Specifically, the specification applies to pipe fabricated from pressure vessel quality steel plates suitable for use at high pressures at atmospheric and lower temperatures.

[Replaces ASTM A671/A671M–10, ''Standard Specification for Electric-Fusion-Welded Steel Pipe for Atmospheric and Lower Temperatures,'' April 1, 2010; Referenced in 49 CFR 192.113; Section I of Appendix B in part 192; and 195.106(e).]

• ASTM A691/A691M–19, ''Standard Specification for Carbon and Alloy Steel Pipe, Electric-Fusion-Welded for High-Pressure Service at High Temperatures,'' November 1, 2019.

ASTM A691/A691M specifies the design, composition, fabrication, and testing of carbon and alloy steel pipe.

[Replaces ASTM A691/A691M–09, ''Standard Specification for Carbon and Alloy Steel Pipe, Electric-Fusion-Welded for High-Pressure Service at High Temperatures,'' October 1, 2009; Referenced in 49 CFR 192.113; Section I of Appendix B in part 192; and 49 CFR 195.106(e).]

E. The Manufacturers Standardization Society of the Valve and Fittings Industry, Inc.

• ANSI/MSS SP–44–2019, ''Steel Pipeline Flanges,'' April 2020.

MSS SP–44 covers pressure-temperature ratings, materials, dimensions, tolerances, marking, and testing of steel pipeline flanges.

[Replaces MSS SP–44–2010, ''Standard Practice, Steel Pipeline Flanges,'' 2010 edition, including Errata (May 20, 2011); Referenced in 49 CFR 192.147(a).]

• MSS SP–75–2019, ''High-Strength, Wrought, Butt-Welding Fittings,'' December 2019.

MSS SP–75 specifies requirements for factory-made, seamless, and electric-welded carbon and low-alloy steel butt-welding fittings. MSS SP–75 is applicable to fittings used in high-pressure gas and oil transmission and distribution systems, including pipelines, compressor stations, metering and regulating stations, and mains.

[Replaces MSS SP–75–2008, ''Specification for High Test, Wrought, Butt-Welding Fittings,'' June 1, 2009; Referenced in 49 CFR 195.118(a).]

F. National Fire Protection Association (NFPA)

• NFPA 58, ''Liquefied Petroleum Gas Code,'' 2020 edition, August 25, 2019.

NFPA 58 specifies requirements for the ''storage, handling, transportation, and use of liquefied petroleum gas.'' The PSRs require any plant that supplies liquefied petroleum to a pipeline system and any pipeline system that transports only petroleum gas or petroleum gas mixtures to meet the requirements of NFPA 58 in addition to the requirements of part 192.

[Replaces NFPA 58, ''Liquefied Petroleum Gas Code,'' 2004 edition, April 1, 2004; Referenced in 49 CFR 192.7; and 192.11(a) through (c).]

• NFPA 59, ''Utility LP-Gas Plant Code,'' 2018 edition, September 6, 2017.

NFPA 59 specifies the design, construction, location, installation, operation, and maintenance of utility gas plants. Compared to NFPA 58, NFPA 59 generally covers larger facilities.

[Replaces NFPA 59, ''Utility LP-Gas Plant Code,'' 2004 edition, April 1, 2004; Referenced in 49 CFR 192.11(a) through (c).]

• NFPA 70, ''National Electrical Code,'' 2017 edition, August 24, 2016.

NFPA 70, also known as the National Electrical Code (NEC), covers the installation and removal of electrical equipment, conductors, and conduits in structures and outdoor areas. The NEC is a foundational standard for electrical safety in residential, commercial, and industrial implementations.

[Replaces NFPA 70, ''National Electrical Code,'' 2011 edition (September 24, 2010); Referenced in 49 CFR 192.163(e) and 192.189(c).]

G. Miscellaneous Amendments

PHMSA is also incorporating miscellaneous editorial amendments and corrections to the PSRs. Some of

these revisions respond to a petition for rulemaking from the AGA. In addition to petitioning PHMSA to incorporate the most recent edition of NFPA 59 by reference, the AGA suggested edits to 49 CFR 192.11 that would clarify the scope of NFPA 58 and NFPA 59. The PSRs currently require operators of liquefied petroleum pipeline facilities to meet the requirements of both NFPA 58 and NFPA 59, but the change clarifies that operators must only satisfy the requirements for the NFPA standard that, based on the scope and applicability statements in NFPA 58 and NFPA 59, is applicable to the type of facility they operate. Generally, NFPA 58 applies to liquefied petroleum pipeline systems and NFPA 59 to utility-scale liquefied petroleum gas plants. PHMSA has considered this proposed clarification and is adopting the recommended editorial revision to 49 CFR 192.11 in this final rule.

Another revision recommended by AGA and which PHMSA adopts in this final rule corrects the minimum wall thickness tables in 49 CFR 192.121 for plastic pipe that is made of polyethylene (PE), polyamide (PA) PA11, and PA12 to include specifications for pipe with a copper tubing sizes (CTS) of 1¼ inches and to correct the minimum wall thickness for 1-inch CTS pipe. The minimum wall thickness—and, more specifically, the dimension ratio, which is the ratio of outside diameter to wall thickness—is consistent with values already specified for adjacent sizes. Plastic pipe, especially PE, is very common on gas distribution systems. On November 20, 2018, PHMSA published a final rule that allowed plastic pipe to operate with a design factor (a derating factor) of 0.4 rather than 0.32 as long as it met various requirements, including a minimum wall thickness that matched the definitions in the tables in 49 CFR 192.121.[20] As described in that 2018 final rule and its supporting RIA, as well as the AGA's petition for rulemaking, the revised design factor allows the use of approximately 17 percent less material or 11 percent higher capacity for a given outside specification.

The NPRM included listings for copper tubing sizes (CTS) of ½ and ¾ inches for polyethylene (PE) pipe. In response to comments, PHMSA included CTS sizes for polyamide (PA) PA11 and PA12 pipe, as well as iron pipe sizes (IPS) below 1 inch for all materials. However, stakeholders subsequently requested that PHMSA also consider including 1¼-inch CTS. This amendment allows the use of 1¼-inch CTS pipe with a 0.4 design factor provided that the pipe wall is at least 0.121 inches thick. A wall thickness of 0.121 corresponds to a dimension ratio of approximately 11, which is the same standard dimension ratio (SDR) that is currently permitted for 1¼-inch IPS, 1-inch CTS, and 1-inch IPS. This change reduces the cost to produce this size of plastic pipe by approximately 10 percent. The revised design factor is already permitted for similar, adjacent sizes such as 1¼-inch IPS pipe, and it was not PHMSA's intent to exclude specifications such as 1¼-inch CTS. The costs and benefits of this change were accounted for in the RIA for the 2018 final rule.

PHMSA also adopts in this final rule other technical and editorial revisions proposed in the NPRM, including the following:

- Updating reference to PHMSA's website (*https://portal.phmsa.dot.gov/*) in § 195.58;
- Copying the definition for a master meter system that is used in part 191 to part 192. The term ''master meter system'' is referenced in both part 191 and part 192; however, it is only defined in § 191.3 of part 191. This rule adds the definition to § 192.3 of part 192;
- Clarifying reference to flange requirements in § 192.147(a) to specify that flanges must meet ASME B16.5, ANSI/MSS SP–44, or the equivalent;
- Correcting the placement of the word ''in'' in § 192.153(d);
- Removing a reference to an inactive phone number for the National Pipeline Mapping System (NPMS) program in § 192.727(g) and 195.59(a);
- Removing references to § 195.242(c) and (d) in § 195.1(c) because this section no longer exists in the regulations;
- Correcting § 195.3(c)(3) to reflect that ASME B31.4 is no longer referenced in § 195.452(h); and
- Revising § 192.307(c) references to API 650 sections 7.3.5 and 7.3.6 because the testing requirements were moved to sections 7.3.6 and 7.3.7, respectively, in the updated edition of API 650.

VI. Regulatory Analyses and Notices

Summary/Legal Authority for This Rule

This final rule is published under the authority of the Secretary of Transportation delegated to the PHMSA Administrator pursuant to 49 CFR 1.97. Among the statutory authorities delegated to PHMSA are those set forth in the Federal pipeline safety statutes (49 U.S.C. 60101 *et seq.*). 49 U.S.C. 60102 grants authority, to the extent appropriate and practicable, to the Secretary to update incorporated, voluntary, consensus industry technical standards that were adopted as part of the PSRs to protect public safety and the environment.

This final rule incorporates by reference more than 20 updated industry standards. In addition, this final rule makes several other minor clarifying and editorial changes to the PSRs.

Executive Orders 12866 and 14094; DOT Regulatory Policies and Procedures

Executive Order 12866 (''Regulatory Planning and Review''), as amended by Executive Order 14094 (''Modernizing Regulatory Review''), requires that agencies ''should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.'' [21] Agencies should consider both quantifiable measures and qualitative measures of costs and benefits that are difficult to quantify. Further, Executive Order 12866 requires that agencies ''should select those [regulatory] approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages, as well as distributive impacts and equity), unless a statute requires another regulatory approach.'' Similarly, DOT Order 2100.6A (''Rulemaking and Guidance Procedures'') requires PHMSA and other DOT operating administrations to consider an assessment of the potential benefits, costs, and other important impacts of the proposed action; they should also quantify (to the extent practicable) the benefits, costs, and any significant distributional impacts, including any environmental impacts.

Executive Order 12866 (as amended by Executive Order 14094) and DOT Order 2100.6A require that PHMSA submit ''significant regulatory actions'' to the OMB for review. However, this final rule is not considered a significant regulatory action under Executive Order 12866 and, therefore, was not subject to review by the OMB. Further, the DOT considers this final rule to be non-significant pursuant to DOT Order 2100.6A.

In accordance with the NTTAA and OMB Circular A–119, PHMSA constantly reviews new editions and revisions to relevant voluntary, consensus industry technical standards, and publishes a proposed rule every two to three years to incorporate new or updated industry standards by

[20] PHMSA, ''Pipeline Safety: Plastic Pipe Rule—Final Rule,'' 83 FR 58694 (Nov. 20, 2018).

[21] Executive Order 12866 is available at 58 FR 51735 (Oct. 4, 1993); Executive Order 14094 is available at 88 FR 21879 (Apr. 6, 2023).

reference. This practice is consistent with the intent of the NTTAA and OMB directives to avoid the need to develop government standards that could potentially result in regulatory conflicts with updated standards and an increased compliance burden for industry.

PHMSA expects that the changes to the PSRs described in this final rule will result in unquantified public safety and environmental benefits associated with the updated industry standards. Although, as discussed above, many of the changes within the updated industry standards for incorporation within the PSRs are editorial revisions or clarifications, others consist of substantive changes that reflect advancements in the state of knowledge (based on developments in technology, testing, materials, and practical experience memorialized within operational and management practices) compared to earlier versions of the same standards. PHMSA's technical review of those updated industry standards concluded that their incorporation would enhance the protection of public safety and the environment.

Further, PHMSA expects the administrative burden for stakeholders stemming from the incorporation of these updated industry standards will be negligible and the net economic benefits will be high. According to the annual reports that operators submit to PHMSA, there are more than 2,813 entities operating distribution systems and facilities for gas and hazardous liquid (as well as carbon dioxide) pipeline facilities subject to part 192 or 195 as of May 23, 2021. In fact, updates to industry standards are generally accepted and followed on a voluntary basis throughout most of the pipeline industry. PHMSA understands that the majority of pipeline operators already purchase and voluntarily apply industry standards—including the updated industry standards that are the subject of this rulemaking—within their ordinary business practices. Incorporation of the updated industry standards within the PSRs will help ensure the industry is not forced to incur the additional cost of complying with different versions of the same standards.

In addition to incorporating updated industry standards into the PSRs, PHMSA is adopting non-substantive editorial changes and clarifications of certain provisions of regulatory language. Since these editorial changes are minor, this final rule will not require pipeline operators to undertake significant new pipeline safety initiatives and would have negligible cost implications. The non-substantive changes will increase the clarity of the pipeline safety regulations, thereby improving compliance and helping to ensure the safety of the Nation's pipeline systems.

Executive Order 13132: Federalism

PHMSA analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism'') [22] and the Presidential Memorandum titled ''Preemption.'' [23] Executive Order 13132 requires agencies to ensure meaningful and timely input by State and local officials regarding the development of regulatory policies that may have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

The regulatory amendments in this final rule will not have a substantial direct effect on State or local governments; the relationship between the national government and the States; or the distribution of power and responsibilities among the various levels of government. In addition, this rule will not impose substantial direct compliance costs on State or local governments. While the final rule's revisions may operate to preempt some State requirements, it will not impose any regulation that has substantial direct effects on the States; the relationship between the national government and the States; or the distribution of power and responsibilities among the various levels of government.

Section 60104(c) of the Federal pipeline safety laws prohibits State safety regulation of interstate pipelines. Under the Federal pipeline safety laws, States that have submitted a current certification under 49 U.S.C. 60105(a) must adopt the minimum Federal pipeline safety requirements for intrastate pipelines and may adopt additional or more stringent requirements so long as they are compatible. A State may also regulate an intrastate pipeline facility that PHMSA does not regulate.

In this instance, the preemptive effect of the final rule is limited to the minimum level necessary to achieve the objectives of the Federal pipeline safety laws. Therefore, PHMSA has determined that the consultation and funding requirements of Executive Order 13132 do not apply to this final rule.

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

PHMSA analyzed this final rule according to the principles and criteria in Executive Order 13175 (''Consultation and Coordination with Indian Tribal Governments'') [24] and DOT Order 5301.1A (''Department of Transportation Tribal Consultation Policy and Procedures''). Executive Order 13175 requires agencies to ensure meaningful and timely input from Tribal government representatives during the development of rules that significantly or uniquely affect Tribal communities by imposing ''substantial direct compliance costs'' or ''substantial direct effects'' on such communities, or the relationship or distribution of power between the Federal Government and Tribes.

PHMSA assessed the impact of the final rule's revisions and concluded that they will not significantly or uniquely affect Tribal communities or Tribal governments. The rule's regulatory amendments are facially neutral and will have broad, national scope; PHMSA, therefore, does not expect this rule would significantly or uniquely affect Tribal communities, much less that it will impose substantial compliance costs on Native American Tribal governments or mandate Tribal action. Insofar as PHMSA expects that the rule will improve safety and reduce environmental risks, PHMSA finds that it will not entail disproportionately high adverse risks for Tribal communities. Therefore, PHMSA concludes that the funding and consultation requirements of Executive Order 13175 and DOT Order 5301.1A do not apply.

Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act, as amended by the Small Business Regulatory Flexibility Fairness Act of 1996 (5 U.S.C. 601 *et seq.*), generally requires Federal agencies to prepare a final regulatory flexibility analysis for a final rule subject to notice-and-comment rulemaking under the Administrative Procedure Act. 5 U.S.C. 603(a).[25] Executive Order 13272 (''Proper Consideration of Small Entities in

[22] 64 FR 43255 (Aug. 10, 1999).

[23] 74 FR 24693 (May 22, 2009).

[24] 65 FR 67249 (Nov. 6, 2000).

[25] Agencies are not required to conduct a regulatory flexibility analysis if the head of the agency certifies that the rule will not have a significant impact on a substantial number of small entities. 5 U.S.C. 605.

Agency Rulemaking'') [26] obliges agencies to establish procedures promoting compliance with the Regulatory Flexibility Act; DOT's implementing guidance is available on its website.[27]

This final rule was developed in accordance with Executive Order 13272 and DOT guidance to ensure compliance with the Regulatory Flexibility Act and provide appropriate consideration of the potential impacts of the rulemaking on small entities. PHMSA has concluded that the costs of incorporating these updated voluntary, consensus industry technical standards within the PSRs will be negligible. PHMSA understands that updates to industry standards are generally accepted and followed on a voluntary basis throughout most of the pipeline industry; the majority of pipeline operators already purchase and voluntarily apply industry standards—including the updated standards that are the subject of this rulemaking—within their ordinary business practices. Further, incorporating such standards by reference helps to ensure that the industry is not forced to comply with competing versions of the same industry standards. Similarly, PHMSA does not expect the miscellaneous editorial and clarifying revisions in this rulemaking will impose meaningful compliance costs on operators. Therefore, based on the available information regarding the anticipated impact of this final rule, PHMSA certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

Pursuant to 5 CFR 1320.8(d), PHMSA is required to provide interested members of the public and affected agencies with an opportunity to comment on information collection and recordkeeping requests. In accordance with 5 CFR 1320.8(d), PHMSA analyzed this final rule in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), which establishes policies and procedures for controlling paperwork burdens imposed by Federal agencies on the public and requires Federal agencies to minimize the burden of paperwork imposed on the U.S. public by ensuring maximum utility and quality of Federal information. This allowed for the use of information technology to improve the Federal Government's performance and accountability regarding the management of information-collection activities. This final rule does not impose any new information-collection requirements or modify any existing information-collection requirements.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) requires agencies to assess the effects of Federal regulatory actions on State, local, and Tribal governments, and the private sector. For any NPRM or final rule that includes a Federal mandate that may result in the expenditure by State, local, or Tribal governments, in an aggregate of $100 million or more (in 1996 dollars) in any given year, the agency must prepare, among other things, a written statement that qualitatively and quantitatively assesses the costs and benefits of the Federal mandate.

As explained in the above discussion of Executive Order 12866, PHMSA does not expect that the final rule will impose enforceable duties of $100 million or more (in 1996 dollars) in any one year on either State, local, or Tribal governments or on the private sector. Therefore, the requirement to prepare a statement pursuant to Unfunded Mandates Reform Act does not apply.

Privacy Act Statement

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

Regulation Identifier Number

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Regulatory and Deregulatory Actions (Unified Agenda). The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

Final Environmental Assessment

The National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. 4321 *et. seq.*) requires Federal agencies to prepare a detailed statement on major Federal actions that significantly affect the quality of the human environment. The Council on Environmental Quality's implementing regulations (40 CFR parts 1500–1508) require Federal agencies to conduct an environmental review that considers (1) the need for the action; (2) alternatives to the action; (3) the probable environmental impacts of the action and alternatives; and (4) the agencies and individuals consulted during the consideration process. DOT Order 5610.1C (''Procedures for Considering Environmental Impacts'') establishes departmental procedures for the evaluation of environmental impacts under NEPA and its implementing regulations. In this final rule, PHMSA incorporates more than 20 updated industry standards.

PHMSA has completed an Environmental Assessment and concluded that an environmental impact statement will not be required for this rulemaking because it will not have a significant impact on the human environment. To the extent that the final rule will impact the environment, those impacts will be primarily beneficial impacts enhancing the PSR's protection of public safety and the environment by incorporating updated industry standards.

Description of Action: The NTTAA directs Federal agencies to use industry standards and design specifications developed by voluntary consensus standard bodies instead of government-developed standards, when applicable. There are currently more than 80 standards incorporated in parts 192, 193, and 195 of the PSRs.

PHMSA engineers and subject matter experts participate on 25 standards development committees to keep current on committee actions. PHMSA only adopts standards into the Federal regulations that meet the Agency's directive(s) to ensure the best interests of public and environmental safety are served.

Purpose and Need: Many of the industry standards currently incorporated in the PSRs have been revised and updated to incorporate and promote new technologies and methodologies. This final rule allows operators to use new technologies by incorporating new editions of the standards into the PSRs.

PHMSA's technical and subject matter experts continually review the actions of pipeline standards-developing committees and study industry safety practices to ensure that PHMSA's endorsement of any new editions or revised industry standards incorporated into the PSRs will improve public safety and provide protection for the environment. If PHMSA does not amend the PSRs to keep up with industry practices, it could potentially have an adverse effect on the safe transportation of energy resources.

These amendments make the regulatory provisions more consistent with current technology and therefore

[26] 67 FR 53461 (Aug. 16, 2002).

[27] DOT, ''Rulemaking Requirements Concerning Small Entities,'' *https://www.transportation.gov/regulations/rulemaking-requirements-concerning-small-entities* (last updated May 18. 2012).

promote the safe transportation of hazardous liquids, natural and other gases, and liquefied natural gas by pipeline.

Alternatives Considered: In developing this final rule, PHMSA considered two alternatives:

Alternative (1): Take no action and continue to incorporate only the existing standards currently referenced in the PSRs. Because PHMSA's goal is to facilitate pipeline safety and incorporate appropriate and up-to-date industry standards, PHMSA rejected the no-action alternative. This alternative potentially results in forgoing the safety and environmental improvements in the updated standards.

Selected Alternative (2): Adopt the above-described amendments and incorporate updated editions of industry standards as described in the NPRM and this final rule, including cited material. This is the selected alternative. PHMSA's goal is to incorporate updated editions of industry standards by reference into the PSRs when appropriate to facilitate pipeline operators to use current technology, new materials, and other management practices. Another goal is to update and clarify certain provisions in the regulations.

Environmental Consequences: The Nation's pipelines are located throughout the United States, both onshore and offshore, and traverse a variety of environments that range from highly populated urban sites to remote, unpopulated, rural areas and ecologically sensitive environments. The Federal pipeline regulatory system is a risk-management system that is prevention-oriented and focused on identifying safety hazards and reducing the likelihood and quantity of a gas or hazardous liquid (or carbon dioxide) release. Pipeline operators are required to develop and implement IM programs to enhance safety by identifying and reducing pipeline integrity risks.

Pipelines subject to this final rule transport hazardous liquids (as well as carbon dioxide) and gas, and therefore, a spill or leak of the product could affect the physical environment as well as the health and safety of the public. The release of hazardous liquids (as well as carbon dioxide) or gas can cause the loss of cultural and historical resources (*e.g.,* properties listed on the National Register of Historic Places); biological and ecological resources (*e.g.,* coastal zones, wetlands, plant and animal species and their habitats, forests, grasslands, or offshore marine ecosystems); special ecological resources (*e.g.,* threatened and endangered plant and animal species and their habitats, national and State parklands, biological reserves, or wild and scenic rivers); and the contamination of air, water resources (*e.g.,* oceans, streams, or lakes), and soil that exists directly adjacent to and within the vicinity of pipelines. Incidents involving pipelines can result in fires and explosions, causing damage to the local environment. Depending on the size of a spill, carbon dioxide release, or gas leak, and the nature of the failure zone, the potential impacts could vary from property or environmental damage, to injuries or, on rare occasions, fatalities.

Compliance with the PSRs substantially reduces the possibility of an accidental release of product. Incorporating new industry standards or updating those already incorporated into the PSRs can provide operators with the advantages and added safety that can accompany the use of newer technologies. These standards are based on the shared knowledge and experience of owners, operators, manufactures, risk-management experts, and others involved in the pipeline industry, as well as regulatory agencies like PHMSA and state DOTs. PHMSA staff actively participates in the standards development process to ensure that each incorporated standard will enhance pipeline safety and environmental protection. Newer editions are not automatically incorporated, but instead reviewed in detail before they may be incorporated into the PSRs.

PHMSA reviewed each of the standards described in this rule and determined that most of the updates involve minor changes, such as editorial changes, the inclusion of best practices, or similar changes. The majority of updates incorporated in this final rule increase pipeline safety standards to decrease risk. In a small number of instances, standards organizations relax standards to reduce industry burden when justified by low risk, overlapping protections, or technological innovation within the same standard. Provisions that allow for relaxation are the less-conservative-design sloshing wave-height calculations in the revised edition of API Std 650; the provisions in the 21st edition of API Std 1104 that allow welders who are qualified in a fixed position to also be qualified to weld in the roll position; and the elimination of the need to calculate evaporation rates in the 7th edition of API Std 2000. PHMSA has determined that each of these updates maintains and provides adequate protection against applicable risks, and that the safety improvements elsewhere in API Std 650, API Std 1104, and API Std 2000 offset these changes.

Environmental Justice: Executive Order 12898 (''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations''),[28] directs Federal agencies to take appropriate and necessary steps to identify and address disproportionately high and adverse effects of Federal actions on the health or environment of minority and low-income populations ''[t]o the greatest extent practicable and permitted by law.'' DOT Order 5610.2C (''U.S. Department of Transportation Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'') establishes departmental procedures for effectuating Executive Order 12898 by promoting and fully considering the principles of environmental justice throughout the planning and decision-making process when developing programs, policies, and activities—including PHMSA rulemaking.

PHMSA evaluated this final rule according to DOT Order 5610.2C and Executive Order 12898 and has determined that it will not cause disproportionately high and adverse human health and environmental effects on minority populations and low-income populations. The final rule is national in scope; it is neither directed toward a particular population, region, or community, nor is it expected to adversely impact any particular population, region, or community. Indeed, because this rule will generally reduce safety and environmental risks, PHMSA understands the regulatory amendments will reduce any disproportionate human health and environmental risks for minority populations, low-income populations, or other underserved and disadvantaged communities in the vicinity of pipelines within the scope of the rule's amendments. Lastly, the regulatory amendments will yield reductions in greenhouse gas emissions, thereby reducing the risks posed by anthropogenic climate change to minority and low-income populations, and historically underserved and other traditionally disadvantaged populations and communities.

The above findings are also consistent with E.O. 14096 (''Revitalizing Our Nation's Commitment to Environmental Justice for All'') [29] by achieving several goals, including continuing to deepen the Biden-Harris Administration's whole of government approach to

[28] 59 FR 7629 (Feb. 16, 1994).

[29] 88 FR 25251 (April 26, 2023).

environmental justice and to better protect overburdened communities from pollution and environmental harms.

Public Involvement: On October 21, 2021, PHMSA held a virtual public meeting to discuss periodic standards updates and inform this rulemaking. During this meeting, members of the public, Tribal government and Tribal advocacy representatives, State pipeline safety program representatives, pipeline safety advocacy groups, first responders and emergency response organizations, and industry experts provided information and feedback on a variety of topics, including current regulations, public perspectives, and public comments from the NPRM. The meeting included many opportunities for questions and public input. PHMSA also opened a docket in coordination with the public meeting to receive additional input during and in response to the meeting, which can be found at: *https://www.regulations.gov/docket/PHMSA-2021-0069.* The full transcripts of the meeting can be found at: *https://primis.phmsa.dot.gov/meetings/MtgHome.mtg?mtg=156.*

Conclusion—Finding of No Significant Impact (FONSI): Based on the analysis summarized in this Final Environmental Assessment, the analysis provided in the NPRM, this final rule, and accompanying documents in Docket No. PHMSA–2016–0002, PHMSA finds that the final rule does not result in a significant impact on the human or natural environment. Overall, the final rule is expected to have a positive environmental impact by incorporating industry standards that will allow the pipeline industry to use improved technologies, new materials, performance-based approaches, manufacturing processes, and other practices to enhance public health, safety, and welfare. PHMSA's goal is to ensure hazardous liquids, natural and other gases, and liquefied natural gas transported by pipeline will arrive safely to their destinations. In accordance with NEPA, PHMSA solicited comments on the environmental and safety impacts of the proposed rule. All comments received during this period were addressed in the final rule. None of the comments concerned the environmental assessment specified in the proposed rule. Therefore, PHMSA is issuing a Finding of No Significant Impact (FONSI) thus concluding the NEPA process for this rulemaking.

Executive Order 13211: Significant Energy Actions

Executive Order 13211 (''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'') [30] requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' Executive Order 13211 defines a ''significant energy action'' as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation that (1)(i) is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of the Office of Information and Regulatory Affairs (OIRA) as a significant energy action.

This final rule will not be a ''significant energy action'' under Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy. Further, OIRA has not designated this final rule as a significant energy action.

Executive Order 13609 and International Trade Analysis

Executive Order 13609 (''Promoting International Regulatory Cooperation'') [31] requires agencies to consider whether the impacts associated with significant variations between domestic and international regulatory approaches are unnecessary or may impair the ability of American businesses to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that would be adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

Similarly, the Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing any industry standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. For purposes of these requirements, Federal agencies may participate in the establishment of international standards so long as the standards have a legitimate domestic objective, such as helping to ensure safety, and do not operate to exclude imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they serve as the basis for U.S. standards.

PHMSA participates in the establishment of international standards to protect the safety of the American public. PHMSA assessed the effects of the final rule and understands that it will not cause unnecessary obstacles to foreign trade.

Cybersecurity and Executive Order 14028

Executive Order 14028 (''Improving the Nation's Cybersecurity'') [32] directs the Federal Government to improve its efforts to identify, deter, and respond to ''persistent and increasingly sophisticated malicious cyber campaigns.'' In keeping with these policies and directives, PHMSA has assessed the effects of this final rule to determine what impact the regulatory amendments may have on cybersecurity risks for pipeline facilities and has determined that this final rule will not materially affect the cybersecurity risk profile for pertinent pipeline facilities.

This final rule adopts more than 20 new or updated voluntary, consensus industry technical standards that provide specification of materials, test methods, or performance requirements. Gas and hazardous liquid (and carbon dioxide) pipeline operator compliance strategies may be subject to current Transportation Security Agency (TSA) pipeline cybersecurity directives [33] and would be subject to ongoing TSA efforts to strengthen cybersecurity and resiliency in the pipeline sector, as discussed within an ANPRM published in November 2022.[34] Further, the Cybersecurity & Infrastructure Security Agency (CISA) and the Pipeline Cybersecurity Initiative (PCI) of the U.S. Department of Homeland Security conduct ongoing activities to address cybersecurity risks to U.S. pipeline facilities, and may introduce other cybersecurity requirements and guidance for gas and hazardous liquid (and carbon dioxide) pipeline operators.[35] Lastly, because PHMSA concludes that each of the updated standards in this final rule will enhance the protection of public safety and the environment, this rulemaking could reduce the public safety and the

[30] 66 FR 28355 (May 22, 2001).

[31] 77 FR 26413 (May 4, 2012).

[32] 86 FR 26633 (May 17, 2021).

[33] *E.g.,* TSA, Security Directive Pipeline-2021–01C (May 29, 2023); TSA, Security Directive Pipeline-2021–02D (July 27, 2023).

[34] TSA, ''Advance Notice of Proposed Rulemaking: Enhancing Surface Cyber Risk Management,'' 87 FR 73527 (Nov. 30, 2022).

[35] *See, e.g.,* CISA, National Cyber Awareness System Alerts, *https://www.cisa.gov/uscert/ncas/alerts* (last accessed Feb. 1, 2023).

environmental consequences in the event of a cybersecurity incident on pertinent pipeline facilities.

National Technology Transfer and Advancement Act

As discussed above, the NTTAA of 1995 (15 U.S.C. 272 note) directs Federal agencies to use voluntary, consensus technical industry standards in their regulatory activities unless doing so would be inconsistent with applicable law or would be otherwise impractical. Voluntary, consensus technical industry standards are technical standards (*e.g.,* specification of materials, test methods, or performance requirements) that are developed or adopted by voluntary consensus standards bodies. This final rule adopts more than 20 new or updated voluntary, consensus industry technical standards.

Severability

The purpose of this final rule is to operate holistically in addressing a panoply of issues necessary to ensure safe operation of regulated gas and hazardous liquid (as well as carbon dioxide) pipelines, with a focus on providing pipeline operators the ability to use current technologies, improved materials, and updated industry and management practices. However, PHMSA recognizes that this rule incorporates by reference various updated industry standards that focus on unique topics. Therefore, PHMSA concludes that the regulatory amendments adopted herein incorporating various updated industry standards into the PSRs are severable and able to function independently if severed from each other. In the event a court were to invalidate one or more of the unique provisions of the final rule issued in this proceeding, the remaining provisions should stand, thus allowing their continued effect.

List of Subjects

49 CFR Part 192

Incorporation by reference, Pipeline safety, Natural gas.

49 CFR Part 195

Incorporation by reference, Pipeline safety, Anhydrous ammonia, Carbon dioxide, Petroleum.

In consideration of the foregoing, PHMSA is amending 49 CFR parts 192 and 195 as follows:

PART 192—TRANSPORTATION OF NATURAL AND OTHER GAS BY PIPELINE: MINIMUM FEDERAL SAFETY STANDARDS

■ 1. The authority citation for part 192 continues to read as follows:

Authority: 30 U.S.C. 185(w)(3), 49 U.S.C. 5103, 60101 *et seq.,* and 49 CFR 1.97.

■ 2. In § 192.3, add, in alphabetical order, the definition for ''Master Meter System'' to read as follows:

§ 192.3 Definitions.

* * * * *

Master Meter System means a pipeline system for distributing gas within, but not limited to, a definable area (such as a mobile home park, housing project, or apartment complex) where the operator purchases metered gas from an outside source for resale through a gas distribution pipeline system. The gas distribution pipeline system supplies the ultimate consumer who either purchases the gas directly through a meter or by other means, such as by rents.

* * * * *

■ 3. Amend § 192.7 by:
■ a. Revising paragraph (a), the introductory text of paragraph (b), paragraphs (b)(7) through (9), the introductory text of paragraph (c) and paragraphs (c)(2), (5), and (6);
■ b. Adding paragraph (c)(7);
■ c. Redesignating paragraphs (c)(8) through (10) as (c)(9) through (11);
■ d. Adding paragraph (c)(8);
■ e. Revising the introductory text of paragraph (e) and paragraphs (e)(1) through (3), (5), (7), and (9);
■ f. Removing and reserve paragraph (f); and
■ g. Revising paragraph (g), the introductory text of paragraph (i), and paragraphs (i)(2) through (4).

The revisions and additions read as follows:

§ 192.7 What documents are incorporated by reference partly or wholly in this part?

(a) Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All approved incorporation by reference (IBR) material is available for inspection at the Pipeline and Hazardous Materials Safety Administration (PHMSA) and the National Archives and Records Administration (NARA). Contact PHMSA at: Office of Pipeline Safety, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; 202–366–4046; *www.phmsa.dot.gov/pipeline/regs.* For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations.html* or email *fr.inspection@nara.gov.* It is also available from the sources in the following paragraphs of this section.

(b) American Petroleum Institute (API), 200 Massachusetts Avenue NW, Suite 1100, Washington, DC 20001–5571; phone: (202) 682–8000; website: *www.api.org.*

* * * * *

(7) API Specification 5L, Line Pipe, 46th edition, April 2018, including Errata 1 (May 2018), (API Spec 5L); IBR approved for §§ 192.55(e); 192.112(a), (b), (c), (d), and (e); 192.113; appendix B to part 192.

(8) API Specification 6D, Specification for Pipeline and Piping Valves, 24th edition, August 2014, including Errata 1 through 10 (October 2014 through July 2021), Addendum 1 (March 2015), and Addendum 2 (June 2016), (API Spec 6D); IBR approved for § 192.145(a).

(9) API Standard 1104, Welding of Pipelines and Related Facilities, 21st edition, September 2013, including Errata 1 through 5 (April 2014 through September 2018), Addendum 1 (2014), and Addendum 2 (2016), (API Std 1104); IBR approved for §§ 192.225(a); 192.227(a); 192.229(b) and (c); 192.241(c); appendix B to part 192.

* * * * *

(c) American Society of Mechanical Engineers (ASME), Three Park Avenue, New York, NY 10016; phone: (800) 843–2763; email: *CustomerCare@asme.org;* website: *www.asme.org/.*

* * * * *

(2) ASME/ANSI B16.5–2003, Pipe Flanges and Flanged Fittings, October 2004, (ASME/ANSI B16.5); IBR approved for §§ 192.147(a); 192.607(f).

* * * * *

(5) ASME B31.8–2018, Gas Transmission and Distribution Piping Systems, Issued November 20, 2018, (ASME B31.8); IBR approved for §§ 192.112(b); 192.619(a).

(6) ASME/ANSI B31.8S–2004, ''Supplement to B31.8 on Managing System Integrity of Gas Pipelines,'' approved January 14, 2005, (ASME/ANSI B31.8S–2004), IBR approved for §§ 192.714(d); 192.933(d).

(7) ASME B31.8S–2018, Managing System Integrity of Gas Pipelines, Issued November 28, 2018, (ASME B31.8S); IBR approved for §§ 192.13(d); 192.714(c); 192.903 note to Potential impact radius; 192.907 introductory text and (b); 192.911 introductory text, (i), and (k) through (m); 192.913(a) through (c); 192.917(a) through (e); 192.921(a);

192.923(b); 192.925(b); 192.933(c); 192.935(b); 192.937(c); 192.939(a); 192.945(a).

(8) ASME B36.10M–2018, Welded and Seamless Wrought Steel Pipe, Issued October 12, 2018, (ASME B36.10M); IBR approved for § 192.279.

* * * * *

(e) ASTM International (ASTM), 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428; phone: (610) 832–9585; email: *service@astm.org;* website: *www.astm.org.*

(1) ASTM A53/A53M–20, Standard Specification for Pipe, Steel, Black and Hot-Dipped, Zinc-Coated, Welded and Seamless, approved July 1, 2020, (ASTM A53/A53M); IBR approved for § 192.113; appendix B to part 192.

(2) ASTM A106/A106M–19A, Standard Specification for Seamless Carbon Steel Pipe for High-Temperature Service, approved November 1, 2019, (ASTM A106/A106M); IBR approved for § 192.113; appendix B to part 192.

(3) ASTM A333/A333M–18, Standard Specification for Seamless and Welded Steel Pipe for Low-Temperature Service and Other Applications with Required Notch Toughness, approved November 1, 2018, (ASTM A333/A333M); IBR approved for § 192.113; appendix B to part 192.

* * * * *

(5) ASTM A381/A381M–18, Standard Specification for Metal-Arc-Welded Carbon or High-Strength Low-Alloy Steel Pipe for Use with High-Pressure Transmission Systems, approved November 1, 2018, (ASTM A381); IBR approved for § 192.113; appendix B to part 192.

* * * * *

(7) ASTM A671/A671M–20, Standard Specification for Electric-Fusion-Welded Steel Pipe for Atmospheric and Lower Temperatures, approved March 1, 2020, (ASTM A671/A671M); IBR approved for § 192.113; appendix B to part 192.

* * * * *

(9) ASTM A691/A691M–19, Standard Specification for Carbon and Alloy Steel Pipe, Electric-Fusion-Welded for High-Pressure Service at High Temperatures, approved November 1, 2019, (ASTM A691/A691M); IBR approved for § 192.113; appendix B to part 192.

* * * * *

(g) Manufacturers Standardization Society of the Valve and Fittings Industry, Inc. (MSS), 127 Park St. NE, Vienna, VA 22180; phone: (703) 281–6613; email: *info@msshq.org;* website: *www.mss-hq.org/.*

(1) ANSI/MSS SP–44–2019, Steel Pipeline Flanges, published April 2020, (MSS SP–44); IBR approved for § 192.147(a).

(2) [Reserved]

* * * * *

(i) National Fire Protection Association (NFPA), 1 Batterymarch Park, Quincy, MA 02169; phone: (617) 984–7275; website: *www.nfpa.org.*

* * * * *

(2) NFPA 58, Liquefied Petroleum Gas Code, 2020 edition, effective August 25, 2019, (NFPA 58); IBR approved for § 192.11.

(3) NFPA 59, Utility LP-Gas Plant Code, 2018 edition, effective September 6, 2017, (NFPA 59); IBR approved for § 192.11.

(4) NFPA 70, National Electrical Code (NEC), 2017 edition, effective August 24, 2016, (NFPA 70); IBR approved for §§ 192.163(e); 192.189(c).

* * * * *

■ 4. Revise § 192.11 to read as follows:

§ 192.11 Petroleum gas systems.

(a) Each plant that supplies petroleum gas by pipeline to a natural gas distribution system must meet the requirements of this part and NFPA 58 or NFPA 59 (both incorporated by reference, *see* § 192.7), based on the scope and applicability statements in those standards.

(b) Each pipeline system subject to this part that transports only petroleum gas or petroleum gas/air mixtures must meet the requirements of this part and NFPA 58 or NFPA 59 (both incorporated by reference, *see* § 192.7), based on the scope and applicability statements in those standards.

(c) In the event of a conflict between this part and NFPA 58 or NFPA 59 (both incorporated by reference, *see* § 192.7), NFPA 58 or NFPA 59 shall prevail if applicable based on the scope and applicability statements in those standards.

§ 192.13 [AMENDED]

■ 5. In § 192.13 paragraph (d), remove the text ''ASME/ANSI B31.8S'' and add, in its place, the text ''ASME B31.8S''.

§ 192.112 [AMENDED]

■ 6. Amend § 192.112 by:

■ a. Removing in paragraph (b)(1)(ii), the text ''American Society of Mechanical Engineers (ASME)'' and adding, in its place, the text ''ASME'';

■ b. Removing in paragraph (b)(2)(iv), the text ''API Specification 5L'' and adding, in its place, the text ''API Spec 5L'';

■ c. Removing in the introductory text of paragraph (c)(2), the text ''include (i) and either (ii) or (iii)'' and adding, in its place, the text ''include paragraph (c)(2)(i) of this section and either paragraph (c)(2)(ii) or (iii) of this section'';

■ d. Redesignating paragraphs (c)(2)(iii)(a) through (e) as paragraphs (c)(2)(iii)(A) through (E) and adding a paragraph break before each newly redesignated paragraph; and

■ e. Removing in paragraph (e)(3), the text '''ANSI/API Spec 5L''' and adding, in its place, the text ''API Spec 5L''.

■ 7. Revise § 192.113 to read as follows:

§ 192.113 Longitudinal joint factor (E) for steel pipe.

(a) The longitudinal joint factor to be used in the design formula in § 192.105 is determined in accordance with the table 1 to this paragraph (a):

TABLE 1 TO PARAGRAPH (a)

Specification	Pipe class	Longitudinal joint factor (E)
ASTM A53/A53M (incorporated by reference, see § 192.7)	Seamless	1.00
	Electric resistance welded	1.00
	Furnace butt welded	.60
ASTM A106/A106M (incorporated by reference, see § 192.7)	Seamless	1.00
ASTM A333/A333M (incorporated by reference, see § 192.7)	Seamless	1.00
	Electric resistance welded	1.00
ASTM A381 (incorporated by reference, see § 192.7)	Double submerged arc welded	1.00
ASTM A671/A671M (incorporated by reference, see § 192.7)	Electric-fusion-welded	1.00
ASTM A672 (incorporated by reference, see § 192.7)	Electric-fusion-welded	1.00
ASTM A691/A691M (incorporated by reference, see § 192.7)	Electric-fusion-welded	1.00
API Spec 5L (incorporated by reference, see § 192.7)	Seamless	1.00

TABLE 1 TO PARAGRAPH (a)—Continued

Specification	Pipe class	Longitudinal joint factor (E)
	Electric resistance welded	1.00
	Electric flash welded	1.00
	Submerged arc welded	1.00
	Furnace butt welded	.60
Other	Pipe over 4 inches (102 millimeters)	.80
Other	Pipe 4 inches (102 millimeters) or less	.60

(b) If the type of longitudinal joint cannot be determined, the joint factor to be used must not exceed that designated for ''Other.''

■ 8. In § 192.121, revise paragraphs (c)(2)(iv), (d)(2)(iv), and (e)(4) to read as follows:

§ 192.121 Design of plastic pipe.

* * * * *

(c) * * *

(2) * * *

(iv) The wall thickness for a given outside diameter is not less than that listed in Table 1 to this paragraph (c)(2)(iv):

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

PE pipe: minimum wall thickness and SDR values

Pipe size (inches)	Minimum wall thickness (inches)	Corresponding dimension ratio (values)
½″ CTS	0.090	7
½″ IPS	0.090	9.3
¾″ CTS	0.090	9.7
¾″ IPS	0.095	11
1″ CTS	0.099	11
1″ IPS	0.119	11
1¼″ CTS	0.121	11
1¼″ IPS	0.151	11
1½″ IPS	0.173	11
2″	0.216	11
3″	0.259	13.5
4″	0.265	17
6″	0.315	21
8″	0.411	21
10″	0.512	21
12″	0.607	21

(d) * * *

(2) * * *

(iv) The minimum wall thickness for a given outside diameter is not less than that listed in table 2 to this paragraph (d)(2)(iv):

TABLE 2 TO PARAGRAPH (d)(2)(IV)

PA–11 pipe: minimum wall thickness and SDR values

Pipe size (inches)	Minimum wall thickness (inches)	Corresponding dimension ratio (values)
½″ CTS	0.090	7.0
½″ IPS	0.090	9.3
¾″ CTS	0.090	9.7
¾″ IPS	0.095	11

TABLE 2 TO PARAGRAPH (d)(2)(IV)—Continued

PA–11 pipe: minimum wall thickness and SDR values

Pipe size (inches)	Minimum wall thickness (inches)	Corresponding dimension ratio (values)
1″ CTS	0.099	11
1″ IPS	0.119	11
1¼″ CTS	0.121	11
1¼″ IPS	0.151	11
1½″ IPS	0.173	11
2″ IPS	0.216	11
3″ IPS	0.259	13.5
4″ IPS	0.333	13.5
6″ IPS	0.491	13.5

(e) * * *

(4) The minimum wall thickness for a given outside diameter is not less than that listed in table 3 to this paragraph (e)(4):

TABLE 3 TO PARAGRAPH (e)(4)

PA–12 Pipe: minimum wall thickness and SDR values

Pipe size (inches)	Minimum wall thickness (inches)	Corresponding dimension ratio (values)
½″ CTS	0.090	7
½″ IPS	0.090	9.3
¾″ CTS	0.090	9.7
¾″ IPS	0.095	11
1″ CTS	0.099	11
1″ IPS	0.119	11
1¼″ CTS	0.121	11
1¼″ IPS	0.151	11
1½″ IPS	0.173	11
2″ IPS	0.216	11
3″ IPS	0.259	13.5
4″ IPS	0.333	13.5
6″ IPS	0.491	13.5

* * * * *

§ 192.145 [AMENDED]

■ 9. In § 192.145 paragraph (a), remove the text ''ANSI/API Spec 6D'' and add, in its place, the text ''API Spec 6D''.

■ 10. In § 192.147, revise paragraph (a) to read as follows:

§ 192.147 Flanges and flange accessories.

(a) Each flange or flange accessory (other than cast iron) must meet the minimum requirements of ASME/ANSI B16.5 (incorporated by reference, see § 192.7), ANSI/MSS SP–44 (incorporation by reference, see § 192.7), or the equivalent.

* * * * *

■ 11. In § 192.153, revise paragraph (d) to read as follows:

§ 192.153 Components fabricated by welding.

* * * * *

(d) Except for flat closures designed in accordance with ASME BPVC, Section VIII, Division 1 or Division 2, (both incorporated by reference, *see* § 192.7), flat closures and fish tails may not be used on pipe that either operates at 100 psig (689 kilopascals) or more, or that is more than 3 inches (76 millimeters) in nominal diameter.

* * * * *

§ 192.163 [AMENDED]

■ 12. In § 192.163 paragraph (e), remove the text ''NFPA–70'' and add, in its place, the text ''NFPA 70 (incorporated by reference, *see* § 192.7)''.

§ 192.225 [AMENDED]

■ 13. In § 192.225 paragraph (a), remove the text ''section 5'' and add, in its place, the text ''section 5 (except for Note 2 in section 5.4.2.2)''.

■ 14. Revise § 192.279 to read as follows:

§ 192.279 Copper pipe.

Copper pipe may not be threaded except for copper pipe that is used for joining screw fittings or valves, which may be threaded if the wall thickness is equivalent to the comparable size of Schedule 40 or heavier wall pipe listed in ASME B36.10M (incorporated by reference, *see* § 192.7).

§ 192.714 [AMENDED]

■ 15. Amend § 192.714, by:

■ a. Removing the text ''ASME/ANSI B31.8S'' in paragraph (c), and adding, in its place, the text ''ASME B31.8S'';

■ b. Removing in paragraph (c) the text ''section 7, Figure 4'' and adding, in its place, the text ''Section 7, Figure 7.2.1–1''; and

■ c. Removing in paragraph (d)(1) and (d)(2)(iv), the text ''ASME/ANSI

B31.8S'' and adding, in its place, the text ''ASME/ANSI B31.8S–2004''.

■ 16. In § 192.727 revise paragraph (g)(1) to read as follows:

§ 192.727 Abandonment or deactivation of facilities.

* * * * *

(g) * * *

(1) The preferred method to submit data on pipeline facilities abandoned after October 10, 2000, is to the National Pipeline Mapping System (NPMS) in accordance with the NPMS ''Standards for Pipeline and Liquefied Natural Gas Operator Submissions.'' To obtain a copy of the NPMS Standards, please refer to the NPMS homepage at *www.npms.phmsa.dot.gov.* A digital data format is preferred, but hard copy submissions are acceptable if they comply with the NPMS Standards. In addition to the NPMS-required attributes, operators must submit the date of abandonment, diameter, method of abandonment, and certification that, to the best of the operator's knowledge, all of the reasonably available information requested was provided and, to the best of the operator's knowledge, the abandonment was completed in accordance with applicable laws. Refer to the NPMS Standards for details in preparing your data for submission. The NPMS Standards also include details of how to submit data. Alternatively, operators may submit reports by mail, fax or email to the Office of Pipeline Safety, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Information Resources Manager, PHP–10, 1200 New Jersey Avenue SE, Washington, DC 20590–0001; fax (202) 366–4566; email *InformationResourcesManager@dot.gov.* The information in the report must contain all reasonably available information related to the facility, including information in the possession of a third party. The report must contain the location, size, date, method of abandonment, and a certification that the facility has been abandoned in accordance with all applicable laws.

* * * * *

§ 192.903 [AMENDED]

■ 17. Amend the Note to *Potential impact radius* in § 192.903 by removing the term ''ASME/ANSI B31.8S'' and adding in its place the term ''ASME B31.8S''.

§ 192.907 [AMENDED]

■ 18. In § 192.907 paragraph (b), remove the text ''ASME/ANSI B31.8S'' wherever it appears and add, in its place, the text ''ASME B31.8S''.

■ 19. Amend § 192.911 by:

■ a. Removing in the introductory text to § 192.911, paragraphs (i), and (l), the text ''ASME/ANSI B31.8S'' and adding in its place, the text ''ASME B31.8S''; and

■ b. Revising paragraph (m).

The revisions read as follows:

§ 192.911 What are the elements of an integrity management program?

* * * * *

(m) A communication plan that includes the elements of ASME B31.8, Paragraph 850.9 (incorporated by reference, *see* § 192.7), and that includes procedures for addressing safety concerns raised by—

(1) OPS; and

(2) A State or local pipeline safety authority when a covered segment is located in a State where OPS has an interstate agent agreement.

* * * * *

§ 192.917 [AMENDED]

■ 20. Amend § 192.917 by:

■ a. Removing the text ''ASME/ANSI B31.8S'', wherever it appears, and add, in its place, the text ''ASME B31.8S'';

■ b. Removing the paragraph break between the introductory text of paragraph (b) and the undesignated paragraph immediately following;

■ c. Removing in paragraph (e)(1), the text ''Appendix A7'' and adding, in its place, the text ''Appendix A–8''; and

■ d. Removing in paragraph (e)(4), the text ''Appendices A4.3 and A4.4'' and adding, in its place, the text ''Appendices A–5.3 and A–5.4''.

§ 192.921 [AMENDED]

■ 21. In § 192.921 paragraph (a)(2), remove the text ''specified in Table 3 of section 5 of ASME/ANSI'' and add in its place, the text ''specified in Table 5.6.1–1 of Section 5 of ASME''.

§ 192.923 [AMENDED]

■ 22. In § 192.923, amend paragraph (b)(1) by:

■ a. Removing the text ''ASME/ANSI'' and adding, in its place, the text ''ASME''; and

■ b. Removing the text ''section 6.4'' and adding, in its place, the text ''Section 6.4''.

§ 192.925 [AMENDED]

■ 23. In § 192.925, remove the text ''ASME/ANSI B31.8S'', wherever it appears, and add, in its place, the text ''ASME B31.8S''.

§ 192.927 [AMENDED]

■ 24. In § 192.927 paragraph (c)(4)(iii), remove the paragraph break that appears after the text ''risk factors specific to the ICDA region''.

§ 192.933 [AMENDED]

■ 25. Amend § 192.933, by:

■ a. Removing in paragraph (c), the text ''ASME/ANSI B31.8S'' and adding, in its place, the text ''ASME B31.8S'';

■ b. Removing in paragraph (c), the text ''section 7, Figure 4'' and adding, in its place, the text ''Section 7, Figure 7.2.1–1''; and

■ c. Removing in paragraph (d), the text ''ASME/ANSI B31.8S'', wherever it appears, and adding, in its place, the text ''ASME/ANSI B31.8S–2004''.

§ 192.935 [AMENDED]

■ 26. In § 192.935 paragraph (b)(1)(iv), remove the text ''ANSI/ASME'' and add, in its place, the text ''ASME''.

§ 192.937 [AMENDED]

■ 27. In § 192.937 paragraph (c)(2), remove the text ''table 3 of section 5 of ASME/ANSI'' and add, in its place, the text ''Table 5.6.1–1 of Section 5 of ASME''.

§ 192.939 [AMENDED]

■ 28. Amend § 192.939 by:

■ a. Removing in paragraph (a)(1)(ii), the text ''section 5, Table 3'' and adding, in its place, the text ''Table 5.6.1–1 of Section 5''; and

■ b. Removing in paragraph (a)(3), the text ''ASME/ANSI B31.8S, section 5, Table 3'' and adding, in its place, the text ''ASME B31.8S, Table 5.6.1–1 of Section 5''.

Appendix B to Part 192 [Amended]

■ 29. Amend Section I.A. by removing the text ''API Specification for Line Pipe'' and adding in its place, the text ''Line Pipe''.

PART 195—TRANSPORTATION OF HAZARDOUS LIQUIDS BY PIPELINE

■ 30. The authority citation for part 195 continues to read as follows:

Authority: 30 U.S.C. 185(w)(3), 49 U.S.C. 5103, 60101 *et seq,* and 49 CFR 1.97.

■ 31. In § 195.1, revise paragraph (c) to read as follows:

§ 195.1 Which pipelines are covered by this Part?

* * * * *

(c) *Breakout tanks.* Breakout tanks that are subject to this part must comply with requirements that apply specifically to breakout tanks and, to the extent applicable, with requirements that apply to pipeline systems and pipeline facilities. If a conflict exists between a requirement that applies specifically to breakout tanks and a requirement that applies to pipeline systems or pipeline facilities, the

requirement that applies specifically to breakout tanks prevails. Anhydrous ammonia breakout tanks need not comply with §§ 195.132(b); 195.205(b); 195.264(b) and (e); 195.307; 195.428(c) through (d); and 195.432(b) and (c).

■ 32. Amend § 195.3 by:
■ a. Revising paragraph (a), the introductory text of paragraph (b), and paragraphs (b)(1), and (5), (12) through (14), (17) and (18), and (20) and (21);
■ b. Redesignating paragraphs (b)(1) through (23) as set forth in the following table:

Old	New
Paragraph (b)(1)	Paragraph (b)(11).
Paragraph (b)(2) through (11).	Paragraph (b)(1) through (10).
Paragraph (b)(12)	Paragraph (b)(22).
Paragraph (b)(13) through (20).	Paragraph (b)(12) through (19).
Paragraph (b)(21)	Paragraph (b)(21).
Paragraph (b)(22)	Paragraph (b)(23).
Paragraph (b)(23)	Paragraph (b)(20).

■ d. Revising the introductory text of paragraph (c) and paragraphs (c)(3) and (4);
■ e. Revising and republishing paragraph (e);
■ f. Revising paragraph (f), the introductory text of paragraph (g), and paragraph (g)(4); and
■ g. Redesignating paragraphs (f) and (g) as set forth in the following table:

Old	New
Paragraph (f)	Paragraph (g).
Paragraph (g)	Paragraph (f).

The additions and revisions read as follows:

§ 195.3 What documents are incorporated by reference partly or wholly in this part?

(a) Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All approved incorporation by reference (IBR) material is available for inspection at the Pipeline and Hazardous Materials Safety Administration (PHMSA) and at the National Archives and Records Administration (NARA). Contact PHMSA at: Office of Pipeline Safety, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; (202) 366–4046; *www.phmsa.dot.gov/pipeline/regs.* For information on inspecting this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations.html* or email *fr.inspection@nara.gov.* It is also available from the sources in the following paragraphs of this section.

(b) American Petroleum Institute (API), 200 Massachusetts Avenue NW, Suite 1100, Washington, DC 20001–5571; phone: (202) 682–8000; website: *www.api.org/.*

(1) API Recommended Practice 2026, ''Safe Access/Egress Involving Floating Roofs of Storage Tanks in Petroleum Service,'' 3rd edition, June 2017, (API RP 2026); IBR approved for § 195.405(b).

* * * * *

(5) API Recommended Practice 651, Cathodic Protection of Aboveground Petroleum Storage Tanks, 4th edition, September 2014, (API RP 651); IBR approved for §§ 195.565 and 195.573(d).

* * * * *

(12) API Standard 2350, ''Overfill Prevention for Storage Tanks in Petroleum Facilities,'' 5th edition, September 2020, (API Std 2350), including Errata 1 (April 2021); IBR approved for § 195.428(c).

(13) API Specification 5L, Line Pipe, 46th edition, April 2018, including Errata 1 (May 2018), (API Spec 5L) IBR approved for § 195.106(b) and (e).

(14) API Specification Spec 6D, Specification for Pipeline and Piping Valves, 24th edition, August 2014, including Errata 1 through 10 (October 2014 through July 2021), Addendum 1 (March 2015), and Addendum 2 (June 2016), (API Spec 6D); IBR approved for § 195.116(d).

* * * * *

(17) API Standard 620, Design and Construction of Large, Welded, Low-Pressure Storage Tanks, 12th edition, effective October 2013, including Addendum 1 (November 2014) (API Std 620); IBR approved for §§ 195.132(b); 195.205(b); 195.264(b), and (e); 195.307(b); 195.565; 195.579(d).

(18) API Standard 650, Welded Tanks for Oil Storage, 13th edition, March 2020, including Errata 1 (January 2021), (API Std 650); IBR approved for §§ 195.132(b); 195.205(b); 195.264(b), (e); 195.307(c), (d); 195.565; 195.579(d).

* * * * *

(20) API Standard 1104, Welding of Pipelines and Related Facilities, 21st edition, September 2013, including Errata 1 through 5 (April 2014 through September 2018), Addendum 1 (July 2014), and Addendum 2 (May 2016); IBR approved for §§ 195.214(a); 195.222(a) and (b); 195.228(b).

(21) API Standard 2000, Venting Atmospheric and Low-pressure Storage Tanks, 7th Edition, March 2014, Reaffirmed April 2020, (API Std 2000), IBR approved for § 195.264(e).

* * * * *

(c) The American Society of Mechanical Engineers (ASME), Two Park Avenue, New York, NY 10016; phone: (800) 843–2763; website: *http://www.asme.org/.*

* * * * *

(3) ASME B31.4–2006, Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids, October 20, 2006, (ASME B31.4); IBR approved for § 195.110(a).

(4) ASME B31.8–2018, Gas Transmission and Distribution Piping Systems, Issued November 20, 2018, (ASME B31.8); IBR approved for §§ 195.5(a); 195.406(a).

* * * * *

(e) ASTM International (ASTM), 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 119428; phone: (610) 832–9585; email: *service@astm.org;* website: *http://www.astm.org/.*

(1) ASTM A53/A53M–20, Standard Specification for Pipe, Steel, Black and Hot-Dipped, Zinc-Coated, Welded and Seamless, approved July 1, 2020, (ASTM A53/A53M); IBR approved for § 195.106(e).

(2) ASTM A106/A106M–19A, Standard Specification for Seamless Carbon Steel Pipe for High-Temperature Service, approved November 1, 2019, (ASTM A106/A106M); IBR approved for § 195.106(e).

(3) ASTM A333/A333M–18, Standard Specification for Seamless and Welded Steel Pipe for Low-Temperature Service and Other Applications with Required Notch Toughness, approved November 1, 2018, (ASTM A333/A333M); IBR approved for § 195.106(e).

(4) ASTM A381/A381M–18, Standard Specification for Metal-Arc-Welded Carbon or High-Strength Low-Alloy Steel Pipe for Use with High-Pressure Transmission Systems, approved November 1, 2018, (ASTM A381); IBR approved for § 195.106(e).

(5) ASTM A671/A671M–20, Standard Specification for Electric-Fusion-Welded Steel Pipe for Atmospheric and Lower Temperatures, approved March 1, 2020, (ASTM A671/A671M); IBR approved for § 195.106(e).

(6) ASTM A672/A672M–09, Standard Specification for Electric-Fusion-Welded Steel Pipe for High-Pressure Service at Moderate Temperatures, approved October 1, 2009, (ASTM A672/A672M); IBR approved for § 195.106(e).

(7) ASTM A691/A691M–19, Standard Specification for Carbon and Alloy Steel Pipe, Electric-Fusion-Welded for High-Pressure Service at High Temperatures, approved November 1, 2019, (ASTM A691/A691M); IBR approved for § 195.106(e).

(f) Manufacturers Standardization Society of the Valve and Fittings Industry, Inc. (MSS), 127 Park St. NE,

Vienna, VA 22180; phone: (703) 281–6613; website: *www.mss-hq.org/.*

(1) MSS SP–75–2019 Standard Practice, High-Strength, Wrought, Butt-Welding Fittings, published December 2019, (MSS SP–75); IBR approved for § 195.118(a).

(2) [Reserved]

(g) Association for Materials Protection and Performance (AMPP), 15835 Park Ten Place, Houston, TX 77084; phone: (800) 797–6223; website: *https://ampp.org/standards.*

* * * * *

(4) NACE SP0204–2015, Stress Corrosion Cracking (SSC) Direct Assessment Methodology, Revised March 14, 2015, (NACE SP0204); IBR approved for § 195.588(c).

§ 195.5 [AMENDED]

■ 33. In § 195.5 paragraph (a)(1)(i), remove the text ''ASME/ANSI B31.8'' and add, in its place, the text ''ASME B31.8''.

■ 34. In § 195.58, revise paragraph (a) to read as follows:

§ 195.58 Reporting submission requirements.

(a) *General.* Except as provided in paragraphs (b) and (e) of this section, an operator must submit each report required by this part electronically to PHMSA at *https://portal.phmsa.dot.gov* unless an alternative reporting method is authorized in accordance with paragraph (d) of this section.

* * * * *

■ 35. In § 195.59, revise paragraph (a) to read as follows:

§ 195.59 Abandonment or deactivation of facilities.

* * * * *

(a) The preferred method to submit data on pipeline facilities abandoned after October 10, 2000, is to the National Pipeline Mapping System (NPMS) in accordance with the NPMS ''Standards for Pipeline and Liquefied Natural Gas Operator Submissions.'' To obtain a copy of the NPMS standards, please refer to the NPMS homepage at *https://www.npms.phmsa.dot.gov.* A digital data format is preferred, but hard copy submissions are acceptable if they comply with the NPMS Standards. In addition to the NPMS-required attributes, operators must submit the date of abandonment, diameter, method of abandonment, and certification that, to the best of the operator's knowledge, all of the reasonably available information requested was provided and, to the best of the operator's knowledge, the abandonment was completed in accordance with applicable laws. Refer to the NPMS Standards for details in preparing your data for submission. The NPMS Standards also include details of how to submit data. Alternatively, operators may submit reports by mail, fax or email to the Office of Pipeline Safety, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Information Resources Manager, PHP–10, 1200 New Jersey Avenue SE, Washington, DC 20590–0001; fax: (202) 366–4566; email: *InformationResourcesManager@dot.gov.* The information in the report must contain all reasonably available information related to the facility, including information in the possession of a third party. The report must contain the location, size, date, method of abandonment, and a certification that the facility has been abandoned in accordance with all applicable laws.

* * * * *

§ 195.106 [AMENDED]

■ 36. In § 195.106, amend paragraphs (b)(1)(i) and (e)(1) by removing the text ''ANSI/API Spec 5L'' and adding, in its place, the text ''API Spec 5L''.

§ 195.110 [AMENDED]

■ 37. In § 195.110 paragraph (a), remove the text ''ASME/ANSI B31.4'' and add, in its place, the words ''ASME B31.4''.

§ 195.116 [AMENDED]

■ 38. In § 195.116 paragraph (d), remove the text ''ANSI/API Spec 6D'' and add, in its place, the text ''API Spec 6D''.

§ 195.214 [AMENDED]

■ 39. In § 195.214 paragraph (a), remove the text ''section 5'' and add, in its place, the text ''section 5 (except for Note 2 in section 5.4.2.2)''.

■ 40. Amend § 195.307 by:

■ a. Revising paragraph (c); and

■ b. Removing in paragraph (d), the text ''API Standard 653'' and adding, in its place, the text ''API Std 653''.

The revision reads as follows:

§ 195.307 Pressure testing aboveground breakout tanks.

* * * * *

(c) For aboveground breakout tanks built to API Std 650 (incorporated by reference, *see* § 195.3) that were first placed into service after October 2, 2000, testing must be conducted in accordance with Sections 7.3.6 and 7.3.7 of API Std 650.

* * * * *

§ 195.405 [AMENDED]

■ 41. In § 195.405 paragraph (b), remove the text ''API Pub 2026'', wherever it appears, and add, in its place, the text ''API RP 2026''.

§ 195.406 [AMENDED]

■ 42. In § 195.406 paragraph (a)(1)(i), remove the text ''ASME/ANSI B31.8'' and add, in its place, the text ''ASME B31.8''.

§ 195.428 [AMENDED]

■ 43. In § 195.428 paragraph (c), remove the text ''API RP 2350'', wherever it appears, and add, in its place, the text ''API Std 2350''.

§ 195.565 [AMENDED]

■ 44. In § 195.565, remove the text ''ANSI/API RP 651'', wherever it appears, and add, in its place, the text ''API RP 651''.

§ 195.588 [AMENDED]

■ 45. In § 195.588 paragraph (c), remove the text ''NACE SP0204–2008'', wherever it appears, and add, in its place, the text ''NACE SP0204''.

Issued in Washington, DC, on April 17, 2024, under authority delegated in 49 CFR 1.97.

Tristan H. Brown,

Deputy Administrator.

[FR Doc. 2024–08624 Filed 4–26–24; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 240227–0061; RTID 0648–XD879]

Fisheries of the Exclusive Economic Zone Off Alaska; Gulf of Alaska; Final 2024 and 2025 Harvest Specifications for Groundfish; 2024 Rockfish Program Cooperative Allocations

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

ACTION: Temporary rule.

SUMMARY: NMFS is providing notification for the Rockfish Program cooperative allocations as described in the final rule that published on March 4, 2024, implementing the final 2024 and 2025 harvest specifications and prohibited species catch limits for the groundfish fishery of the Gulf of Alaska (GOA). These allocations are necessary to provide the Rockfish Program cooperative amounts for 2024, thus allowing commercial fishermen to

maximize their economic opportunities in this fishery. This notification comports with the Fishery Management Plan (FMP) for Groundfish of the GOA (GOA FMP).

DATES: Effective 1,200 hours, Alaska local time (A.l.t.), May 1, 2024, through 1,200 hours, A.l.t., December 31, 2024.

FOR FURTHER INFORMATION CONTACT: Abby Jahn, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the FMP prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens 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 parts 679 and 680.

As described in the final 2024 and 2025 harvest specifications for groundfish of the Gulf of Alaska, allocations among vessels belonging to catcher vessel (CV) cooperatives or catcher/processor (CP) cooperatives are not included in the final harvest specifications (March 4, 2024, 89 FR 15484). Rockfish Program applications for CV cooperatives and CP cooperatives are not due to NMFS until March 1 of each calendar year; therefore, NMFS cannot calculate 2024 and 2025 allocations in conjunction with the final harvest specifications (§ 679.81(f)). NMFS has received the 2024 Rockfish Program applications and has calculated the 2024 allocations for CV cooperatives and CP cooperatives, as set forth in § 679.81(b), (c), and (e). NMFS is listing the 2024 allocations in table 1.

BILLING CODE 3510–22–P

Table 1 -- 2024 Rockfish Program Cooperative Allocations

Entry Level	Group code	Species Group	Metric tons
Rockfish Program Entry Level	401	Pacific Ocean Perch	5
		Northern Rockfish	5
		Dusky Rockfish	50
Catcher/Processor Cooperatives			
Gulf of Alaska Rockfish Best Use Cooperative	412	Pacific Ocean Perch	9898.095
		Thornyhead Rockfish	183.645
		Halibut	74.1
		Sablefish	338.75
		Northern Rockfish	791.509
		Rougheye/Blackspotted Rockfish	185.441
		Shortraker Rockfish	75.6
		Dusky Rockfish	2665.296

Catcher Vessel Cooperatives			
Silver Bay Seafoods Rockfish Cooperative	407	Pacific Cod	146.372
		Pacific Ocean Perch	4066.489
		Thornyhead Rockfish	13.517
		Halibut	29.183
		Sablefish	162.791
		Northern Rockfish	277.527
		Dusky Rockfish	966.522
North Pacific Rockfish Cooperative	408	Pacific Cod	94.923
		Pacific Ocean Perch	2583.116
		Thornyhead Rockfish	8.766
		Halibut	18.925
		Sablefish	105.572
		Northern Rockfish	170.51
		Dusky Rockfish	724.616
OBSI Rockfish Cooperative	409	Pacific Cod	129.555
		Pacific Ocean Perch	3189.151
		Thornyhead Rockfish	11.964
		Halibut	25.83
		Sablefish	144.088
		Northern Rockfish	273.706
		Dusky Rockfish	1068.762
Western Alaska Fisheries Rockfish Cooperative	410	Pacific Cod	57.915
		Pacific Ocean Perch	1881.135
		Thornyhead Rockfish	5.348
		Halibut	11.547
		Sablefish	64.412
		Northern Rockfish	83.669
		Dusky Rockfish	280.738
Star of Kodiak Rockfish Cooperative	411	Pacific Cod	159.575
		Pacific Ocean Perch	3634.013
		Thornyhead Rockfish	14.736
		Halibut	31.815
		Sablefish	177.475
		Northern Rockfish	378.079
		Dusky Rockfish	1359.067

BILLING CODE 3510–22–C

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. Through previous actions, the FMP and regulations are designed to authorize NMFS to take this action. See 50 CFR part 679. This action is exempt from review under Executive Order 12866.

The Assistant Administrator for Fisheries, NOAA, finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B), as such requirement is unnecessary and contrary to the public interest. This notification provides information on the 2024 Rockfish Program cooperative allocations, and does not change operating practices in the fisheries. This notification is consistent with the harvest specifications recommended by the North Pacific Fishery Management Council in December 2023 and implemented by NMFS in the final rule for the 2024 and 2025 harvest specifications (89 FR 15484, March 4, 2024). Those harvest specifications specify the final total allowable catch (TAC) limits from which NMFS calculates the Rockfish Program cooperative allocations based on existing regulations, which were implemented through prior notice and comment rulemaking (§ 679.81(b), (c), and (e)). The public was provided with notice and opportunity to comment during the public comment period for the proposed harvest specifications (88 FR 85184, December 7, 2023) and has had notice of the final harvest specifications implementing the final TAC limits (89 FR 15484, March 4, 2024). Because the public already had a meaningful opportunity to comment on the TAC limits from which these allocations are derived, further opportunity for public comment is

unnecessary and would not be meaningful.

This notification announces the Rockfish Program cooperative allocations based on applications received after the publication of the 2024 and 2025 harvest specifications. If this notification is delayed to allow for notice and comment it could also result in confusion for participants in the Rockfish Program given that the final rule implementing the 2024 and 2025 harvest specifications is effective and the Rockfish Program fishery opens May 1, 2024. Therefore, the Assistant Administrator finds good cause to waive the requirement to provide prior notice and opportunity for public comment. For the reasons above, the Assistant Administrator also finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date and make this rule effective immediately upon publication.

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

Dated: April 23, 2024.

Everett Wayne Baxter,

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

[FR Doc. 2024–09042 Filed 4–26–24; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 89, No. 83
Monday, April 29, 2024

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 927

[Doc. No. AMS–SC–22–0079]

Pears Grown in Oregon and Washington; Amendment to the Marketing Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referendum order.

SUMMARY: This rulemaking proposes an amendment to Marketing Order No. 927, which regulates the handling of pears grown in Oregon and Washington. The proposed amendment would revise the Fresh Pear Committee's approval requirement for recommending modifications to the marketing order's fresh pear handling regulations from 80 to 75 percent.

DATES: The referendum will be conducted from May 13 through May 27, 2024. Only pear growers who grew pears within the designated production area during the period July 1, 2022, through June 30, 2023, are eligible to vote in this referendum.

ADDRESSES: Interested persons with questions and comments are invited to submit written questions and comments to the Docket Clerk, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; or Telephone: (202) 720–8085.

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* or *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.*

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 proposal is issued under Marketing Order No. 927, as amended (7 CFR part 927), regulating the handling of pears grown in Oregon and Washington. Part 927 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 growers and handlers of pears 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 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.

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 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. This rule shall not be deemed to preclude, preempt, or supersede any State program covering pears grown in Oregon and Washington.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under sec. 8c(15)(A) of the Act (7 U.S.C. 608c(15)(A)), any handler subject to an order may file with the U.S. Department of Agriculture (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. 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 1504 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) (Pub. L. 110–246) amended sec. 8c(17) of the Act, which in turn required the addition of supplemental rules of practice to 7 CFR part 900 (73 FR 49307; August 21, 2008). The amendment of sec. 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. USDA may use informal rulemaking to amend marketing orders depending upon the nature and complexity of the proposed amendment, the potential regulatory and economic impacts on affected entities, and any other relevant matters.

AMS has considered these factors and has determined that the amendment proposed herein is not unduly complex and the nature of the proposed amendment is appropriate for utilizing the informal rulemaking process to amend the Order. This proposed rule

would revise the approval requirement for recommending modifications to the Order's fresh pear handling regulations. A discussion of the potential regulatory and economic impacts on affected entities is discussed later in the ''Final Regulatory Flexibility Analysis'' section of this proposed rule. The amendment would apply equally to all producers and handlers, regardless of size. The proposed amendment also has no additional impact on the reporting, record-keeping, or compliance costs of small businesses.

The Committee recommended the proposed amendment to the Order following deliberations at a public meeting held on June 2, 2022. The Committee recommended this change by vote of nine in favor and two opposed, with one abstention. The two opposing voters did not feel the proposed change was necessary, and the abstention voter wanted an even lower voter approval requirement. The Committee submitted its formal recommendation to amend the Order through the informal rulemaking process on August 23, 2022, and subsequently provided AMS clarification about the recommendation on December 1, 2022.

A proposed rule soliciting public comments on the proposed amendment was published in the **Federal Register** on October 10, 2023 (88 FR 69888). AMS received one comment—supporting the proposed rule. Based on all the information available to AMS at this time, including the comment received in response to the proposed rule, no substantive changes will be made to the proposed amendment.

AMS will conduct a producer referendum to determine support for the proposed amendment. If appropriate, a final rule will then be issued to effectuate the amendment, if it is favored by producers in the referendum.

Proposal—Prerequisites to Recommendations

Currently, §§ 927.33(a) and 927.52(a) of the Order provide that all decisions of the Committee require a supporting vote of 75 percent or greater; except that a decision to recommend changes to the regulations concerning the shipment of fresh pears requires a supporting vote of 80 percent or greater. The voting requirements in § 927.52 of the Order utilize a weighted calculation of votes based on the handling of specific pear varieties. The Committee recommended modifying the current 80 percent voting requirement to 75 percent to align these voting requirements, mitigate confusion, and simplify the Order.

In 2020, the Committee recommended a regulation change for the Anjou pear variety in three separate motions, each receiving a separate vote. A subcommittee was then formed to investigate how the proposed modification to the voting requirement might have affected the 2020 voting outcomes. The subcommittee analyzed the three motions by comparing each voting outcome at 75- and 80-percent concurrence requirement levels. Of the three, two motions did not have enough Committee support at either voting level and received only 52 percent and 66 percent of the vote, respectively. The third motion for the regulation change received 86 percent affirmative support by vote. Therefore, the subcommittee concluded that changing the requirement to 75 percent would not have altered the outcome of those votes.

While a majority of the Committee believes the current 80-percent voter affirmation requirement is too high, two members believe the change to 75 percent is not necessary, and one member believes the change is not impactful enough.

The Committee considered alternatives, including a 70-percent requirement. However, after running simulations with historical data to assess the impact of a 70- or 75-percent requirement, the Committee determined 75 percent to be optimal in that it did not materially affect vote outcomes for recommendations. Additionally, the adjustment from an 80- to 75-percent voting requirement establishes regulatory consistency with other Committee recommendations that have a 75-percent voting requirement. As such, the Committee believes this proposal would provide more continuity to all Committee voting procedures without materially changing voting outcomes, thereby mitigating confusion and improving the efficiency of its operations.

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 action 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 in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 708 growers of fresh pears in the production area and 27 handlers subject to regulation under the Order. At the time this analysis was prepared, small agricultural producers of pears were defined by the Small Business Administration as those having annual receipts equal to or less than $3,500,000 (North American Industry Classification System code 111339, Other Noncitrus Fruit Farming), and small agricultural service firms were defined as those whose annual receipts are equal to or less than $34,000,000 (North American Industry Classification System Code 115114, Postharvest Crop Activities) (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS), the 2020 average grower price received for fresh pears produced in Oregon and Washington was $11.39 per 44-pound standard box or equivalent. Committee data indicates total production was 16,290,225 44-pound standard boxes or equivalent in the 2019–20 fiscal period. The total 2019–20 fiscal period value of assessable fresh ''summer/fall'' and ''winter'' pears grown in Oregon and Washington was $185,545,663 (16,290,225 44-pound standard boxes or equivalent multiplied by $11.39 per box equals $185,545,663). Dividing the crop value by the estimated number of growers (708), yields an estimated average receipt per grower of $262,070.

According to USDA Market News data, the reported average terminal price for 2020 Oregon and Washington fresh pears was $34.87 per 44-pound standard box or equivalent (data reported in 4/5 bushel). Multiplying the Committee-reported 2019–20 Oregon and Washington total production of 16,290,225 44-pound standard boxes or equivalent by the estimated average price per box or equivalent of $34.87 equals $568,040,146. Dividing this figure by 27 regulated handlers yields estimated average annual handler receipts of $21,038,524.

Therefore, using the above data, the majority of growers and handlers of Oregon and Washington fresh pears may be classified as small entities.

This proposed rule would revise a provision in the Order's subpart regulating handling of pears grown in Oregon and Washington. This proposal would align the approval requirement for recommending modifications to the Order's fresh pear handling regulations, which is 80 percent, with all other Committee voting requirements within the Order. Currently, all other Committee recommendations require 75 percent concurrence. The different voting requirements sometimes result in

confusion for some Committee members, which can disrupt Committee operations.

The proposed amendment has no anticipated impact on the reporting, record-keeping, or compliance costs of small businesses.

The proposed amendment would not directly increase or decrease costs to members of the pear industry.

Alternatives to the proposed amendment were considered, including making no changes at this time. However, the Committee believes it is necessary to bring all voting requirements in-line for clarity and understanding to ensure the efficient execution of the Order.

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 proposed rule would impose no additional reporting or recordkeeping requirements on either small or large pear 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.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this action.

The Committee's meetings are widely publicized throughout the pear production area. All interested persons are invited to attend the meetings and encouraged to participate in Committee deliberations on all issues. Like all Committee meetings, the meeting held on June 2, 2022, was open to the public, and all entities, both large and small, were encouraged to express their views on the proposed amendment.

A proposed rule concerning this action published in the **Federal Register** on October 10, 2023 (88 FR 69888). A copy of the rule was sent via email to Committee staff for distribution to all Committee members and Oregon and Washington pear growers and handlers. The proposed rule was also made available by USDA through the internet and the Office of the Federal Register. A 60-day comment period ending December 11, 2023, was provided to allow interested persons to respond to the proposals. AMS received one comment—supportive of the proposed amendment—during the comment period. Based on all the information available to AMS at this time, including the comment received in response to the proposed rule, no substantive changes will be made to the amendment as proposed.

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.

Findings and Conclusions

AMS has determined that the findings and conclusions, and general findings and determinations included in the proposed rule set forth in the October 10, 2023, issue of the **Federal Register** (88 FR 69888) are appropriate and necessary and are hereby approved and adopted.

Marketing Order

Annexed hereto and made a part hereof is the document entitled, ''Order Amending the Order Regulating the Handling Pears Grown in Oregon and Washington.'' This document has been decided upon as the detailed and appropriate means of effectuating the foregoing findings and conclusions. It is hereby ordered that this entire proposed rule be published in the **Federal Register**.

Referendum Order

It is hereby directed that a referendum be conducted in accordance with the procedure for the conduct of referenda (7 CFR 900.400–407) to determine whether the annexed order amending the Order regulating the handling of pears grown in Oregon and Washington is approved by growers, as defined under the terms of the Order, who during the representative period were engaged in the production of pears in the production area. The representative period for the conduct of such referendum is hereby determined to be July 1, 2022, through June 30, 2023.

The agents designated by the Secretary to conduct the referendum are Josh Wilde and Barry Broadbent, West Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324–3375, Fax: (863) 291–8614, or Email: *Joshua.R.Wilde@usda.gov* and *Barry.Broadbent@usda.gov,* respectively.

Order Amending the Order Regulating the Handling of Pears Grown in Oregon and Washington [1]

Findings and Determinations

The findings and determinations hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of Marketing Order 927; 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 927 as hereby proposed to be amended and all the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

2. Marketing Order 927 as hereby proposed to be amended regulates the handling of pears grown in Oregon and Washington and is applicable only to persons in the respective classes of commercial and industrial activity specified in the Order;

3. Marketing Order 927 as hereby proposed to be amended is limited in application to the smallest regional production area that 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 927 as hereby proposed to be 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 pears produced or packed in the production area; and

5. All handling of pears grown or handled in the production area, as defined in Marketing Order 927 is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, all

[1] 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.

handling of pears grown in Oregon and Washington shall be in conformity to, and in compliance with, the terms and conditions of the said Order as hereby proposed to be amended as follows:

The provisions of the proposed marketing order amending the Order contained in the proposed rule issued by the Administrator and published in the **Federal Register** (88 FR 69888) on October 10, 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 927

Marketing agreements, Pears, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the AMS proposes to amend 7 CFR part 927 as follows:

PART 927—PEARS GROWN IN OREGON AND WASHINGTON

■ 1. The authority citation for 7 CFR part 927 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Amend § 927.52 by revising paragraph (a) to read as follows:

§ 927.52 Prerequisites to recommendations.

(a) Decisions of the Fresh Pear Committee or the Processed Pear Committee with respect to any recommendations to the Secretary pursuant to the establishment or modification of a supplemental rate of assessment for an individual variety or subvariety of pears shall be made by affirmative vote of not less than 75 percent of the applicable total number of votes, computed in the manner described in paragraph (b) of this section, of all members. Decisions of the Fresh Pear Committee pursuant to the provisions of § 927.50 shall be made by an affirmative vote of not less than 75 percent of the applicable total number of votes, computed in the manner prescribed in paragraph (b) of this section, of all members.

* * * * *

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2024–09049 Filed 4–26–24; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

[NRC–2024–0034]

RIN 3150–AL07

List of Approved Spent Fuel Storage Casks: NAC International, Inc., NAC–UMS Universal Storage System, Certificate of Compliance No. 1015, Renewal of Initial Certificate and Amendment Nos. 1 Through 9

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is proposing to amend its spent fuel storage regulations by revising the NAC International, Inc., NAC–UMS Universal Storage System listing within the ''List of approved spent fuel storage casks'' to renew the initial certificate and Amendment Nos. 1 through 9 of Certificate of Compliance No. 1015. The renewal of the initial certificate of compliance and Amendment Nos. 1 through 9 for 40 years changes the certificate's conditions and technical specifications to address aging management activities related to the structures, systems, and components important to safety of the dry storage system to ensure that these will maintain their intended functions during the period of extended storage operations.

DATES: Submit comments by May 29, 2024. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Submit your comments, identified by Docket ID NRC–2024–0034, at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

You can read a plain language description of this proposed rule at *https://www.regulations.gov/docket/NRC-2024-0034.* For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Christopher Markley, Office of Nuclear Material Safety and Safeguards; telephone: 301–415–6293, email: *Christopher.Markley@nrc.gov* and Greg Trussell, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–6244, email: *Gregory.Trussell@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2024–0034, when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2024–0034. Address questions about NRC dockets to Helen Chang, telephone: 301–415–3228, email: *Helen.Chang@nrc.gov.* For technical questions contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time, Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2024–0034 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Rulemaking Procedure

Because the NRC considers this action to be non-controversial, the NRC is publishing this proposed rule concurrently with a direct final rule in the Rules and Regulations section of this issue of the **Federal Register**. The direct final rule will become effective on July 15, 2024. However, if the NRC receives any significant adverse comment by May 29, 2024, then the NRC will publish a document that withdraws the direct final rule. If the direct final rule is withdrawn, the NRC will address the comments in a subsequent final rule. In general, absent significant modifications to the proposed revisions requiring republication, the NRC will not initiate a second comment period on this action in the event the direct final rule is withdrawn.

A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

(1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, a substantive response is required when:

(a) The comment causes the NRC to reevaluate (or reconsider) its position or conduct additional analysis;

(b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the NRC.

(2) The comment proposes a change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition.

(3) The comment causes the NRC to make a change (other than editorial) to the rule.

For a more detailed discussion of the proposed rule changes and associated analyses, see the direct final rule published in the Rules and Regulations section of this issue of the **Federal Register**.

III. Background

Section 218(a) of the Nuclear Waste Policy Act of 1982, as amended, requires that ''[t]he Secretary [of the Department of Energy] shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the [Nuclear Regulatory] Commission may, by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission.'' Section 133 of the Nuclear Waste Policy Act states, in part, that ''[t]he Commission shall, by rule, establish procedures for the licensing of any technology approved by the Commission under Section 219(a) [sic: 218(a)] for use at the site of any civilian nuclear power reactor.''

To implement this mandate, the Commission approved dry storage of spent nuclear fuel in NRC-approved casks under a general license by publishing a final rule that added a new subpart K in part 72 of title 10 of the *Code of Federal Regulations* (10 CFR) entitled ''General License for Storage of Spent Fuel at Power Reactor Sites'' (55 FR 29181; July 18, 1990). This rule also established a new subpart L in 10 CFR part 72 entitled ''Approval of Spent Fuel Storage Casks,'' which contains procedures and criteria for obtaining NRC approval of spent fuel storage cask designs. The NRC subsequently issued a final rule on October 19, 2000 (65 FR 62581), that approved the NAC–UMS Universal Storage System design and added it to the list of NRC-approved cask designs in § 72.214 as Certificate of Compliance (CoC) No. 1015.

On August 28, 2007 (72 FR 49352), the NRC amended the scope of the general licenses issued under 10 CFR 72.210 to include the storage of spent fuel in an independent spent fuel storage installations (ISFSI) at power reactor sites to persons authorized to possess or operate nuclear power reactors under 10 CFR part 52. On February 16, 2011 (76 FR 8872), the NRC amended subparts K and L in 10 CFR part 72, to extend and clarify the term limits for certificates of compliance and to revise the conditions for spent fuel storage cask renewals, including adding requirements for the safety analysis report to include time-limited aging analyses and a description of aging management programs. The NRC also clarified the terminology used in the regulations to use ''renewal'' rather than ''reapproval'' to better reflect that extending the term of a currently approved cask design is based on the cask design standards in effect at the time the CoC was approved rather than current standards.

IV. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31885). The NRC requests comment on the proposed rule with respect to clarity and effectiveness of the language used.

V. Availability of Documents

The documents identified in the following table are available to interested persons as indicated.

Document	ADAMS accession No./Web link/ **Federal Register** citation
Proposed Certificate of Compliance	
Proposed Renewed Certificate of Compliance No. 1015, Renewed Initial Certificate	ML23213A151.
Proposed Renewed Certificate of Compliance No. 1015, Renewed Amendment 1	ML23213A152.
Proposed Renewed Certificate of Compliance No. 1015, Renewed Amendment 2	ML23213A153.
Proposed Renewed Certificate of Compliance No. 1015, Renewed Amendment 3	ML23213A154.

Document	ADAMS accession No./Web link/ **Federal Register** citation
Proposed Renewed Certificate of Compliance No. 1015, Renewed Amendment 4	ML23213A155.
Proposed Renewed Certificate of Compliance No. 1015, Renewed Amendment 5	ML23213A156.
Proposed Renewed Certificate of Compliance No. 1015, Renewed Amendment 6	ML23213A157.
Proposed Renewed Certificate of Compliance No. 1015, Renewed Amendment 7	ML23213A158.
Proposed Renewed Certificate of Compliance No. 1015, Renewed Amendment 8	ML23213A159.
Proposed Renewed Certificate of Compliance No. 1015, Renewed Amendment 9	ML23213A160.
Preliminary Safety Evaluation Report	
Preliminary Safety Evaluation Report for Renewed Certificate of Compliance No. 1015, Amendments Nos. 1 through 9.	ML23213A161.
Proposed Conditions for Cask Use and Technical Specifications	
Proposed Conditions for Cask Use and Technical Specifications, Renewed Initial Certificate	ML23213A164.
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 1	ML23213A166.
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 2	ML23213A168.
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 3, Appendix A	ML23213A171.
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 3, Appendix B	ML23213A178.
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 4, Appendix A	ML23213A172.
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 4, Appendix B	ML23213A179.
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 5, Appendix A	ML23213A173.
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 5, Appendix B	ML23213A180.
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 6, Appendix A	ML23213A174.
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 6, Appendix B	ML23213A181.
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 7, Appendix A	ML23213A175.
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 7, Appendix B	ML23213A182.
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 8, Appendix A	ML23213A176.
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 8, Appendix B	ML23213A183.
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 9, Appendix A	ML23213A177.
Proposed Conditions for Cask Use and Technical Specifications, Renewed Amendment 9, Appendix B	ML23213A184.
Environmental Documents	
''Environmental Assessment for Proposed Rule Entitled, ''Storage of Spent Nuclear Fuel in NRC-Approved Storage Casks at Nuclear Power Reactor Sites.'' (1989).	ML051230231.
''Environmental Assessment and Findings of No Significant Impact for the Final Rule Amending 10 CFR Part 72 License and Certificate of Compliance Terms.'' (2010).	ML100710441.
Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel: Final Report (NUREG–2157, Volumes 1 and 2). (2014).	ML14198A440 (package).
NAC International, Inc., NAC–UMS Universal Storage System Renewal Application Documents	
NAC International, Inc., NAC–UMS Universal Storage System, Certificate of Compliance (CoC) Renewal Application, October 13, 2020.	ML20293A102.
NAC International, Inc., Request for Additional Information Responses NAC–UMS Cask System, Revision 22A, March 3, 2022.	ML22062A764.
Replacement Page for Responses to the Nuclear Regulatory Commission's (NRC) Request for Additional Information for the Request to Renew the NAC–UMS Cask System Certificate of Compliance No. 1015, March 18, 2022.	ML22077A076.
NAC, Supplement to the NRC's Request for Additional Information for the Request to Renew the NAC–UMS Cask System Certificate of Compliance No. 1015, July 28, 2022.	ML22209A078 (package).
Request to Withdraw Administrative Controls for Adverse Weather Events During Operations from NAC–MPC CoC Renewal Application, December 21, 2022.	ML22355A120.
Other Documents	
''General License for Storage of Spent Fuel at Power Reactor Sites.'' (July 18, 1990)	55 FR 29181.
''Licenses, Certifications, and Approvals for Nuclear Power Plants.'' (August 28, 2007)	72 FR 49352.
''License and Certificate of Compliance Terms.'' (February 16, 2011)	76 FR 8872.
''Agreement State Program Policy Statement; Correction.'' (October 18, 2017)	82 FR 48535.
Nuclear Energy Institute NEI 14–03, Revision 2, ''Format, Content and Implementation Guidance for Dry Cask Storage Operations-Based Aging Management.'' (December 21, 2016).	ML16356A210.
Regulatory Guide 3.76, Revision 0, ''Implementation of Aging Management Requirements for Spent Fuel Storage Renewals.'' (July 31, 2021).	ML21098A022.
''List of Approved Spent Fuel Storage Casks: NAC–UMS Addition.'' (October 19, 2000)	65 FR 62581.
Presidential Memorandum, ''Plain Language in Government Writing.'' (June 10, 1998)	63 FR 31885.

The NRC may post materials related to this document, including public comments, on the Federal rulemaking website at *https://www.regulations.gov* under Docket ID NRC–2024–0034. In addition, the Federal rulemaking website allows members of the public to receive alerts when changes or additions occur in a docket folder. To subscribe:

(1) navigate to the docket folder (NRC–2024–0034); (2) click the ''Subscribe'' link; and (3) enter an email address and click on the ''Subscribe'' link.

Dated: April 9, 2024.

For the Nuclear Regulatory Commission.

Raymond Furstenau,

Acting Executive Director for Operations.

[FR Doc. 2024–08509 Filed 4–26–24; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1488; Project Identifier AD–2023–00182–T]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (SNPRM).

SUMMARY: The FAA is revising a notice of proposed rulemaking (NPRM) that applied to certain The Boeing Company Model 757–200, –200CB, and –200PF series airplanes. This action revises the NPRM by adding airplanes to the applicability. The FAA is proposing this airworthiness directive (AD) to address the unsafe condition on these products. Since these actions would impose an additional burden over that in the NPRM, the FAA is requesting comments on this SNPRM.

DATES: The FAA must receive comments on this SNPRM by June 13, 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.* 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* under Docket No. FAA–2023–1488; 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 SNPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this SNPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; website *myboeingfleet.com.*
- 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* by searching for and locating Docket No. FAA–2023–1488.

FOR FURTHER INFORMATION CONTACT: Wayne Ha, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: 562–627–5238; email: *wayne.ha@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–2023–1488; Project Identifier AD–2023–00182–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 again revise 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,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this proposed AD.

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 SNPRM 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 SNPRM, 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 SNPRM. Submissions containing CBI should be sent to Wayne Ha, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: 562–627–5238; email: *wayne.ha@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued an NPRM to amend 14 CFR part 39 by adding an AD that would apply to The Boeing Company Model 757–200, –200CB, and –200PF series airplanes. The NPRM published in the **Federal Register** on August 4, 2023 (88 FR 51745). The NPRM was prompted by a report of cracks found at the main deck cargo door cutout forward and aft hinge attachment holes. In the NPRM, the FAA proposed to require a maintenance record check for repairs at the forward and aft hinge areas of the main deck cargo door cutout; repetitive open-hole high frequency eddy current (HFEC) inspections for cracks in the unrepaired areas of the bear strap, skin, doubler, and upper sill chord at the main deck cargo door forward and aft hinge attachment holes; and corrective actions including obtaining and following procedures for alternative inspections and crack repairs.

Actions Since the NPRM Was Issued

Since the FAA issued the NPRM, the FAA determined that airplanes that have been modified from a passenger to a freighter configuration using VT Mobile Aerospace Engineering (VT MAE) Supplemental Type Certificate (STC) ST03562AT, ST03952AT, or ST04242AT were inadvertently omitted in the NPRM.

Comments

The FAA received comments from VT MAE, FedEx Express (FedEx), United Parcel Service (UPS), Boeing, Aviation Partners Boeing (APB), and two individuals. The following presents the comments received on the NPRM and the FAA's response to each comment.

Effect of Winglets on Accomplishment of the Proposed Actions

APB stated that accomplishing STC ST01518SE on 757–200 passenger airplanes that have been converted to freighters using Boeing STC ST00916WI–D does not affect the actions specified in the proposed rule.

The FAA agrees with the commenter. The FAA has redesignated paragraph (c) of the proposed AD as paragraph (c)(1) of this proposed AD and added paragraph (c)(2) of this proposed AD to state that installation of STC ST01518SE does not affect the ability to accomplish the actions required by this proposed AD. Therefore, for airplanes on which APB STC ST01518SE is installed, a ''change in product'' alternative method of compliance (AMOC) approval request is not necessary to comply with the requirements of 14 CFR 39.17.

Request To Add Actions for Certain Airplanes

FedEx asked for clarification regarding what actions should be done on its fleet. FedEx noted that its airplanes were converted to freighters using VT MAE STC ST03562AT and were not included in the proposed AD due to this conversion. FedEx stated that the intent of the proposed AD applies to its fleet since the STC is based on the design of Boeing 757–200 special freighter (SF) airplanes. VT MAE noted that the installation of the main deck cargo door hinge using VT MAE STCs ST03562AT, ST03952A, and ST04242AT is identical to Boeing 757–200 SF airplanes (those converted using Boeing STC ST00916WI–D). FedEx and VT MAE proposed to use the actions and compliance times specified for Group 2 airplanes as identified in Boeing Alert Requirements Bulletin 757–53A0106 RB, dated January 3, 2023, for airplanes modified under one of the specified VT MAE STCs. The commenters noted that this would include an initial action time related to the time since the aircraft was converted to a freighter.

The FAA agrees that the 757–200 airplanes that have been modified under VT MAE STCs ST03562AT, ST03952AT, and ST04242AT are affected by the identified unsafe condition and has revised paragraph (c)(1) of this proposed AD to include airplanes modified using those STCs. At this time, whether the VT MAE and Boeing STCs are identical in the areas affected by this proposed AD or using the compliance methods and times for Group 2 airplanes adequately addresses the identified unsafe condition has not been determined. Therefore, the FAA has redesignated paragraph (g) of the proposed AD as paragraph (g)(1) of this proposed AD and added paragraph (g)(2) of this proposed AD to specify the applicable compliance times and actions for those airplanes. However, under the provisions of paragraph (i) of this AD, the FAA will consider requests for alternative compliance times or methods if sufficient data are provided to substantiate the request. The FAA is seeking comments on the applicable compliance time and actions for airplanes modified with one of the identified VT MAE STCs. The applicable compliance times and actions for those airplanes may change depending upon comments and data the FAA may receive and review.

Request for Additional Information on Requirements and Unsafe Condition

Two individuals requested that the proposed AD specify the location and size of the liner holes that need to be inspected, as well as the acceptable tolerance for the hole diameter and the plug fit; guidance on how to repair cracks if they are found, such as the type and size of the fasteners, sealants, and patches to be used; a compliance time for the inspections and repairs, based on the number of flight cycles and flight hours of the airplane; and the reason for the unplugged liner holes and how they cause stress concentration and cracks. The commenters stated that this information would help operators to perform the inspections more accurately and consistently, ensure that the repairs are done in accordance with the Boeing standards and specifications, prioritize the most critical aircraft while preventing further crack propagation, and educate operators and maintenance personnel on how to prevent the problem.

The FAA agrees to clarify. The inspection requirements, compliance times, and repair instructions are addressed in Boeing Alert Requirements Bulletin 757–53A0106 RB, dated January 3, 2023, which is mandated by paragraph (g) of this proposed AD. This service information is available in the docket for interested parties. Additionally, the NPRM provided details on the cause of the identified unsafe condition and how to address it. No change is necessary to this proposed AD.

Request To Require Replacement of Skin Panel Under Certain Conditions

The individual commenters suggested that the proposed AD should specify that if the cracks exceed a specified maximum allowable length or maximum allowable width, as specified in the Boeing 757 Structural Repair Manual, then the affected area must be replaced with a new section of skin panel. The commenters added that the replacement procedure must follow any instructions and drawings provided by Boeing, the new section must be inspected for proper installation and fit, and the replacement must be done before further flight. One individual stated that the repair should be universal for all affected models.

The FAA does not agree with the commenters' request. If any crack is found, this proposed AD requires repairing it; there is no maximum allowable length or width for cracking. The crack repair instructions are addressed in Boeing Alert Requirements Bulletin 757–53A0106 RB, dated January 3, 2023, which is required by paragraph (g) of this proposed AD. If an operator finds any cracks, they must follow the procedures outlined in paragraph (h)(2) of this proposed AD to obtain customized repair instructions. No change is necessary to this proposed AD.

Request To Clarify Repairs Requiring Additional Actions

UPS requested that the FAA clarify the proposed AD regarding the repairs found during the required maintenance record check. UPS noted that Boeing Alert Requirements Bulletin 757–53A0106 RB, dated January 3, 2023, requires a maintenance record check for ''any repair'' at the forward and aft hinge areas of the main deck cargo door cutout. UPS stated that Boeing 757–200PF Structural Repair Manual (SRM) 53–00–01–1A–1 allows for smooth dents, edge and surface blends, and rivet plugging of lightning strike or small hole damage in accordance with SRM 53–00–01–2R–6. UPS added that rivet plugs using solid rivets are a Category A repair with no supplemental inspections, so any repairs within the SRM allowable limits and small damage repair do not appreciably affect damage tolerance of the fuselage skin at the door cutout and surround structure. Additionally, UPS noted the potential for non-reinforcing repairs (dents, blends, etc.) that are beyond SRM allowable limits but approved by Boeing to remain as-is without supplemental inspections. UPS stated that it believes the intent of the maintenance record check is to identify and report existing reinforcing and freeze plug repairs in the inspection areas that may affect damage tolerance of the skin and door surround structure. UPS added that Boeing confirmed this intent in Boeing Message SRID 4–5882455484. UPS therefore requested that the proposed

AD be revised to require using ''any reinforcing or freeze plug repair'' in lieu of ''any repair.''

The FAA does not agree with the commenter's request. The FAA has no way of knowing the type or extent of repairs that might be on a given airplane or how those repairs would impact the actions required by this AD. Therefore, any existing repair, including any non-reinforced repair, needs to be evaluated for any potential effect on the inspection requirements. No change is necessary to this proposed AD.

Request To Revise Certain Wording

Boeing requested the FAA to revise the Background section and paragraph (e) of the proposed AD to clarify the affected structure and align the wording with the service information. Boeing requested that verbiage regarding what prompted the proposed AD be revised to specify ''cargo deck cutout'' rather than ''cargo deck.'' Boeing also requested that verbiage regarding the possible effects of undetected cracks be revised to specify ''cargo door hinge area'' rather than ''cargo door hinge.''.

The FAA agrees with the commenter's request. The FAA has revised the Background section and paragraph (e) of this proposed AD accordingly.

FAA's Determination

The FAA is proposing this AD after determining the unsafe condition described previously is likely to exist or develop in other products of the same type design. Certain changes described above expand the scope of the NPRM. As a result, it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this SNPRM.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Alert Requirements Bulletin 757–53A0106 RB, dated January 3, 2023. This service information specifies procedures for a maintenance record check for repairs at the forward and aft hinge areas of the main deck cargo door cutout; repetitive open-hole HFEC inspections for cracks in the unrepaired areas of the bear strap, skin, doubler, and upper sill chord at the main deck cargo door forward and aft hinge attachment holes; and corrective actions including obtaining and following procedures for alternative inspections and crack repairs.

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**.

Proposed AD Requirements in This SNPRM

This proposed AD would require accomplishing the actions specified in the service information already described, except for any differences identified as exceptions in the regulatory text of this proposed AD. For information on the procedures and compliance times, see this service information at *regulations.gov* by searching for and locating Docket No. FAA–2023–1488.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 564 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Maintenance record check ...	1 work-hour * × $85 per hour = $85	$0	$85	$47,940
HFEC inspections	26 work-hours × $85 per hour = $2,210, per inspection cycle.	0	2,210 per inspection cycle	1,246,440 per inspection cycle

* The time to do the maintenance record check will vary by operator but would likely take no more than 1 work-hour per airplane.

The FAA has received no definitive data on which to base the cost estimates for the on-condition actions specified in this proposed AD.

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 adding the following new airworthiness directive:

The Boeing Company: Docket No. FAA–2023–1488; Project Identifier AD–2023–00182–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by June 13, 2024.

(b) Affected ADs

None.

(c) Applicability

(1) This AD applies to The Boeing Company Model 757–200, –200CB, and –200PF series airplanes specified in paragraph (c)(1)(i) or (ii) of this AD, certificated in any category.

(i) Airplanes identified in Boeing Alert Requirements Bulletin 757–53A0106 RB, dated January 3, 2023.

(ii) Airplanes converted to a freighter configuration using VT MAE Supplemental Type Certificate (STC) ST03562AT, ST03952AT, or ST04242AT.

(2) Installation of STC ST01518SE does not affect the ability to accomplish the actions required by this AD. Therefore, for airplanes on which STC ST01518SE is installed, a ''change in product'' alternative method of compliance (AMOC) approval request is not necessary to comply with the requirements of 14 CFR 39.17.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Unsafe Condition

This AD was prompted by a report indicating an operator has found cracks on three Model 757–200PF airplanes at the main deck cargo door cutout forward and aft hinge attachment holes. The FAA is issuing this AD to detect and correct cracks in the main deck cargo door hinge area. Undetected cracks in the main deck cargo door hinge area could result in reduced structural integrity of the aircraft.

(f) Compliance

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

(g) Required Actions

(1) For the airplanes identified in paragraph (c)(1)(i) of this AD: Except as specified by paragraph (h) of this AD, at the applicable times specified in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 757–53A0106 RB, dated January 3, 2023, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin 757–53A0106 RB, dated January 3, 2023.

Note 1 to paragraph (g)(1): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin 757–53A0106, dated January 3, 2023, which is referred to in Boeing Alert Requirements Bulletin 757–53A0106 RB, dated January 3, 2023.

(2) For the airplanes identified in paragraph (c)(1)(ii) of this AD: Within 30 days after the effective date of this AD, do a maintenance record check for any repair at the forward and aft hinge areas of the main deck cargo door cutout and obtain inspection instructions and applicable repair instructions using a method approved by the Manager, AIR–520, Continued Operational Safety Branch, FAA. Comply with all applicable instructions at the time specified in the instructions.

(h) Exceptions to Service Information Specifications

(1) Where the Compliance Time columns of the tables in the ''Compliance'' paragraph of Boeing Alert Requirements Bulletin 757–53A0106 RB, dated January 3, 2023, use the phrase the original issue date of Requirements Bulletin 757–53A0106 RB, this AD requires using the effective date of this AD.

(2) Where Boeing Alert Requirements Bulletin 757–53A0106 RB, dated January 3, 2023, specifies contacting Boeing for repair instructions or for alternative inspections, this AD requires doing the repair, or doing the alternative inspections and applicable on-condition actions using a method approved in accordance with the procedures specified in paragraph (i) of this AD.

(i) 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 responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j)(1) of this AD. Information may be emailed to: *AMOC@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, AIR–520, Continued Operational Safety Branch, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(j) Related Information

(1) For more information about this AD, contact Wayne Ha, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: 562–627–5238; email: *wayne.ha@faa.gov.*

(2) Service information identified in this AD that is not incorporated by reference is available at the address specified in paragraph (k)(3) of this AD.

(k) 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 the AD specifies otherwise.

(i) Boeing Alert Requirements Bulletin 757–53A0106 RB, dated January 3, 2023.

(ii) [Reserved]

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; website *myboeingfleet.com.*

(4) 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.

(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* or email *fr.inspection@nara.gov.*

Issued on April 23, 2024.

Victor Wicklund,

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

[FR Doc. 2024–09019 Filed 4–26–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–1009; Project Identifier MCAI–2023–01221–T]

RIN 2120–AA64

Airworthiness Directives; MHI RJ Aviation ULC (Type Certificate Previously Held by Bombardier, Inc.) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain MHI RJ Aviation ULC Model CL–600–2D15 (Regional Jet Series 705) and CL–600–2D24 (Regional Jet Series 900) airplanes. This proposed AD was prompted by a report that torque wrenches used during production installation of bulkhead fittings on the oxygen lines of the flight crew oxygen mask stowage boxes and adapter fitting on the oxygen pressure gauge were out of calibration during production installation, which resulted in a higher torque level setting than required. This proposed AD would require replacement of the affected oxygen line fittings, as specified in a Transport Canada 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 June 13, 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.* 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* under Docket No. FAA–2024–1009; 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 Transport Canada material that is proposed for IBR in this AD, contact Transport Canada, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario K1A 0N5, Canada; telephone 888–663–3639; email *TC.AirworthinessDirectives-Consignesdenavigabilite.TC@tc.gc.ca.* You may find this material on the Transport Canada website at *tc.canada.ca/en/aviation.* It is also available at *regulations.gov* under Docket No. FAA–2024–1009.
- 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.

FOR FURTHER INFORMATION CONTACT: Fatin Saumik, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email *Fatin.R.Saumik@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–2024–1009; Project Identifier MCAI–2023–01221–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,* 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 Fatin Saumik, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email *Fatin.R.Saumik@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

Transport Canada, which is the aviation authority for Canada, has issued Transport Canada AD CF–2023–75, dated November 28, 2023 (Transport Canada AD CF–2023–75) (also referred to as the MCAI), to correct an unsafe condition for certain MHI RJ Aviation ULC Model CL–600–2D15 (Regional Jet Series 705) and CL–600–2D24 (Regional Jet Series 900) airplanes. The MCAI states MHI RJ Aviation ULC received a quality escape notice from a supplier, reporting that torque wrenches used during production installation of bulkhead fittings on the oxygen lines of the flight crew oxygen mask stowage boxes and adapter fitting on the oxygen pressure gauge were out of calibration, which resulted in a higher torque level setting than required by drawing. This over-torque could cause damage to the oxygen line fittings which, if not corrected, could cause oxygen leakage before being annunciated and result in lack of oxygen to the flight crew when needed. The FAA is proposing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2024–1009.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Transport Canada AD CF–2023–75, dated November 28, 2023, which specifies procedures for replacement of the bulkhead fittings on the oxygen lines of the mask stowage boxes and replacement of the fitting adapter on the oxygen pressure gauge. 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**.

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 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 would require accomplishing the actions specified in Transport Canada AD CF–2023–75 described previously, except for any differences identified as exceptions in the regulatory text of this proposed 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, the FAA proposes to incorporate Transport Canada AD CF–2023–75 by reference in the FAA final

rule. This proposed AD would, therefore, require compliance with Transport Canada AD CF–2023–75 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 Transport Canada AD CF–2023–75 for compliance will be available at *regulations.gov* under Docket No. FAA–2024–1009 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 24 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
6 work-hours × $85 per hour = $510	$350	$860	$20,640

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 adding the following new airworthiness directive:

MHI RJ Aviation ULC (Type Certificate Previously Held by Bombardier, Inc.): Docket No. FAA–2024–1009; Project Identifier MCAI–2023–01221–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by June 13, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to MHI RJ Aviation ULC (Type Certificate previously held by Bombardier, Inc.) Model CL–600–2D15 (Regional Jet Series 705) and CL–600–2D24 (Regional Jet Series 900) airplanes, certificated in any category, as identified in Transport Canada AD CF–2023–75, dated November 28, 2023 (Transport Canada AD CF–2023–75).

(d) Subject

Air Transport Association (ATA) of America Code 35, Oxygen.

(e) Unsafe Condition

This AD was prompted by a report that torque wrenches used during production installation of bulkhead fittings on the oxygen lines of the flight crew oxygen mask stowage boxes and adapter fitting on the oxygen pressure gauge were out of calibration, which resulted in a higher torque level setting than required. The FAA is issuing this AD to address this over-torque, which could cause damage to the oxygen line fittings. The unsafe condition, if not addressed, could result in oxygen leakage before being annunciated and result in lack of oxygen to the flight crew when needed.

(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, Transport Canada AD CF–2023–75.

(h) Exception to Transport Canada AD CF–2023–75

(1) Where Transport Canada AD CF–2023–75 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where Transport Canada AD CF–2023–75 refers to hours air time, this AD requires using flight hours.

(i) 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 (j) of this AD. Information may be emailed to: *9-AVS-NYACO-COS@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; Transport Canada; or MHI RJ Aviation ULC's Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(j) Additional Information

For more information about this AD, contact Fatin Saumik, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite

410, Westbury, NY 11590; telephone 516–228–7300; email *Fatin.R.Saumik@faa.gov.*

(k) 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) Transport Canada AD CF–2023–75, dated November 28, 2023.

(ii) [Reserved]

(3) For Transport Canada AD CF–2023–75, contact Transport Canada, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario K1A 0N5, Canada; telephone 888–663–3639; email *TC.AirworthinessDirectives-Consignesdenavigabilite.TC@tc.gc.ca.* You may find this Transport Canada AD on the Transport Canada website at *tc.canada.ca/en/aviation.*

(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,* or email *fr.inspection@nara.gov.*

Issued on April 20, 2024.

Victor Wicklund,

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

[FR Doc. 2024–09016 Filed 4–26–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–1285; Project Identifier MCAI–2023–01146–T]

RIN 2120–AA64

Airworthiness Directives; Airbus Canada Limited Partnership (Type Certificate Previously Held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2023–05–08, which applies to certain Airbus Canada Limited Partnership Model BD–500–1A10 and BD–500–1A11 airplanes. AD 2023–05–08 requires required revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. Since the FAA issued AD 2023–05–08, the FAA has determined that new or more restrictive airworthiness limitations are necessary. This proposed AD would continue to require certain actions in AD 2023–05–08 and require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this NPRM by June 13, 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*. 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* under Docket No. FAA–2024–1285; 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 Airbus Canada Limited Partnership material, contact Airbus Canada Limited Partnership, 13100 Henri-Fabre Boulevard, Mirabel, Québec J7N 3C6, Canada; telephone 450–476–7676; email a220 website *a220world.airbus.com.*
- 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.

FOR FURTHER INFORMATION CONTACT: Gabriel D. Kim, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7343; email *9-avs-nyaco-cos@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–2024–1285; Project Identifier MCAI–2023–01146–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 the 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*, 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 Gabriel D. Kim, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590, telephone 516–228–7343; email *9-avs-nyaco-cos@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2023–05–08, Amendment 39–22377 (88 FR 20751, April 7, 2023) (AD 2023–05–08), for certain Airbus Canada Limited Partnership Model BD–500–1A10 and BD–500–1A11 airplanes. AD 2023–05–08 requires revising the existing maintenance or inspection program, as

applicable, to incorporate new or more restrictive airworthiness limitations. AD 2023–05–08 resulted from a determination that new or more restrictive airworthiness limitations are necessary. The FAA issued AD 2023–05–08 to supersede AD 2021–04–05, Amendment 39–21426 (86 FR 10799, February 23, 2021). AD 2023–05–08 terminated the actions specified in AD 2021–04–05, except for Section 03, ''Candidate CMR Limitations—General'', of Airbus Canada Limited Partnership A220 Airworthiness Limitations, BD500–3AB48–11400–02, Issue 011.00, dated June 18, 2020. The FAA issued AD 2023–05–08 to address reduced structural integrity of the airplane or reduced controllability of the airplane.

Actions Since AD 2023–05–08 Was Issued

Since the FAA issued AD 2023–05–08, the FAA has determined that new or more restrictive airworthiness limitations are necessary.

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued TCCA AD CF–2023–69, dated October 5, 2023 (TCCA AD CF–2022–18) (also referred to after this as the MCAI), to correct an unsafe condition for certain Airbus Canada Limited Partnership Model BD–500–1A10 and BD–500–1A11 airplanes. Airplanes with an original airworthiness certificate or original export certificate of airworthiness issued after August 17, 2023, must comply with the airworthiness limitations specified as part of the approved type design and referenced on the type certificate data sheet; this proposed AD therefore does not include those airplanes in the applicability.

The FAA is proposing this AD to address new or more restrictive airworthiness limitations are necessary. The FAA is proposing this AD to address reduced structural integrity of the airplane or reduced controllability of the airplane.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2024–1285.

Related Service Information Under 1 CFR Part 51

Airbus Canada Limited Partnership has issued A220 Airworthiness Limitations, BD500–3AB48–11400–02, Issue 017.01, dated August 17, 2023, which describes airworthiness limitations for fuel tank systems, safe life limits, and certification maintenance requirements.

This proposed AD would also require Airbus Canada Limited Partnership A220 Airworthiness Limitations, BD500–3AB48–11400–02, Issue 014.00, dated February 3, 2022, which the Director of the Federal Register approved for incorporation by reference as of May 12, 2023 (88 FR 20751, April 7, 2023).

This proposed AD would also require Airbus Canada Limited Partnership A220 Airworthiness Limitations, BD500–3AB48–11400–02, Issue 011.00, dated June 18, 2020, which the Director of the Federal Register approved for incorporation by reference as of March 30, 2021 (86 FR 10799, February 23, 2021).

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 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 on other products of the same type design.

Proposed Requirements of This NPRM

This proposed AD would retain all requirements of AD 2023–05–08, which includes retaining Section 03, ''Candidate CMR Limitations—General,'' of Airbus Canada Limited Partnership A220 Airworthiness Limitations, BD500–3AB48–11400–02, Issue 011.00, dated June 18, 2020. This proposed AD would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. Revising the existing maintenance or inspection program as proposed in this AD would terminate the retained requirements from AD 2023–05–08 that are specified in paragraph (i) of this proposed AD.

This proposed AD would require revisions to certain operator maintenance documents to include new actions (*e.g.,* inspections) and Critical Design Configuration Control Limitations (CDCCLs). Compliance with these actions and CDCCLs is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this proposed AD, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (m)(1) of this proposed AD.

Differences Between This NPRM and the MCAI or Service Information

TCCA AD CF–2023–69 specifies to incorporate all sections of the airworthiness limitations document. This proposed AD would not require the incorporation of Section 03, ''Candidate CMR limitations,'' of Airbus Canada Limited Partnership A220 Airworthiness Limitations, BD500–3AB48–11400–02, Issue 017.01, dated August 17, 2023. However, this proposed AD would continue to require the incorporation of Section 03, ''Candidate CMR limitations—General,'' of Airbus Canada Limited Partnership A220 Airworthiness Limitations, BD500–3AB48–11400–02, Issue 011.00, dated June 18, 2020, which is identical to the list of CCMRs identified in Issue 017.01.

Costs of Compliance

The FAA estimates that this proposed AD affects 99 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

The FAA estimates the total cost per operator for the retained actions from AD 2023–05–08 to be $7,650 (90 work-hours × $85 per work-hour).

The FAA has determined that revising the maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate. Therefore, the agency estimates the average total cost per operator to be $7,650 (90 work-hours × $85 per work-hour).

The FAA estimates the total cost per operator for the new proposed actions to be $7,650 (90 work-hours × $85 per work-hour).

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 2023–05–08, Amendment 39–22377 (88 FR 20751, April 7, 2023); and

■ b. Adding the following new airworthiness directive:

Airbus Canada Limited Partnership (Type Certificate Previously Held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.): Docket No. FAA–2024–1285; Project Identifier MCAI–2023–01146–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by June 13, 2024.

(b) Affected ADs

This AD replaces AD 2023–05–08, Amendment 39 22377 (88 FR 20751, April 7, 2023) (AD 2023–05–08).

(c) Applicability

This AD applies to Airbus Canada Limited Partnership airplanes, certificated in any category, as identified in paragraphs (c)(1) and (2) of this AD.

(1) Model BD–500–1A10 airplanes, serial numbers 50001 and subsequent with an original airworthiness certificate or original export certificate of airworthiness issued on or before August 17, 2023.

(2) Model BD–500–1A11 airplanes, serial numbers 55001 and subsequent with an original airworthiness certificate or original export certificate of airworthiness issued on or before August 17, 2023.

(d) Subject

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks.

(e) Reason

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address reduced structural integrity of the airplane or reduced controllability of the airplane.

(f) Compliance

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

(g) Retained Revision of the Existing Maintenance or Inspection Program, With Revised Language

This paragraph restates the requirements of paragraph (g) of AD 2023–05–08, with revised language. For airplanes with an original airworthiness certificate or original export certificate of airworthiness issued on or before June 18, 2020: Within 90 days after March 30, 2021 (the effective date of AD 2021–04–05, Amendment 39–21426 (86 FR 10799, February 23, 2021)), revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in Section 03, ''Candidate CMR Limitations—General,'' of Airbus Canada Limited Partnership A220 Airworthiness Limitations, BD500–3AB48–11400–02, Issue 011.00, dated June 18, 2020. The initial compliance time for doing the tasks is at the time specified in Airbus Canada Limited Partnership A220 Airworthiness Limitations, BD500–3AB48–11400–02, Issue 011.00, dated June 18, 2020, or within 90 days after March 30, 2021, whichever occurs later.

(h) Retained No Alternative Actions, Intervals, or Critical Design Configuration Control Limitations (CDCCLs), With Revised Language

This paragraph restates the requirements of paragraph (h) of AD 2023–05–08 with revised language. After the existing maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections), intervals, or CDCCLs may be used unless the actions, intervals, and CDCCLs are approved as an alternative method of compliance.

(i) Retained Revision of the Existing Maintenance or Inspection Program, With a New Terminating Action

This paragraph restates the requirements of paragraph (i) of AD 2023–05–08, with a new terminating action. For airplanes with an original airworthiness certificate or original export certificate of airworthiness issued on or before February 3, 2022: Within 90 days after May 12, 2023 (the effective date of AD 2023–05–08), revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in Sections 01, ''Airworthiness limitations—Introduction;'' 02, ''Certification maintenance requirements—General;'' 04, ''ALI structural inspections—General;'' 05, ''Life limited parts—General;'' 06, ''Fuel system limitations—General;'' 07, ''Critical design configuration control limitations—General;'' 08, ''Power plant limitations—General;'' 09, ''Structural repair limitations—General;'' and 10, ''Limit of validity—General;'' inclusive of Airbus Canada Limited Partnership A220 Airworthiness Limitations, BD500–3AB48–11400–02, Issue 014.00, dated February 3, 2022. The initial compliance time for doing the tasks is at the time specified in Airbus Canada Limited Partnership A220 Airworthiness Limitations, BD500–3AB48–11400–02, Issue 014.00, dated February 3, 2022, or within 90 days after May 12, 2023 (the effective date of AD 2023–05–08), whichever occurs later. Accomplishing the revision of the existing maintenance or inspection program required by paragraph (k) of this AD terminates the requirements of this paragraph.

(j) Retained No Alternative Actions, Intervals, or Critical Design Configuration Control Limitations (CDCCLs), With a New Exception

This paragraph restates the requirements of paragraph (j) of AD 2023–05–08, with a new exception. Except as required by paragraph (k) of this AD, after the existing maintenance or inspection program has been revised as required by paragraph (i) of this AD, no alternative actions (*e.g.,* inspections), intervals, or CDCCLs may be used unless the actions, intervals, and CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (m)(1) of this AD.

(k) New Maintenance or Inspection Program Revision

Within 90 days after the effective date of this AD, revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in Airbus Canada Limited Partnership A220 Airworthiness Limitations, BD500–3AB48–11400–02, Issue 017.01, dated August 17, 2023, except for the information specified in Section 03, ''Candidate CMR Limitations—General''. The initial compliance time for doing the tasks is at the time specified in Airbus Canada Limited Partnership A220

Airworthiness Limitations, BD500–3AB48–11400–02, Issue 017.01, dated August 17, 2023, or within 90 days after the effective date of this AD, whichever occurs later. Accomplishing the revision of the existing maintenance or inspection program required by this paragraph terminates the actions required by paragraph (i) of this AD.

(l) New No Alternative Actions, Intervals, or CDCCLs

After the existing maintenance or inspection program has been revised as required by paragraph (k) of this AD, no alternative actions (*e.g.,* inspections), intervals, or CDCCLs may be used unless the actions, intervals, and CDCCLs are approved as an AMOC in accordance with the procedures specified in paragraph (m)(1) of this AD.

(m) 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 (n)(2) of this AD. Information may be emailed to: *9-AVS-NYACO-COS@faa.gov.*

(i) 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 Transport Canada; or Airbus Canada Limited Partnership's Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(n) Additional Information

(1) Refer to Transport Canada AD CF–2023–69, dated October 5, 2023, for related information. This Transport Canada AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2024–1285.

(2) For more information about this AD, contact Gabriel D. Kim, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7343; email *9-avs-nyaco-cos@faa.gov.*

(o) 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.

(3) The following service information was approved for IBR on [DATE 35 DAYS AFTER PUBLICATION OF THE FINAL RULE].

(i) Airbus Canada Limited Partnership A220 Airworthiness Limitations, BD500–3AB48–11400–02, Issue 017.01, dated August 17, 2023.

(ii) [Reserved]

(4) The following service information was approved for IBR on May 12, 2023 (88 FR 20751, April 7, 2023).

(i) Airbus Canada Limited Partnership A220 Airworthiness Limitations, BD500–3AB48–11400–02, Issue 014.00, dated February 3, 2020.

(ii) [Reserved]

(5) The following service information was approved for IBR on March 30, 2021 (86 FR 10799, February 23, 2021).

(i) Airbus Canada Limited Partnership A220 Airworthiness Limitations, BD500–3AB48–11400–02, Issue 011.00, dated June 18, 2020.

(ii) [Reserved]

(6) For Airbus Canada Limited Partnership material, contact Airbus Canada Limited Partnership, 13100 Henri-Fabre Boulevard, Mirabel, Québec J7N 3C6, Canada; telephone 450–476–7676; email *a220_crc@abc.airbus;* website *a220world.airbus.com.*

(7) 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.

(8) 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,* or email *fr.inspection@nara.gov.*

Issued on April 20, 2024.

Victor Wicklund,

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

[FR Doc. 2024–09015 Filed 4–26–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–2422; Airspace Docket No. 23–AWP–48]

RIN 2120–AA66

Modification of Class E Airspace; Bishop Airport, Bishop, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify the Class E airspace designated as a surface area, modify the airspace designated as an extension to a Class E surface area, modify the Class E airspace extending upward from 700 feet above the surface, and remove the Class E airspace extending upward from 1,200 feet above the surface at Bishop Airport, Bishop, CA. These actions would support the safety and management of instrument flight rules (IFR) operations at the airport.

DATES: Comments must be received on or before June 13, 2024.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–2422 and Airspace Docket No. 23–AWP–48 using any of the following methods:

* *Federal eRulemaking Portal:* Go to *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* 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/.* 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: Keith Adams, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198; telephone (206) 231–2428.

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 Class E airspace to support IFR operations at Bishop Airport, Bishop, CA.

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,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Availability of Rulemaking Documents

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

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets 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 Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198.

Incorporation by Reference

Class E2, E4, and E5 airspace designations are published in paragraph 6002, 6004, and 6005 respectively, 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 has developed three new special procedures for Bishop Airport: Area Navigation (RNAV) (Global Positioning System [GPS]) M Runway (RWY) 12 approach, RNAV (GPS) RWY 30 approach, and MOTSE ONE DEPARTURE (RNAV).

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 that would modify the Class E airspace designated as a surface area, modify the airspace designated as an extension to a Class E surface area, modify the Class E airspace extending upward from 700 feet above the surface, and remove Class E airspace extending upward from 1,200 feet above the surface at Bishop Airport, Bishop, CA.

The Class E airspace designated as a surface area should be expanded to include that airspace within 1.8 miles northeast and 1 mile southwest of the 147° bearing from the airport, extending from the 5-mile radius to 6.9 miles southeast of the airport, and that airspace within 3.8 miles either side of the 317° bearing extending to the 7.1-mile radius of the airport. This would more appropriately contain arriving IFR operations between the surface and 1,000 feet above the surface while executing the RNAV (GPS) M RWY 12 and the RNAV (GPS) M RWY 30 approaches. It would also better contain departing IFR operations until reaching the base of adjacent controlled airspace while executing the MOTSE ONE DEPARTURE (RNAV).

The Class E airspace designated as an extension to a Class E surface area is oversized and should be reduced to be within 1.2 miles east and 1.1 miles west of the airport's 337° bearing extending from the 7.1-mile radius of the airport to 9.6 miles northwest of the airport. This would more appropriately contain arriving IFR operations below 1,000 feet above the surface while executing the Localizer Directional Aid (LDA) RWY 17 approach.

The Class E airspace extending upward from 700 feet above the surface should be reduced to include that airspace within 3.4 miles northeast and 4 miles southwest of the airport's 157° bearing extending 7.6 miles southeast of the airport, and 4 miles southwest and 3.4 miles northeast of the airport's 337° bearing extending 15.2 miles northwest of the airport. This would better contain arriving IFR operations below 1,500 feet above the surface while executing the RNAV (GPS) M RWY 12 and RNAV (GPS) M RWY 30 approaches. The modification would also more appropriately contain departing IFR operations below 1,200 feet above the surface when executing the MOTSE ONE DEPARTURE (RNAV).

The Class E airspace extending upward from 1,200 feet above the surface should be removed, as the area is already within the Coaldale and Los Angeles Class E enroute domestic airspace areas.

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 6002 Class E Airspace Areas Designated as Surface Areas.

* * * * *

AWP CA E2 Bishop, CA [Amended]

Bishop Airport, CA
(Lat. 37°22′23″ N, long. 118°21′49″ W)

That airspace extending upwards from the surface within a 5-mile radius of the airport, within 1.8 miles northeast and 1 mile southwest of the airport's 147° bearing extending to 6.9 miles southeast, and within 3.8 miles either side of the airport's 317° bearing extending to the 7.1-mile radius of the airport.

* * * * *

Paragraph 6004 Class E Airspace Areas Designated as an Extension to a Class D or Class E Surface Area.

* * * * *

AWP CA E4 Bishop, CA [Amended]

Bishop Airport, CA
(Lat. 37°22′23″ N, long. 118°21′49″ W)

That airspace extending upward from the surface within 1.2 miles east and 1.1 miles west of the airport's 337° bearing extending from the 7.1-mile radius of the airport to 9.6 miles northwest of the airport.

* * * * *

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

* * * * *

AWP CA E5 Bishop, CA [Amended]

Bishop Airport, CA
(Lat. 37°22′23″ N, long. 118°21′49″ W)

That airspace extending upward from 700 feet above the surface within 3.4 miles northeast and 4 miles southwest of the airport's 157° bearing extending 7.6 miles southeast of the airport, and within 3.4 miles northeast and 4 miles southwest of the airport's 337° bearing extending 15.2 miles northwest of the airport.

* * * * *

Issued in Des Moines, Washington, on April 22, 2024.

B.G. Chew,

Group Manager, Operations Support Group, Western Service Center.

[FR Doc. 2024–09006 Filed 4–26–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2024–0867; Airspace Docket No. 24–ANE–03]

RIN 2120–AA66

Amendment of Class E Airspace; Presque Isle, ME

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E airspace extending upward from 700 feet above the surface for Presque Isle International Airport, Presque Isle, ME, by adding and updating airport names in the header and updating geographic coordinates. This action would not change the airspace boundaries or operating requirements.

DATES: Comments must be received on or before June 13, 2024.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2024–0867 and Airspace Docket No. 24–ANE–03 using any of the following methods:

* *Federal eRulemaking Portal:* Go to *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 for Federal holidays.

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

Docket: Background documents or comments received may be read at *www.regulations.gov* 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 for Federal holidays.

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

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the 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,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Availability of Rulemaking Documents

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

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

Incorporation by Reference

Class E airspace designations are published in Paragraph 6005 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 will 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 7400.11 lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA proposes an amendment to 14 CFR part 71 to amend Class E airspace extending from 700 feet above the surface for Presque Isle International Airport, Presque Isle, ME, by updating Presque Isle International Airport's name (previously ''Northern Maine Regional Airport''), adding AR Gould Hospital Heliport to the description header, and updating geographic coordinates to align with FAA databases. This action would not change the airspace boundaries or operating requirements.

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

Regulatory Notices and Analyses

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

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' prior to any final regulatory action by the FAA.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

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

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

* * * * *

ANE ME E5 Presque Isle, ME

Presque Isle International Airport, ME
(Lat. 46°41′20″ N, long. 68°02′41″ W)
Caribou Municipal Airport
(Lat. 46°52′18″ N, long. 68°01′06″ W)
Loring International Airport
(Lat. 46°57′02″N, long. 67°53′09″ W)
AR Gould Hospital Heliport
(Lat. 46°40′33″N, long. 67°59′56″ W)

That airspace extending upward from 700 feet above the surface within an area bounded by a line beginning at lat. 46°27′20″ N, long. 67°46′57″ W, to lat. 46°27′16″ N, long. 68°15′11″ W, to lat. 46°58′33″ N, long. 68°25′07″ W, to lat. 47°06′57″ N, long. 67°53′40″ W, to lat. 47°03′52″ N, long. 67°47′26″ W, to the point of beginning, excluding that airspace outside of the United States.

* * * * *

Issued in College Park, Georgia, on April 23, 2024.

Patrick Young,

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

[FR Doc. 2024–09074 Filed 4–26–24; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL COMMUICATIONS COMMISSION

47 CFR Parts 25 and 101

[WT Docket No. 20–133; FCC 24–16; FR ID 207951]

Modernizing and Expanding Access to the 70/80/90 GHz Bands; Further Notice of Proposed Rulemaking

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; solicitation of comment.

SUMMARY: In this document, the Federal Communications Commission

(Commission) seeks comment on the potential inclusion of ship-to-aerostat transmissions as part of maritime operations otherwise authorized in a Report and Order, and of Fixed Satellite Service (FSS) earth stations in the third-party database registration system used for terrestrial links in certain bands.

DATES: Comments are due on or before May 29, 2024; reply comments are due on or before June 28, 2024. Written comments on the Initial Regulatory Flexibility Analysis (IRFA) in this document must have a separate and distinct heading designating them as responses to the IRFA and must be submitted by the public on or before May 29, 2024. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before June 28, 2024.

ADDRESSES: Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998). You may submit comments, identified by WT Docket No. 20–133, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing ECFS: *https://www.fcc.gov/ecfs/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand- or messenger-delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice,* 35 FCC Rcd 2788, 2788–89 (OS 2020), *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, computer diskettes, audio recordings), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

FOR FURTHER INFORMATION CONTACT: Jeffrey Tignor, Wireless Telecommunications Bureau, Broadband Division, at *Jeffrey.Tignor@fcc.gov* or 202–418–0774. For Paperwork Reduction Act, contact Kathy Williams at *PRA@fcc.gov* or 202–418–2918.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further Notice of Proposed Rulemaking (*FNPRM*) in WT Docket No. 20–33, FCC 24–16; adopted on January 24, 2024 and released on January 26, 2024. The full text of this document is available at *https://docs.fcc.gov/public/attachments/FCC-24-16A1.pdf.*

Ex Parte Rules

The proceeding shall be treated as ''permit-but-disclose'' in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must: (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made; and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Initial Regulatory Flexibility Analysis

The Commission prepared an Initial Regulatory Flexibility Analysis (IRFA) concerning the potential impact of rule and policy changes in the *FNPRM* on small entities. Written public comments are requested on the IRFA. Comments must be filed by the deadlines for comments on the *FNPRM* indicated on the first page of this document and must have a separate and distinct heading designating them as responses to the IRFA, see section II of this document for more detail.

Paperwork Reduction Act

This document contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the Commission previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

Providing Accountability Through Transparency Act

The Providing Accountability Through Transparency Act requires each agency, in providing notice of a rulemaking, to post online a brief plain-language summary of the proposed rule. Accordingly, the Commission will publish the required summary of this *FNPRM* on *https://www.fcc.gov/proposed-rulemakings.*

Synopsis

I. Further Notice of Proposed Rulemaking in WT Docket No. 20–133

1. In this *FNPRM,* the Commission seeks comment on two issues regarding the 71–76 GHz (70 GHz) and 81–86 GHz (80 GHz) bands for which the record in this proceeding was not sufficient for it to make a determination in the *Report and Order:* (1) whether to permit ship-to-aerostat transmissions as part of the maritime service otherwise authorized in the *Report and Order;* and (2) whether to include FSS earth stations in the existing third-party database registration regime modified in the *Report and Order.*

2. *Inclusion of Ship-to-Aerostat Transmissions in the Maritime Service.* In the *Report and Order,* the Commission declined to permit ship-to-aerostat transmissions at this time.[1] The Commission notes that Aeronet Global Communications, Inc. (Aeronet) has expressed concern that ship-to-aerostat links are critical to the operation of its proposed maritime system, and claimed that the maritime broadband services otherwise newly authorized in the *Report and Order* depend on the availability of a return link. The Commission seeks comment on whether to authorize ship-to-aerostat transmissions, including input on the potential impact on Federal and other non-Federal operations.

3. *Inclusion of Fixed Satellite Service (FSS) in Third-Party Database Registration System.* In the *Report and Order,* the Commission declined to include FSS earth stations in the third-party database registration system because of lack of notice, and a record insufficient to address this issue. Space Exploration Technology Corporation (SpaceX) has advocated for the inclusion of FSS into the existing light-licensing regime for the 70/80/90 GHz bands. To date, few parties have addressed the feasibility of these proposals, and those that have mentioned the issue have suggested that operational limitations and/or further technical study would be needed. As SpaceX contends and others support, incorporating earth station gateways in the third-party database would enable the light-licensing approach currently used for operations under subpart Q of part 101 to serve as a unified portal for operations in the 70 GHz and 80 GHz bands that are licensed under a nationwide, non-exclusive license. The Commission recognizes that a unified database may provide efficiencies for the use of these bands and may offer other benefits.

4. Accordingly, the Commission seeks comment on the potential inclusion of FSS earth stations in the third-party database registration regime in the 70 GHz and 80 GHz bands. As a general matter, would it be feasible to include FSS in the database registration process? Would doing so have any negative effects on incumbent services? What changes would be necessary to the database system to accommodate FSS registrations, and would those changes be feasible? The Commission notes that in response to the aeronautical and maritime rules the Commission adopts, at least one party has articulated how ''major modifications to the databases or most likely entirely new structures'' may be necessary, and that ''[m]aking [these] changes . . . and developing enhanced analysis methods to cover coordination zones . . . would have to be supported by the proponents'' of the newly included operations in the bands. See, *e.g.,* Comsearch Comments, WT Docket No. 20–133, at 1 (filed Nov. 8, 2023). The Commission seeks comment on whether analogous concerns exist for the changes that may be necessary to permit FSS into the regime, and on the allocation of costs for such changes.

5. If the Commission does incorporate FSS earth stations into the third-party database system under what protection criteria should they be included? SpaceX argues that the limits set forth in the Federal Agencies Letter, which the Commission adopts for aeronautical operations in these bands, are inappropriate for FSS, and urges the Commission to instead adopt the rules found in part 25 as a guide to the appropriate operational restrictions for FSS in this context. The part 25 rules, however, contemplate individual coordination of earth stations, and therefore may not be a good fit for the link registration system (LRS) administered by third-party database managers that is used to coordinate operations in these bands. The equivalent isotropically radiated power (EIRP) limit for earth stations in part 25 is much more generous than the EIRP limits for fixed and aeronautical services in these bands.[2] For earth stations that are individually coordinated, this higher-powered limit may be modified to suit the specific circumstances and satisfy all potentially affected parties. For database coordination, however, the EIRP limit must be such that coexistence with other operators and services is possible without such individual attention. The EIRP limits the Commission adopts for aeronautical service are the product of significant attention, analysis and input from a variety of parties and perspectives, including those operators and services most likely to be affected by any harmful interference. The Commission seeks similar comment on appropriate EIRP limits for potential FSS earth stations in the 70 GHz and 80 GHz bands. What limits would best enable meaningful FSS service, while adequately protecting incumbent operations? In a similar vein, the Commission seeks comment on the appropriate out-of-band emissions (OOBE) limits for FSS earth stations in these bands, given the importance of protecting adjacent band operations. The Commission also seeks comment generally on any other operational limits or restrictions that might be required to meaningfully enable database registration for FSS earth stations without risking harmful interference to incumbent and adjacent services.

6. The Commission seeks comment on the appropriate criteria for the protection of FSS from other services. The rules that the Commission adopts are designed in part to protect FSS operations, both Federal and non-Federal, from the newly established aeronautical service. However, there are currently no rules requiring fixed links to protect FSS operations. What criteria could be implemented for this purpose? Current part 101 rules include an interference protection threshold for fixed services. Is there a similar appropriate threshold for satellite earth stations? Are there any other protection criteria that might be necessary to ensure that other services in these bands do not cause harmful interference to FSS operations? Consistent with the Commission's statement when it adopted service rules for Fixed Service (FS) use of the band, the Commission proposes to require registrations for new FS links submitted on or after the release date of this *FNPRM* to demonstrate protection of FSS earth stations with a final authorization prior

[1] For purposes of both the *Report and Order* and the *Further Notice of Proposed Rulemaking,* the Commission considers the term ''aerostat'' to mean an airborne transmitter operating within a small specified area, below 1,000 feet of elevation, regardless of method of propulsion.

[2] 47 CFR 5.204(b) (+ 64 dBW in any 1 megahertz band); *id.* 101.113 (+55 dBW). Because the part 25 limit is expressed as a power density, while the part 101 limit is not, this is not a direct comparison. Converting the part 25 limit to 70/80 GHz channel sizes, which are at minimum 1.25 gigahertz, yields an equivalent EIRP of, at minimum, +94.96 dBW toward the horizon, or 39.96 dB higher than the part 101 limit, while for a 4.5 gigahertz channel the part 25 limit would allow an EIRP 45.53 dB higher than the part 101 limit.

to the submission date of the new FS registration.

7. Finally, the Commission seeks comment on any changes that would be necessary to its rules or procedures to accommodate FSS in the third-party database system as a logistical matter. Currently, terrestrial and aeronautical operators must first obtain a nationwide license from the Commission before registering individual sites with a database administrator. What would be the equivalent for a satellite operator? Should a satellite operator also be required to obtain a nationwide license from the Commission before registering individual sites with a database administrator? If so, what changes would be required to the part 25 earth station licensing rules? The Commission also seeks comment on any changes necessary for Federal to non-Federal coordination in the FSS context. For fixed services in these bands, this coordination is accomplished by the database administrators querying an automated green light/yellow light system operated by National Telecommunications and Information Administration (NTIA), with a yellow light result leading to more individual coordination. Could this system accommodate FSS operations as well? What changes would be necessary to support such inclusion? The Commission seeks comment generally on these and any other issues raised by the possibility of including FSS earth stations in the 70/80 GHz database registration system.

II. Intitial Regulatory Flexibility Analysis

8. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this IRFA of the possible significant economic impact on a substantial number of small entities by the policies proposed in the *FNPRM.* Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the *FNPRM.* The Commission will send a copy of the *FNPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *FNPRM* and the IRFA (or summaries thereof) will be published in the **Federal Register**.

A. Need for, and Objectives of, the Proposed Rules

9. In the *FNPRM,* the Commission considers and seeks comment on whether—and if so, how—it might include FSS earth stations in the third-party database registration regime currently used for operations in the 70 GHz and 80 GHz bands. Included in the Commission's discussion of potential rule changes and requests for comments in the *FNPRM* are repeated requests from SpaceX, which has advocated for the inclusion of FSS into the existing light-licensing regime for the 70/80/90 GHz bands. The *FNPRM* seeks comment on issues including whether it would be feasible to include FSS in the database regime process, and whether doing so would have any negative effects on incumbent services. The Commission also solicits comment on what changes to the database system might be needed, whether such changes are feasible, how costs for any changes should be allocated and if those costs would have a significant economic impact on small entities either currently operating, or seeking to operate, in those bands. Lastly, the item also asks commenters to address what protection criteria should be adopted if FSS earth stations are incorporated into the third-party database system, on the appropriate criteria for the protection of FSS from other service, and on any changes that might be necessary to the Commission's rules or procedures as a logistical matter. In addition, in the *FNPRM,* the Commission seeks comment on whether to permit ship-to-aerostat transmissions as part of the maritime service otherwise authorized in the *Report and Order.*

B. Legal Basis

10. The proposed action is authorized pursuant to sections 4, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 303, and 307.

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

11. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the SBA.'' A ''small business concern'' is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

12. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* The Commission's actions, over time, may affect small entities that are not easily categorized at present. The Commission therefore describes, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States, which translates to 33.2 million businesses.

13. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' The Internal Revenue Service (IRS) uses a revenue benchmark of $50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenues of $50,000 or less according to the registration and tax data for exempt organizations available from the IRS.

14. Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2017 Census of Governments indicate there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number, there were 36,931 general purpose governments (county, municipal, and town or township) with populations of less than 50,000 and 12,040 special purpose governments—independent school districts with enrollment populations of less than 50,000. Accordingly, based on the 2017 U.S. Census of Governments data, the Commission estimates that at least 48,971 entities fall into the category of ''small governmental jurisdictions.''

15. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The SBA size standard for this industry classifies a business as small if

it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 594 providers that reported they were engaged in the provision of wireless services. Of these providers, the Commission estimates that 511 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

16. *Fixed Microwave Services.* Fixed microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. They also include the Upper Microwave Flexible Use Service (UMFUS), Millimeter Wave Service (70/80/90 GHz), Local Multipoint Distribution Service (LMDS), the Digital Electronic Message Service (DEMS), 24 GHz Service, Multiple Address Systems (MAS), and Multichannel Video Distribution and Data Service (MVDDS), where in some bands licensees can choose between common carrier and non-common carrier status. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with a SBA small business size standard applicable to these services. The SBA small size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of fixed microwave service licensees can be considered small.

17. The Commission's small business size standards with respect to fixed microwave services involve eligibility for bidding credits and installment payments in the auction of licenses for the various frequency bands included in fixed microwave services. When bidding credits are adopted for the auction of licenses in fixed microwave services frequency bands, such credits may be available to several types of small businesses based average gross revenues (small, very small and entrepreneur) pursuant to the competitive bidding rules adopted in conjunction with the requirements for the auction and/or as identified in part 101 of the Commission's rules for the specific fixed microwave services frequency bands.

18. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time the Commission is not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

19. *Satellite Telecommunications.* This industry comprises firms ''primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' Satellite telecommunications service providers include satellite and earth station operators. The SBA small business size standard for this industry classifies a business with $38.5 million or less in annual receipts as small. U.S. Census Bureau data for 2017 show that 275 firms in this industry operated for the entire year. Of this number, 242 firms had revenue of less than $25 million. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 65 providers that reported they were engaged in the provision of satellite telecommunications services. Of these providers, the Commission estimates that approximately 42 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, a little more than half of these providers can be considered small entities.

20. *All Other Telecommunications.* This industry is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Providers of internet services (*e.g.,* dial-up ISPs) or Voice over Internet Protocol (VoIP) services, via client-supplied telecommunications connections are also included in this industry. The SBA small business size standard for this industry classifies firms with annual receipts of $35 million or less as small. U.S. Census Bureau data for 2017 show that there were 1,079 firms in this industry that operated for the entire year. Of those firms, 1,039 had revenue of less than $25 million. Based on this data, the Commission estimates that the majority of ''All Other Telecommunications'' firms can be considered small.

21. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment. The SBA small business size standard for this industry classifies businesses having 1,250 employees or less as small. U.S. Census Bureau data for 2017 show that there were 656 firms in this industry that operated for the entire ear. Of this number, 624 firms had fewer than 250 employees. Thus, under the SBA size standard, the majority of firms in this industry can be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

22. The proposals contemplated in the *FNPRM* may impose new or additional reporting, recordkeeping, and/or other compliance obligations on small entities, as well as on other licensees and applicants if adopted. In particular, there may be new recordkeeping or compliance obligations created if changes are made to the Commission's part 101 technical and/or operational rules in order to accommodate the potential inclusion of FSS earth stations in the third-party database registration regime in the 70 GHz and 80 GHz bands or in order to permit ship-to-aerostat transmissions as part of the maritime service otherwise authorized in the *Report and Order.*

23. At this time, Commission is not currently in a position to determine whether, if adopted, the proposed rules and associated requirements raised in

the *FNPRM* would require small entities to hire attorneys, engineers, consultants, or other professionals and cannot quantify the cost of compliance with the potential rule changes and compliance obligations raised herein. In the Commission's discussion of these proposals in the *FNPRM,* the Commission have sought comments from the parties in the proceeding, and requested costs and benefits analyses, which may help the Commission identify and evaluate relevant matters for small entities, including any compliance costs and burdens that may result from any matters discussed in the *FNPRM,* or from any proposed rules in the proceeding, should they be adopted.

E. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

24. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.

25. In the *FNPRM,* the Commission has sought to minimize the economic impact on small entities, as well as considered significant alternatives and weigh their potential impact to those entities. For example, in response to Space X's advocacy for including FSS into the existing light-licensing regime for the 70/80/90 GHz bands, the Commission considered whether it was feasible to alter the third-party database registration regime to include FSS earth stations as well as what compliance obligations could be adopted to minimize the economic impact to small entities. In addition, in response to Aeronet's advocacy for permitting ship-to-aerostat transmissions in the maritime service otherwise authorized in the *Report and Order,* the Commission considered whether it was feasible to authorize such links as well as what compliance obligations could be adopted to minimize the economic impact on small entities. In order to provide proper notice for potential commenters and to allow for a technical record that will better assist the Commission in adopting rules that will minimize burdens to small and other entities as much as possible, the Commission seek comment on FSS-specific issues and issues related to ship-to-aerostat links.

26. Additionally, the Commission considered what types of changes to the database system would be needed for FSS registrations and if any changes, if adopted, would cause major modifications to the databases, or alternatively, if entirely new database structures would be required. The Commission seek comment from small entities as to what economic or compliance-related challenges they would encounter as a result of adopting such changes. The Commission also considered what protection criteria should be included as part of incorporating FSS earth stations into the third-party database system. For example, the Commission could adopt, as SpaceX prefers, the rules found in part 25 as a framework for appropriate FSS operational restrictions, as opposed to using the limits set forth in the Federal Agencies Letter, which was adopted by the Commission for aeronautical operations in these bands. The Commission seek comment on any other operational limits or restrictions that might be required to meaningfully enable database registration for FSS earth stations without risking harmful interference to incumbent and adjacent services. Lastly, the Commission also considered what types of changes to its rules or procedures intended to accommodate FSS in the third-party database system would be necessary, what licensing requirements for satellite operators would be required and what changes would be needed for Federal to non-Federal coordination in the FSS context.

27. To assist with the Commission's evaluation of the significant economic impact on small entities, and to better evaluate options and alternatives should the proposals in the *FNPRM* be adopted, the Commission has sought comment from the parties. The proposals in this proceeding to accommodate the potential inclusion of FSS earth stations in the third-party database registration regime in the 70 GHz and 80 GHz bands are predicated on requests from SpaceX for the same. The proposals in this proceeding to include ship-to-aerostat transmissions as part of the maritime service otherwise authorized in the *Report and Order* are predicated on requests from Aeronet for the same. In light of these requests, the *FNPRM* seeks comment on how to weigh the inherent public interest considerations involved. The Commission expects to more fully consider the economic impact and alternatives for small entities following the review of comments and costs and benefits analyses filed in response to the *FNPRM.* The Commission's evaluation of this information will shape the final alternatives it considers, the final conclusions in reaches, and any final actions it ultimately takes in this proceeding to minimize any significant economic impact that may occur on small entities.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

28. None.

III. Ordering Clauses

29. *It is ordered* that, pursuant to sections 4, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C 154, 303, 307, the Further Notice of Proposed Rulemaking *is adopted* as set forth above.

30. *It is further ordered* that the Commission's Office of the Secretary, *shall send* a copy of the Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2024–05391 Filed 4–26–24; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register
Vol. 89, No. 83
Monday, April 29, 2024

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

Agricultural Marketing Service

[Doc. No. AMS–NOP–23–0089]

National Organic Standards Board: Call for Nominations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice; call for nominations.

SUMMARY: The National Organic Standards Board (NOSB) was established to assist in the development of standards for substances to be used in organic production and to advise the Secretary on the implementation of the Organic Foods Production Act of 1990 (OFPA). Through this Notice, the U.S. Department of Agriculture (USDA) is announcing its call for nominations to fill five vacancies on the NOSB. The positions are listed below under **SUPPLEMENTARY INFORMATION.** Appointees will serve a 5-year term likely beginning January 23, 2025, and ending January 23, 2030. Additionally, USDA seeks nominations for a pool of candidates that the Secretary of Agriculture can draw upon as replacement appointees if unexpected vacancies occur.

DATES: Application packages must be received by mail or postmarked on or before June 28, 2024.

ADDRESSES: Applications can be sent via email to Michelle Arsenault at *michelle.arsenault@usda.gov,* or mailed to: USDA–AMS–NOP, 1400 Independence Avenue SW, Room 2642–S, Ag Stop 0268, Washington, DC 20250–0268. Electronic submittals are preferred.

FOR FURTHER INFORMATION CONTACT: Michelle Arsenault; Telephone: (202) 997–0115; or Email: *Michelle.Arsenault@usda.gov.*

SUPPLEMENTARY INFORMATION: For information on how to apply, please see the nominations process page: *https://www.ams.usda.gov/rules-regulations/organic/nosb/nomination-process.*

OFPA, as amended (7 U.S.C. 6501–6524), requires the Secretary to establish the NOSB in accordance with the Federal Advisory Committee Act. The NOSB is composed of 15 members: four individuals who own or operate an organic farming operation, or employees of such individuals; two individuals who own or operate an organic handling operation, or employees of such individuals; one individual who owns or operates a retail establishment with significant trade in organic products, or employees of such individuals; three individuals with expertise in areas of environmental protection and resource conservation; three individuals who represent public interest or consumer interest groups; one individual with expertise in the fields of toxicology, ecology, or biochemistry; and one individual who is a certifying agent.

Through this notice, USDA seeks to fill the following five positions:

- one individual who owns or operates an organic farming operation or employee of such individual;
- two individuals who own or operate an organic handling operation or employees of such individuals;
- one individual who owns or operates a retail establishment with significant trade in organic products or employee of such individual; and
- one individual with expertise in areas of environmental protection and resource conservation.

Per OFPA, individuals seeking appointment to the NOSB must meet the definition of the position that they seek as identified under 7 U.S.C. 6518. For example, demonstrated experience and interest in organic production and organic certification; demonstrated experience with respect to agricultural products produced and handled on certified organic farms, or experience with consumer and public interest organizations. Applicants must also satisfy additional selection criteria the NOSB recommended on June 10, 1999. These criteria are listed below and on the following web page: *https://www.ams.usda.gov/rules-regulations/organic/nosb/nomination-process.*

Additional criteria include:

- an understanding of organic principles and practical experience in the organic community;
- a commitment to the integrity of the organic food and fiber industry;
- demonstrated experience in the development of public policy such as participation on public or private advisory boards, boards of directors, or other comparable organizations;
- participation in standards development or involvement in educational outreach activities;
- the ability to evaluate technical information and to fully participate in NOSB deliberation and recommendations;
- the willingness to commit the time and energy necessary to assume NOSB duties; and
- other such factors as may be appropriate for specific positions.

To apply, submit the following: a resume (required); Form AD–755 (required), which can be accessed at: *https://www.usda.gov/sites/default/files/documents/ad-755.pdf;* a cover letter (optional); and letters of recommendation (optional). Resumes should be no longer than five (5) pages and should include the following information: the position for which you are applying; current and past organization affiliations; areas of expertise; education; career positions held; and any other notable positions held. Previous applicants who wish to be considered must reapply.

If USDA receives a request under the Freedom of Information Act.

(5 U.S.C. 552) for records relating to NOSB nominations, application materials may be released to the requester. Prior to the release of the information, personally identifiable information protected by the Privacy Act (5 U.S.C. 552a) will be redacted.

The Agricultural Marketing Service (AMS) encourages submissions from traditionally underrepresented individuals, organizations, and businesses to reflect the diversity of this industry. AMS encourages submissions from qualified applicants, regardless of race, color, age, sex, sexual orientation, gender identity, national origin, religion, disability status, protected veteran status, or any other characteristic protected by law.

AMS policy is that diversity of the boards should reflect the diversity of its industries in terms of the experience of members, methods of production and distribution, marketing strategies, and other distinguishing factors, including but not limited to individuals from historically underserved communities,

that will bring different perspectives and ideas to the Board. AMS plans to conduct extensive outreach, paying particular attention to reaching underserved communities; diversity of the population served; and the knowledge, skills, and abilities of the members to serve a diverse population.

The information collection requirements concerning the nomination process have been previously approved by the Office of Management and Budget (OMB) under OMB Control No. 0505–0001.

Dated: April 24, 2024.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2024–09135 Filed 4–26–24; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Solicitation of Nominations for Membership for the West Virginia Resource Advisory Committee

AGENCY: Department of Agriculture (USDA).

ACTION: Notice of solicitation of nominations for membership.

SUMMARY: In accordance with the Secure Rural Schools (SRS) and Community Self-Determination Act of 2000 as amended, codified in Agricultural Improvement Act of 2018, and the Federal Advisory Committee Act (FACA), as amended, the United States Department of Agriculture is seeking nominations of qualified candidates to be considered for the West Virginia Resource Advisory Committee (RAC). The West Virginia RAC will advise the Secretary of Agriculture on proposed recommendations and other such matters as the Secretary determines. The West Virginia RAC will be governed by the provisions of FACA. Duration of the West Virginia RAC is for two years unless renewed by the Secretary of Agriculture.

DATES: Nominations must be submitted via email or postmarked by June 30, 2024. The package must be sent to the address listed in **FOR FURTHER INFORMATION CONTACT**. Criteria for a completed package can be found in Nomination and Application Information Below.

ADDRESSES: Please submit nominations and resumes may be submitted to the Secretary of Agriculture through Kristopher Hennig, Monongahela National Forest, Partnership Coordinator, 200 Sycamore Street, Elkins, WV 26241 or email at *2146ristopher.hennig@usda.gov.*

FOR FURTHER INFORMATION CONTACT: Inquiries may be sent to Kristopher Hennig, Forest Supervisor's Office, 200 Sycamore Street, Elkins, WV 26241, by Phone at (304) 940–3317, or by email at *kristopher.hennig@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

Public Law of Secure Rural Schools and Community Self-Determination Act of 2000, as amended, 16 U.S.C. 7125, directs the Secretary of Agriculture to create Secure Rural Schools Resource Advisory Committees (SRS RAC) to provide advice and recommendations to the Forest Service concerning projects and funding consistent with SRS Title II of the Act. Pursuant to 16 U.S.C 7125 and the Federal Advisory Committee Act, 5 U.S.C. 10, notice is hereby given that the Secretary of Agriculture is seeking nominations of qualified candidates to be considered for the West Virginia RAC. Additional information on the West Virginia RAC can be found by visiting the following website at: *https://www.fs.usda.gov/main/mnf/workingtogether/advisorycommittees.*

The Act describes the duties of the committee as follows: to review projects proposed by counties and other interested parties; to recommend projects and funding; to provide early and continuous coordination with Forest Service officials; to provide frequent opportunities for citizens, organizations, tribes, land management agencies and other interested parties to participate openly and meaningfully, beginning in the early stages of project development; to monitor projects approved under the Act; to advise the designated federal official on the progress of monitoring; and to make recommendations for any appropriate changes or adjustments to projects being monitored.

Meetings for the SRS RAC's will be published on the **Federal Register** website at least 15 days prior to the meeting date at: *www.federalregister.gov.*

Membership Balance

The SRS RACs will be comprised of 15 members approved by the Secretary of Agriculture (or designee) where each will serve a 4-year term. SRS RACs memberships will be balanced in terms of the points of view represented and functions to be performed. The SRS RACs shall include representation from the following interest areas:

(1) Five persons who represent:

(a) Organized Labor or Non-Timber Forest Product Harvester Groups,

(b) Developed Outdoor Recreation, Off Highway Vehicle Users, or Commercial Recreation Activities,

(c) Energy and Mineral Development, or Commercial or Recreational Fishing Interests,

(d) Commercial Timber Industry, or

(e) Federal Grazing or Other Land Use Permits, or Represent Non-Industrial Private Forest Landowners, within the area for which the committee is organized.

(2) Five persons who represent:

(a) Nationally Recognized Environmental Organizations,

(b) Regionally or Locally Recognized Environmental Organizations,

(c) Dispersed Recreational Activities,

(d) Archaeological and Historical Interests, or

(e) Nationally or Regionally Recognized Wild Horse and Burro Interest Groups, Wildlife or Hunting Organizations, or Watershed Associations.

(3) Five persons who represent:

(a) State Elected Office (or a designee),

(b) County or Local Elected Office,

(c) American Indian Tribes within or adjacent to the area for which the committee is organized,

(d) Area School Officials or Teachers, or

(e) Affected Public at Large.

Of these members, one will become the Chairperson who is recognized for their ability to lead a group in a fair and focused manner and who has been briefed on the mission of the RAC. A chairperson is selected by a majority of RAC members. The Committee will meet on an annual basis or as needed and determined by the Agency. In the event that a vacancy arises, the Designated Federal Officer (DFO) may request the Secretary to fill the vacancy in the manner in which the original appointments were made. In accordance with the SRS Act, members of the SRS RAC shall serve without compensation. SRS RAC members may be allowed travel and per diem expenses for attendance at committee meetings, subject to approval of the DFO responsible for administrative support to the SRS RAC.

Nomination and Application Information

The appointment of members to the SRS RACs will be made by the Secretary of Agriculture. The public is invited to submit nominations for membership on the SRS RACs, either as a self-nomination or a nomination of any qualified and interested person. Any individual or organization may nominate one or more qualified persons to represent the interest areas listed above.

Individuals who wish to be considered for membership on the West Virginia Secure Rural Schools Advisory Committee must submit a nomination with information, including a *Form AD–755 (Advisory Committee or Research and Promotion Background Information).* Nominations should be typed and include the following:

If nominating an individual, a brief summary, no more than two pages, explaining the nominee's qualifications to serve on the Secure Rural Schools Advisory Committee and addressing the membership composition and criteria described above.

(a) A resume providing the nominee's background, experience, and educational qualifications.

(b) A completed *Form AD–755, Advisory Committee or Research and Promotion Background Information.* The form can be downloaded by visiting the following website *https://www.usda.gov/sites/default/files/documents/ad755.pdf.*

(c) Letters of endorsement are required for certain representations.

Persons with disabilities who require alternative means of communication for program information (for example., Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

Equal opportunity practices in accordance with USDA policies shall be followed in all appointments to the SRS RACs. To ensure that the recommendations of the SRS RACs have taken into account the needs of the diverse groups served by USDA, membership will, to the extent practicable, include individuals with demonstrated ability to represent all racial and ethnic groups, women and men, and persons with disabilities.

USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Dated: April 23, 2024.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2024–09085 Filed 4–26–24; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are required regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by May 29, 2024 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food Safety and Inspection Service

Title: Salmonella Control Strategies Pilot Projects.

OMB Control Number: 0583–NEW.

Summary of Collection: Food Safety and Inspection Service FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18 and 2.53), as specified in the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*). This statute mandates that FSIS protect the public by verifying that poultry products are safe, wholesome, and properly labeled. This ongoing, voluntary data collection will provide comprehensive information about pathogen control and the measurement strategies necessary for an effective poultry products inspection program.

Need and Use of the Information: On October 19, 2021, USDA announced that FSIS would mobilize a stronger and more comprehensive effort to reduce Salmonella illnesses associated with poultry products. A key component of this effort is identifying ways to incentivize the use of preharvest controls to reduce Salmonella contamination coming into the slaughterhouse. Under the pilot projects program, establishments will experiment with new or existing pathogen control and measurement strategies and share data with FSIS. Associations may also submit aggregate data. The data will be analyzed by FSIS to determine whether they support changes to FSIS existing Salmonella control strategies.

Description of Respondents: Business-for-not for-profit; Farms; State, Local or Tribal Government.

Number of Respondents: 40.

Frequency of Responses: Reporting; Other (one-time).

Total Burden Hours: 620.

Rachelle Ragland-Greene,

Acting Departmental Information Collection Clearance Officer.

[FR Doc. 2024–09093 Filed 4–26–24; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF COMMERCE

Census Bureau

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; 2024 American Community Survey (ACS) Sexual Orientation and Gender Identity Test

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 September 19, 2023, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: U.S. Census Bureau, Department of Commerce.

Title: American Community Survey (ACS) Methods Panel: 2024 Sexual Orientation and Gender Identity (SOGI) Test.

OMB Control Number: 0607–0936.

Form Number(s): Paper questionnaires: ACS–1(X)SGO, ACS–1(X)SGA; ACS internet electronic instrument (no form number), ACS CAPI(HU) electronic instrument (no form number), ACS Content Follow-up internet and CATI electronic instruments (no form numbers).

Type of Request: Regular submission, Request for a Revision of a Currently Approved Collection.

Number of Respondents: 281,000 respondents to the initial interview; 88,000 respondents to the Content Follow-up reinterview.

Average Hours per Response: 40 minutes for the initial interview; 20 minutes for the Content Follow-up reinterview.

Burden Hours: 216,819 hours.

	Estimated number of respondents	Estimated burden (in hours)	Total estimated burden hours
Initial Interview	281,000	0.667	187,427
Content Follow-up Reinterview	88,000	0.334	29,392
Total			216,819

Needs and Uses: The information collected in the 2024 ACS SOGI test will be used to evaluate the quality of data from questions on sexual orientation and gender identity. The research will inform recommendations for potential production ACS implementation on question wording and response options, whether a confirmation question is asked of everyone or only of those people with discrepant responses for sex at birth and current gender identity, and the style of write-in boxes to use for internet respondents. The data will also be used to produce descriptive statistics on the test topics, assess the impact on other questions on the survey that have changed, and gain insight into terminology by analyzing write-in responses and responses to qualitative questions asked in the test. Data will be assessed by mode of response as well as type of respondent (proxy or self-reported data), in addition to other subgroups of interest.

Because the questions being tested under this clearance have yet to be asked in the American Community Survey, the data gathered will not be considered official statistics of the Census Bureau or other Federal agencies. Test results will be included in research reports that will be published on the Census Bureau's website. Results may also be prepared for presentations at professional meetings and conferences or for publication in professional journals. All published test results will be statistical products that contain only aggregated data that do not reveal individual responses.

Details of the questions being tested and test plans are available in Supporting Statements A and B and associated attachments. See directions below for how to find these documents online on *www.reginfo.gov.*

Affected Public: Individuals or households.

Frequency: This is a one-time test.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13 U.S.C. 141, 193, and 221.

This information collection request may be viewed at *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.* 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 0607–0936.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–09101 Filed 4–26–24; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of Economic Analysis

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Services Surveys: BE–180, Benchmark Survey of Financial Services Transactions Between U.S. Financial Services Providers and Foreign Persons

AGENCY: Bureau of Economic Analysis, 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 June 28, 2024.

ADDRESSES: Interested persons are invited to submit written comments to Christopher Stein, Chief, Services Surveys Branch, Bureau of Economic Analysis, by email to *christopher.stein@bea.gov* or *PRAcomments@bea.gov.* Please reference OMB Control Number 0608–0062 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 Christopher Stein, Chief, Services Surveys Branch, Bureau of Economic Analysis; 301–278–9189; or via email at *christopher.stein@bea.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Benchmark Survey of Financial Services Transactions between U.S. Financial Services Providers and Foreign Persons (Form BE–180) is a periodic survey, conducted every five years for reporting years ending in ''4'' and ''9'', that collects data from U.S. persons who engage in international trade in covered financial services transactions. This mandatory benchmark survey, conducted under the authority of the International Investment and Trade in Services Survey Act, and section 5408 of the Omnibus Trade and Competitiveness Act of 1988, covers the universe of transactions in financial services with foreign persons and is BEA's most comprehensive survey of such transactions. The survey was last conducted in 2020, covering the 2019 reporting year. A response is required from U.S. persons subject to the reporting requirements of the BE–180, whether or not they are contacted by BEA, to ensure complete coverage of transactions in financial services between U.S. and foreign persons. A U.S. person means any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization (whether or not organized under the laws of any State), resident in the United States or subject to the jurisdiction of the United States. A U.S. person must report if they had transactions with foreign persons in the categories covered by the survey during the 2024 calendar year. For U.S. persons that had combined transactions that were $3 million or less in the financial services categories covered by the survey for fiscal year 2024, a completed benchmark would include totals for each type of transaction in which they engaged. A U.S. person whose combined transactions with foreign persons exceeded $3 million in the financial services categories covered by the survey for fiscal year 2024, is required to provide data on the total transactions of each of the covered types of financial services transactions and must disaggregate the totals by country and by relationship to the foreign counterparty (foreign affiliate, foreign parent group, or unaffiliated).

The data are needed to monitor U.S. trade in financial services, to analyze the impact of these cross-border services on the U.S. and foreign economies, to compile and improve the U.S. economic accounts, to support U.S. commercial policy on trade in services, to conduct trade promotion, and to improve the ability of U.S. businesses to identify and evaluate market opportunities. The data are used in estimating the trade in financial services component of the U.S. international transactions accounts (ITAs) and national income and product accounts (NIPAs).

The Bureau of Economic Analysis (BEA) is proposing to make modifications to the survey for 2024 to further align BEA's statistics with international guidelines and to collect additional information that can be used to improve the current estimation methodologies for published financial services transactions, increasing the quality and usefulness of BEA's statistics on trade in financial services. To evaluate the feasibility of these changes, BEA conducted outreach to a sample of nine respondents to the Quarterly Survey of Financial Services Transactions between U.S. Financial Services Providers and Foreign Persons (BE–185). Reporter feedback gathered substantiated the ability of the respondents to comply with the additional data requests, and that the survey changes should not impose a material increase in reporting burden.

BEA does not plan to change the exemption levels used for the previous benchmark survey for 2019.

BEA proposes to:

(1) Add a question on employment size class. This information would be required of all survey respondents to aid in identifying the number of small businesses reporting on the survey, and the volume of services trade data reported by small businesses. These questions will help BEA's broader effort to develop statistics to better track the economic health and contributions on the nation's small businesses.

(2) Add a question to collect information on the largest states, districts, or territories (up to three) for exports and imports of services. This information would be required of all survey respondents and will contribute to BEA's effort to produce estimates of the value of exports and imports of services by U.S. state for the first time.

(3) Modify the remote services schedules (C and D) to better capture trade in digitally delivered services. This will improve BEA's estimates of U.S. trade in information and communications technology (ICT) and potentially ICT-enabled services.

BEA will also align BE–180 transaction categories to incorporate two minor modifications made to the BE–185 survey beginning with 2021 reporting: collecting brokerage services in the three separate categories of (1) equity, (2) debt, and (3) other; and financial advisory and custody services in two distinct categories for (1) advisory, and (2) custody services. BEA also plans to eliminate question 15, asking if the U.S. Reporter had cryptocurrency-related transactions. This item is no longer necessary for BEA's effort to measure financial services transactions associated with crypto currency.

BEA estimates there will be no material impact on the average filing burden. Proposals one and two should not affect burden because BEA believes this data to be readily available in reporter records or can be provided by many respondents based on recall, without the need to search existing records. Additionally, proposal three is a minor modification to data previously collected on the 2019 BE–180 benchmark survey. The codes being aligned with transaction categories on the BE–185 survey will have no material impact on burden because reporters are already reporting in these categories on the BE–185 survey or have data readily available (those companies only subject to filing in a benchmark year) since the requirement was aggregate reporting on the previous BE–180 filing.

The language in the instructions and definitions will be reviewed and adjusted as necessary to clarify survey requirements.

II. Method of Collection

BEA will contact potential respondents by mail in January of 2025 to announce the upcoming benchmark survey. Respondents would then be notified in May 2025 that a completed BE–180 form is due July 31, 2025. Reports would be required from each U.S. person that had transactions in the covered financial services with foreign persons during 2024. A response is required from persons subject to the reporting requirements of the BE–180 Benchmark Survey of Financial Services Transactions between U.S. Financial Services Providers and Foreign Persons, whether or not they are contacted by BEA.

BEA offers its electronic filing option, the eFile system, for use in reporting on Form BE–180. For more information about eFile, go to *www.bea.gov/efile.* In addition, BEA posts all its survey forms and reporting instructions on its website, *www.bea.gov/ssb.* These may

be downloaded, completed, printed, and submitted via fax or mail.

III. Data

OMB Control Number: 0608–0062.
Form Number(s): BE–180.
Type of Review: Regular submission.
Affected Public: Business or other for-profit organizations.
Estimated Number of Respondents: 6,000 annually (4,500 reporting mandatory data and 1,500 that would file exemption claims or voluntary responses).
Estimated Time per Response: 11 hours is the average for the 2,000 respondents filing data by country and affiliation; 2 hours for the 2,500 respondents filing data by transaction type only, and 1 hour for those filing an exemption claim or other response. Hours may vary considerably among respondents because of differences in company size and complexity.
Estimated Total Annual Burden Hours: 28,500.
Estimated Total Annual Cost to Public: $0.
Respondent's Obligation: Mandatory.
Legal Authority: International Investment and Trade in Services Survey Act (Pub. L. 94–472, 22 U.S.C. 3101–3108, as amended) and Section 5408 of the Omnibus Trade and Competitiveness Act of 1988.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through 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. 2024–09149 Filed 4–26–24; 8:45 am]

BILLING CODE 3510–06–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–016]

Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2018–2019

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that certain passenger vehicle and light truck tires (passenger tires) were made as less than normal value during the period of review (POR) August 1, 2018, through July 31, 2019.

DATES: Applicable April 29, 2024.

FOR FURTHER INFORMATION CONTACT: Toni Page, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1402 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1398.

SUPPLEMENTARY INFORMATION:

Background

On June 18, 2020, Commerce published the preliminary results of the 2018–2019 administrative review of the antidumping duty order on passenger tires from the People's Republic of China (China).[1] On June 3, 2021, Commerce deferred the deadline for the final results to consider whether to request a voluntary remand from the U.S. Court of International Trade of the 2017–2018 administrative review to evaluate the information provided by U.S. Customs and Border Protection (CBP) regarding Shandong New Continent Tire Co., Ltd. (Shandong New Continent) (the mandatory respondent in the 2017–2018 administrative review whose rate of zero percent was preliminarily assigned to the separate rate respondents in the instant administrative review), further examine whether Shandong New Continent accurately reported its 2017–2018 POR sales information, and potentially reopen the record to solicit additional information.[2] On February 20, 2024, Commerce notified interested parties of its intent to issue the final results of the 2018–2019 administrative review by no later than April 22, 2024.[3] For a summary of the events subsequent to the *Preliminary Results, see* the Issues and Decision Memorandum.[4]

Scope of the Order

The products covered by this order are certain passenger vehicles and light truck tires. A full description of the scope of the order is provided in the Issues and Decision Memorandum.

Analysis of Comments Received

Commerce addressed all issues raised in the case and rebuttal briefs in the Issues and Decision Memorandum. These issues are identified in the appendix to this notice. The Issues and 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 Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on our analysis of the comments received, we determine that Qingdao Fullrun Tyre Corp., Ltd. (Fullrun Tyre) had no shipments during the POR. For further details, *see* the Issues and Decision Memorandum.

Final Determination of No Shipments

Based on an analysis of CBP information, Commerce determines that the following companies had no shipments during the POR: (1) Shandong Duratti Rubber Corporation

[1] *See Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Rescission, in Part: 2018–2019,* 85 FR 36831 (June 18, 2020) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, ''Deferral of the Final Results of Antidumping Duty Administrative Review; 2018–2019,'' dated June 3, 2021.

[3] *See* Memorandum, ''Notification of Resumption of the Final Results of Antidumping Duty Administrative Review; 2018–2019,'' dated February 20, 2024.

[4] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China; 2018–2019,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

Co., Ltd.; and (2) Qingdao Fullrun Tyre Corp., Ltd.

Shandong Anchi Tyres Co., Ltd. (Anchi) filed a no-shipment certification; however, our preliminary analysis of CBP information contradicted this claim. After further review, we determine for these final results that Anchi had shipments during the POR. For additional information regarding this determination, *see* the Issues and Decision Memorandum.

Separate Rates

In the *Preliminary Results,* we found that the following companies did not establish their eligibility for a separate rate: (1) Qingdao Odyking Tyre Co., Ltd. (Qingdao Odyking); (2) Shandong Longyue Rubber Co., Ltd. DBA ZODO Tire Co., Ltd. (Shandong Longyue); (3) Anchi; and (4) Fullrun Tyre.[5] As such, we preliminarily found that these companies were part of the China-wide entity. No interested party filed comments with respect to Qingdao Odyking's and Shandong Longyue's preliminary separate rate findings; therefore, for the final results, we continue to find that these two companies are part of the China-wide entity. Interested parties did file comments with respect to Anchi and Fullrun Tyre. We have examined these comments and continue to find that Anchi is part of the China-wide entity; however, as noted above, we have found that Fullrun Tyre had no shipments during the instant POR.[6]

We also continue to find that the evidence provided by the following respondents supports finding an absence of both *de jure* and *de facto* government control, and, therefore, we continue to grant a separate rate to each of these companies: (1) Qingdao Fullrun Tyre Tech Corp., Ltd.; (2) Qingdao Powerich Tyre Co., Ltd.; (3) Qingdao Sentury Tire Co., Ltd.; (4) Shandong Linglong Tyre Co., Ltd.; (5) Shandong Province Sanli Tire Manufactured Co., Ltd.; (6) Shandong Yongsheng Rubber Group Co., Ltd.; and (7) Shouguang Firemax Tyre Co., Ltd.

Rate for Non-Selected Separate Rate Respondents

The Tariff Act of 1930, as amended (the Act), and Commerce's regulations do not address what rate to apply to respondents not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for non-selected respondents that are not examined individually in an administrative review. Section 735(c)(5)(A) of the Act states that the all-others rate should be calculated by averaging the weighted-average dumping margins for individually examined respondents, excluding rates that are zero, *de minimis,* or based entirely on facts available. When the rates for individually examined companies are all zero, *de minimis,* or based entirely on facts available, section 735(c)(5)(B) of the Act provides that Commerce may use ''any reasonable method'' to establish the all-others rate.

However, here, because both mandatory respondents were found to be part of the China-wide entity, there are no estimated weighted-average dumping margins calculated for exporters or producers individually examined in this review. Therefore, consistent with our practice,[7] we have assigned to the non-individually examined companies that demonstrated their eligibility for a separate rate the most recently assigned separate rate in this proceeding (*i.e.,* 0.00 percent).[8]

China-Wide Entity

Under Commerce's current policy regarding the conditional review of the China-wide entity, the China-wide entity will not be under review unless a party specifically requests, or Commerce self-initiates, a review of the entity.[9] Because no party requested a review of the China-wide entity in this review, the entity is not under review and the entity's rate is not subject to change (*i.e.,* 76.46 percent).[10]

Final Results of Review

Commerce determines that the following weighted-average dumping margin exists for the period of August 1, 2018, through July 31, 2019:

Exporter	Weighted-average dumping margin (percent)
Qingdao Fullrun Tyre Tech Corp., Ltd	0.00
Qingdao Powerich Tyre Co., Ltd	0.00
Qingdao Sentury Tire Co., Ltd	0.00
Shandong Linglong Tyre Co., Ltd	0.00
Shandong Province Sanli Tire Manufactured Co., Ltd	0.00
Shandong Yongsheng Rubber Group Co., Ltd	0.00
Shouguang Firemax Tyre Co., Ltd	0.00

Disclosure

Normally, Commerce will disclose the calculations used in our analysis to parties in this review within five days of the date of publication of the notice of final results in the **Federal Register**, in accordance with 19 CFR 351.224(b). However, here, Commerce is applying a separate rate [11] and the China-wide rate [12] that were established in prior segments of the proceeding. Thus, there are no calculations on this record to disclose.

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act, and 19 CFR 351.212(b), Commerce will determine, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

For the final results, we will instruct CBP to apply an *ad valorem* assessment

[5] *See Preliminary Results,* 85 FR 36831, 36832.

[6] *See* Issues and Decision Memorandum at Comment 6.

[7] *See, e.g., Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, Final Successor-in-Interest Determination, and Final Determination of No Shipments; 2018–2019,* 86 FR 59987 (October 29, 2021), and accompanying IDM at Comment 1; and *Drawn Stainless Steel Sinks from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review; 2019–2020,* 86 FR 7363 (January 28, 2021), and accompanying PDM, unchanged in *Drawn Stainless Steel Sinks from the People's Republic of China: Final Results of the Antidumping Duty Administrative Review; 2019–2020,* 86 FR 18511 (April 9, 2021).

[8] *See Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2017–2018,* 85 FR 22396 (April 22, 2020).

[9] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[10] *See Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Order; and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 80 FR 47902, 47904, n.19 (August 10, 2015).

[11] *See Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2017–2018,* 85 FR 22396 (April 22, 2020).

[12] *See Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Order; and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 80 FR 47902 (August 10, 2015).

rate of 76.46 percent to all entries of subject merchandise during the POR that were exported by Qingdao Odyking and Shandong Longyue.

For the companies receiving a separate rate, we intend to assign an assessment rate of 0.00 percent, consistent with the methodology described above. Additionally, if Commerce determines that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's CBP case number will be liquidated at the rate for the China-wide entity.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act for the three separate rate respondents that do not have a superseding cash deposit rate: [13] (1) for the exporters listed above, the cash deposit rate will be equal to the weighted-average dumping margin established in the final results of this review (except that, if the rate is *de minimis* (*i.e.,* less than 0.5 percent), then the cash deposit rate will be zero for that exporter); (2) for previously investigated or reviewed Chinese and non-Chinese exporters not listed above that have separate rates, the cash deposit rate will continue to be equal to the exporter-specific weighted-average dumping margin published of the most recently-completed segment of this proceeding; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the rate for the China-wide entity, *i.e.,* 76.46 percent; and (4) for all exporters of subject merchandise which are not located in China and which are not eligible for a separate rate, the cash deposit rate will be the rate applicable to Chinese exporter(s) that supplied that non-Chinese exporter. These cash deposit requirements shall remain in effect until further notice.

Because Qingdao Sentury Tire Co., Ltd., Shandong Linglong Tyre Co., Ltd., Shandong Province Sanli Tire Manufactured Co., Ltd., and Shouguang Firemax Tyre Co., Ltd. have 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 CBP for these companies. Thus, this notice will not affect the current cash deposit rate for these companies.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of double antidumping duties, and/or an increase in the amount of antidumping duties by the amount of countervailing duties.

Administrative Protective Order

This notice also serves as a reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

We are issuing and publishing these final results of administrative review and notice in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.221(b)(5).

Dated: April 22, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2024–09092 Filed 4–26–24; 8:45 am]

BILLING CODE 3510–DS–P

[13] These three companies are: Qingdao Fullrun Tyre Tech Corp., Ltd.; Qingdao Powerich Tyre Co., Ltd.; and Shandong Yongsheng Rubber Group Co., Ltd.

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–167, C–533–927, C–580–920, C–583–877]

Certain Epoxy Resins From the People's Republic of China, India, the Republic of Korea, and Taiwan: Initiation of Countervailing Duty Investigations

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable April 23, 2024.

FOR FURTHER INFORMATION CONTACT: Nathan James (the People's Republic of China (China)), Eliza DeLong (India), Thomas Martin (the Republic of Korea (Korea)), and Whitley Herndon (Taiwan), AD/CVD Operations, Offices V, V, IV, and IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5305, (202) 482–3878, (202) 482–3936, and (202) 482–6274, respectively.

SUPPLEMENTARY INFORMATION:

The Petitions

On April 3, 2024, the U.S. Department of Commerce (Commerce) received countervailing duty (CVD) petitions concerning imports of certain epoxy resins (epoxy resins) from China, India, Korea, and Taiwan filed in proper form on behalf of U.S. Epoxy Resin Producers *Ad Hoc* Coalition (the petitioner).[1] The CVD petitions were accompanied by antidumping duty (AD) petitions concerning imports of epoxy resins from

[1] *See* Petitioner's Letter, ''Petitions for the Imposition of Antidumping and Countervailing Duties,'' dated April 3, 2024 (the Petitions). The members of the U.S. Epoxy Resin Producers *Ad Hoc* Coalition are Olin Corporation and Westlake Corporation.

China, India, Korea, Taiwan, and Thailand.[2]

Between April 8 and 16, 2024, Commerce requested supplemental information pertaining to certain aspects of the Petitions.[3] Between April 11 and 18, 2024, the petitioner filed timely responses to these requests for additional information.[4]

In accordance with section 702(b)(1) of the Tariff Act of 1930, as amended (the Act), the petitioner alleges that the Government of China (GOC), the Government of India (GOI), the Government of Korea (GOK), and the Taiwan Authorities (TA) are providing countervailable subsidies, within the meaning of sections 701 and 771(5) of the Act, to producers of epoxy resins from China, India, Korea, and Taiwan, respectively, and that such imports are materially injuring, or threatening material injury to, the domestic industry producing epoxy resins in the United States. Consistent with section 702(b)(1) of the Act and 19 CFR 351.202(b), for those alleged programs on which we are initiating CVD investigations, the Petitions were accompanied by information reasonably available to the petitioner supporting its allegations.

Commerce finds that the petitioner filed the Petitions on behalf of the domestic industry because the petitioner is an interested party as defined in section 771(9)(F) of the Act.[5] Commerce also finds that the petitioner demonstrated sufficient industry support with respect to the initiation of the requested CVD investigations.[6]

Period of Investigation

Because the Petitions were filed on April 3, 2024, the period of investigation (POI) for China, India, Korea, and Taiwan investigations is January 1, 2023, through December 31, 2023.[7]

Scope of the Investigations

The merchandise covered by these investigations are epoxy resins from China, India, Korea, and Taiwan. For a full description of the scope of these investigations, *see* the appendix to this notice.

Comments on the Scope of the Investigations

On April 8 and 16, 2024, Commerce requested information and clarification from the petitioner regarding the proposed scope to ensure that the scope language in the Petitions is an accurate reflection of the products for which the domestic industry is seeking relief.[8] On April 12 and 18, 2024, the petitioner provided clarifications and revised the scope.[9] The description of merchandise covered by these investigations, as described in the appendix to this notice, reflects these revisions.

As discussed in the *Preamble* to Commerce's regulations, we are setting aside a period for interested parties to raise issues regarding product coverage (*i.e.,* scope).[10] Commerce will consider all comments received from interested parties and, if necessary, will consult with interested parties prior to the issuance of the preliminary determinations. If scope comments include factual information, all such factual information should be limited to public information.[11] To facilitate preparation of its questionnaires, Commerce requests that scope comments be submitted by 5:00 p.m. Eastern Time (ET) on May 13, 2024, which is 20 calendar days from the signature date of this notice.[12] Any rebuttal comments, which may include factual information, must be filed by 5:00 p.m. ET on May 23, 2024, which is 10 calendar days from the initial comment deadline.

Commerce requests that any factual information that parties consider relevant to the scope of the investigations be submitted during that time period. However, if a party subsequently finds that additional factual information pertaining to the scope of the investigations may be relevant, the party must contact Commerce and request permission to submit the additional information. All scope comments must be filed simultaneously on the records of the concurrent AD and CVD investigations.

Filing Requirements

All submissions to Commerce must be filed electronically via Enforcement and Compliance's Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS), unless an exception applies.[13] An electronically filed document must be received successfully in its entirety by the time and date it is due.

Consultations

Pursuant to sections 702(b)(4)(A)(i) and (ii) of the Act, Commerce notified the GOC, GOI, GOK, and TA of the receipt of the Petitions and provided an opportunity for consultations with respect to the Petitions.[14] Commerce held consultations with the GOK on April 17, 2024 [15] and the TA April 19, 2024.[16] The GOC and the GOI did not request consultations.[17]

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[2] *Id.*

[3] *See* Commerce's Letters, ''Petition for the Imposition of Countervailing Duties on Imports of Certain Epoxy Resins from China: Supplemental Questions,'' dated April 9, 2024; ''Petition for the Imposition of Countervailing Duties on Imports of Certain Epoxy Resins from India: Supplemental Questions,'' dated April 9, 2024; ''Petition for the Imposition of Countervailing Duties on Imports of Certain Epoxy Resins from South Korea: Supplemental Questions,'' dated April 8, 2024; ''Petitions for the Imposition of Countervailing Duties on Imports of Certain Epoxy Resins from Taiwan: Supplemental Questions,'' dated April 8, 2024; and ''Supplemental Questions,'' dated April 8, 2024 (General Issues Questionnaire); *see also* Memorandum, ''Phone Call,'' dated April 16, 2024 (April 16 Memorandum).

[4] *See* Petitioner's Letters, ''Petitioner's Response to Volume I Supplemental Questionnaire,'' dated April 12, 2024 (First General Issues Supplement); ''Petitioner's Response to Volume VIII Supplemental Questionnaire (China Countervailing Duties),'' dated April 15, 2024; ''Petitioner's Response to Volume VIII Supplemental Questionnaire (India Countervailing Duties),'' dated April 11, 2024; ''Petitioner's Response to Volume IX Supplemental Questionnaire (South Korea Countervailing Duties),'' dated April 11, 2024; ''Petitioner's Response to Volume X Supplemental Questionnaire (Taiwan Countervailing Duties),'' dated April 15, 2024; and ''Petitioner's Response to Second General Issues Supplemental Questionnaire,'' dated April 18, 2024 (Second General Issues Supplement).

[5] The members of the petitioning coalition are interested parties under section 771(9)(C) of the Act.

[6] *See* section on ''Determination of Industry Support for the Petitions,'' *infra.*

[7] *See* 19 CFR 351.204(b)(2).

[8] *See* General Issues Questionnaire; *see also* April 16 Memorandum.

[9] *See* First General Issues Supplement at 3–10 and Exhibit I–S4; *see also* Second General Issues Supplement at 2–3 and Exhibit I–SS1.

[10] *See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27323 (May 19, 1997) (*Preamble*).

[11] *See* 19 CFR 351.102(b)(21) (defining ''factual information'').

[12] *See* 19 CFR 351.303(b)(1).

[13] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011); *see also Enforcement and Compliance; Change of Electronic Filing System Name,* 79 FR 69046 (November 20, 2014), for details of Commerce's electronic filing requirements, effective August 5, 2011. Information on using ACCESS can be found at *https://access.trade.gov/help.aspx* and a handbook can be found at *https://access.trade.gov/help/Handbook_on_Electronic_Filing_Procedures.pdf.*

[14] *See* Commerce's Letters, ''Petition for the Imposition of Countervailing Duties on Imports of Certain Epoxy Resins from China: Invitation for Consultations,'' dated April 15, 2024; ''Countervailing Duty Petition on Certain Epoxy Resins from India: Invitation for Consultations,'' dated April 3, 2024; ''Countervailing Duty Petition on Certain Epoxy Resins from the Republic of Korea,'' dated April 8, 2024; and ''Countervailing Duty Petition on Certain Epoxy Resins from Taiwan: Invitation for Consultations to Discuss Countervailing Duty Petition,'' dated April 4, 2024.

[15] *See* Memorandum, ''Countervailing Duty Petition Regarding Certain Epoxy Resins from the Republic of Korea (Korea): Consultations with Officials from the Government of Korea,'' dated April 19, 2024.

[16] *See* Memorandum, ''Countervailing Duty Petition Regarding Certain Epoxy Resins from Taiwan: Consultations with the Taiwan Authorities,'' dated April 19, 2024.

[17] In lieu of consultations, the GOC submitted comments regarding the initiation. *See* GOC's

Determination of Industry Support for the Petitions

Section 702(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 702(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 702(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, Commerce shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the ''industry.''

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs Commerce to look to producers and workers who produce the domestic like product. The U.S. International Trade Commission (ITC), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both Commerce and the ITC apply the same statutory definition regarding the domestic like product,[18] they do so for different purposes and pursuant to a separate and distinct authority. In addition, Commerce's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.[19]

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the petitioner does not offer a definition of the domestic like product distinct from the scope of the investigations.[20] Based on our analysis of the information submitted on the record, we have determined that epoxy resins, as described in the domestic like product definition set forth in the Petitions, constitute a single domestic like product, and we have analyzed industry support in terms of that domestic like product.[21]

In determining whether the petitioner has standing under section 702(c)(4)(A) of the Act, we considered the industry support data contained in the Petitions with reference to the domestic like product as defined in the ''Scope of the Investigations,'' in the appendix to this notice. To establish industry support, the petitioner provided its own production of the domestic like product in 2023 and compared this to total production for the domestic like product by the U.S. epoxy resins industry.[22] We relied on the data provided by the petitioner for purposes of measuring industry support.[23] Our review of the data provided in the Petitions, the First General Issues Supplement, the Second General Issues Supplement, and other information readily available to Commerce indicates that the petitioner has established industry support for the Petitions.[24] First, the Petitions established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, Commerce is not required to take further action to evaluate industry support (*e.g.,* polling).[25] Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petitions account for at least 25 percent of the total production of the domestic like product.[26] Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petitions account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petitions.[27] Accordingly, Commerce determines that the Petitions were filed on behalf of the domestic industry within the meaning of section 702(b)(1) of the Act.[28]

Injury Test

Because China, India, Korea, and Taiwan are ''Subsidies Agreement Countries'' within the meaning of section 701(b) of the Act, section 701(a)(2) of the Act applies to these investigations. Accordingly, the ITC must determine whether imports of the subject merchandise from China, India, Korea, and Taiwan materially injure, or threaten material injury to, a U.S. industry.

Allegations and Evidence of Material Injury and Causation

The petitioner alleges that imports of the subject merchandise are benefiting from countervailable subsidies and that such imports are causing, or threaten to cause, material injury to the U.S. industry producing the domestic like product. In addition, the petitioner alleges that subject imports from Korea and Taiwan exceed the negligibility threshold provided for under section 771(24)(A) of the Act.[29]

With regard to China, while the allegedly subsidized imports do not

Letter, ''China-USA Consultations with Respect to the Possible Initiation of Countervailing Investigation against Certain Epoxy Resins from China,'' dated April 18, 2024.

[18] *See* section 771(10) of the Act.

[19] *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989)).

[20] *See* Petitions at Volume I (pages 17–21 and Exhibits I–18 through I–23); *see also* First General Issues Supplement at 12–15 and Exhibit I–S6; and Second General Issues Supplement at 8.

[21] For a discussion of the domestic like product analysis as applied to these cases and information regarding industry support, *see* Checklists, ''Countervailing Duty Investigation Initiation Checklists: Certain Epoxy Resins from the People's Republic of China, India, the Republic of Korea, Taiwan, and Thailand,'' dated concurrently with, and hereby adopted by, this notice (Country-Specific CVD Initiation Checklists), at Attachment II, Analysis of Industry Support for the Antidumping and Countervailing Duty Petitions Covering Certain Epoxy Resins from the People's Republic of China, India, the Republic of Korea, Taiwan, and Thailand (Attachment II). These checklists are on file electronically via ACCESS.

[22] *See* Petitions at Volume I (pages 6–7 and Exhibit I–5); *see also* First General Issues Supplement at 10–12 and Exhibits I–S2 and I–S5; and Second General Issues Supplement at 3–8 and Exhibits I–SS2 through I–SS5.

[23] *See* Petitions at Volume I (pages 6–7 and Exhibit I–5); *see also* First General Issues Supplement at 10–12 and Exhibits I–S2 and I–S5; and Second General Issues Supplement at 3–8 and Exhibits I–SS2 through I–SS5. For further discussion, *see* Attachment II of the Country-Specific AD Initiation Checklists.

[24] *See* Attachment II of the Country-Specific CVD Initiation Checklists.

[25] *Id.; see also* section 702(c)(4)(D) of the Act.

[26] *See* Attachment II of the Country-Specific CVD Initiation Checklists.

[27] *Id.*

[28] *Id.*

[29] *See* Petitions at Volume I (page 22 and Exhibit I–7).

exceed the statutory requirements for negligibility,[30] the petitioner alleges and provides supporting evidence that: (1) a significant portion of the imported epoxy resins entering through Canada into the U.S. market are produced in China, and once the transshipment issue is corrected, imports from China are not negligible; [31] and (2) there is the potential that imports from China will imminently exceed the negligibility threshold and, therefore, are not negligible for purposes of a threat determination.[32] With regard to India, while the allegedly subsidized imports do not exceed the statutory requirements for negligibility,[33] the petitioner alleges and provides supporting evidence that there is the potential that imports from India will imminently exceed the negligibility threshold and, therefore, are not negligible for purposes of a threat determination.[34] The petitioner's arguments regarding the potential for imports from India and China to imminently exceed the negligibility threshold are consistent with the statutory criteria for ''negligibility in threat analysis'' under section 771(24)(A)(iv) of the Act, which provides that imports shall not be treated as negligible if there is a potential that subject imports from a country will imminently exceed the statutory requirements for negligibility.

The petitioner contends that the industry's injured condition is illustrated by the significant volume of subject imports; reduced market share; underselling and price depression and/or suppression; lost sales and revenues; and adverse impact on U.S. shipments, production, capacity utilization, and financial performance.[35] We assessed the allegations and supporting evidence regarding material injury, threat of material injury, causation, cumulation, as well as negligibility, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation.[36]

[30] *Id.* at 23–24 and Exhibits I–7, I–14, I–24, and I–25.

[31] *Id.* at 23–25 and Exhibits I–7, I–14, I–24, and I–25.

[32] *Id.* at 23 and Exhibit I–31; *see also* First General Issues Supplement at 15–17 and I–S7.

[33] *See* Petitions at Volume I (page 25–26 and Exhibit I–24).

[34] *Id.* at 25–26.

[35] *Id.* at 22–46 and Exhibits I–4 through I–7, I–14, I–16, I–22, I–24 through I–26, and I–28 through I–31; *see also* First General Issues Supplement at 17 and Exhibit I–S8; and Second General Issues Supplement at 8 and Exhibit I–SS6.

[36] *See* Country-Specific CVD Initiation Checklists at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Antidumping and Countervailing Duty Petitions Covering Certain Epoxy Resins from the People's Republic of China, India, the Republic of Korea, Taiwan, and Thailand.

Initiation of CVD Investigations

Based upon the examination of the Petitions and supplemental responses, we find that they meet the requirements of section 702 of the Act. Therefore, we are initiating CVD investigations to determine whether imports of epoxy resins from China, India, Korea, and Taiwan benefit from countervailable subsidies conferred by the GOC, GOI, GOK, and TA, respectively. In accordance with section 703(b)(1) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will make our preliminary determinations no later than 65 days after the date of these initiations.

China

Based on our review of the Petitions, we find that there is sufficient information to initiate a CVD investigation on 16 of 18 programs alleged by the petitioner. For a full discussion of the basis for our decision to initiate on each program, *see* the China CVD Initiation Checklist.

India

Based on our review of the Petitions, we find that there is sufficient information to initiate a CVD investigation on 15 of 16 of the programs alleged by the petitioner. For a full discussion of the basis for our decision to initiate on each program, *see* the India CVD Initiation Checklist.

Korea

Based on our review of the Petitions, we find that there is sufficient information to initiate a CVD investigation on all 32 programs alleged by the petitioner. For a full discussion of the basis for our decision to initiate on each program, *see* the Korea CVD Initiation Checklist.

Taiwan

Based on our review of the Petitions, we find that there is sufficient information to initiate a CVD investigation on 22 of the 28 programs alleged by the petitioner. For a full discussion of the basis for our decision to initiate on each program, *see* the Taiwan CVD Initiation Checklist.

Respondent Selection

In the Petitions, the petitioner identified 28 companies in China, six companies in India, three companies in Korea, and four companies in Taiwan (as producers and/or exporters of epoxy resins.[37] Commerce intends to follow its standard practice in CVD investigations and calculate company-specific subsidy rates in these investigations. In the event that Commerce determines that the number of companies is large and it cannot individually examine each company based on Commerce's resources, where appropriate, Commerce intends to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports of epoxy resins during the POI under the appropriate Harmonized Tariff Schedule of the United States subheadings listed within the ''Scope of the Investigations'' in the appendix.

On April 18, 2024, Commerce released the CBP data for imports of epoxy resins from China, India, Korea, and Taiwan under administrative protective order (APO) to all parties with access to information protected by APO and indicated that interested parties wishing to comment regarding the CBP data and/or respondent selection must do so within three business days of the publication date of the notice of initiation of these investigations.[38] Comments must be filed electronically using ACCESS. An electronically filed document must be received successfully, in its entirety, by ACCESS no later than 5:00 p.m. ET on the date noted above. Commerce will not accept rebuttal comments regarding the CBP data or respondent selection.

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305(b). Instructions for filing such applications may be found on Commerce's website at *https://www.trade.gov/administrative-protective-orders.*

Distribution of Copies of the Petitions

In accordance with section 702(b)(4)(A) of the Act and 19 CFR 351.202(f), a copy of the public version of the Petitions has been provided to the GOC, GOI, GOK, and TA via ACCESS. To the extent practicable, we will

[37] *See* Petitions at Volume I (page 17 and Exhibit I–17); *see also* First General Issues Supplement at 2–3 and Exhibits I–S1 and I–S3; and Second General Issues Supplement at 1.

[38] *See* Memoranda, ''Countervailing Duty Petition on Certain Epoxy Resins from China: Release of Data from U.S. Customs and Border Protection,'' dated April 18, 2024; ''Countervailing Duty Investigation of Certain Epoxy Resins from India: Release of U.S. Customs and Border Protection Entry Data,'' dated April 18, 2024; ''Countervailing Duty Investigation of Certain Epoxy Resins from the Republic of Korea (Korea): Release of U.S. Customs and Border Protection Entry Data,'' dated April 18, 2024; and ''Petition for the Imposition of Countervailing Duties on Imports of Certain Epoxy Resins from Taiwan: Release of U.S. Customs and Border Protection Entry Data,'' dated April 18, 2024.

attempt to provide a copy of the public version of the Petitions to each exporter named in the Petitions, as provided under 19 CFR 351.203(c)(2).

ITC Notification

Commerce will notify the ITC of its initiation, as required by section 702(d) of the Act.

Preliminary Determination by the ITC

The ITC will preliminarily determine, within 45 days after the date on which the Petitions was filed, whether there is a reasonable indication that imports of epoxy resins from China, India, Korea, and/or Taiwan are materially injuring, or threatening material injury to, a U.S. industry.[39] A negative ITC determination for any country will result in the investigation being terminated with respect to that country.[40] Otherwise, these CVD investigations will proceed according to statutory and regulatory time limits.

Submission of Factual Information

Factual information is defined in 19 CFR 351.102(b)(21) as: (i) evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors of production under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). Section 351.301(b) of Commerce's regulations requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted [41] and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct.[42] Time limits for the submission of factual information are addressed in 19 CFR 351.301, which provides specific time limits based on the type of factual information being submitted. Interested parties should review the regulations prior to submitting factual information in these investigations.

Extensions of Time Limits

Parties may request an extension of time limits before the expiration of a time limit established under 19 CFR 351.301, or as otherwise specified by Commerce. In general, an extension request will be considered untimely if it is filed after the expiration of the time limit established under 19 CFR 351.301, or as otherwise specified by Commerce.[43] For submissions that are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. ET on the due date. Under certain circumstances, Commerce may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, we will inform parties in a letter or memorandum of the deadline (including a specified time) by which extension requests must be filed to be considered timely. An extension request must be made in a separate, standalone submission; under limited circumstances we will grant untimely filed requests for the extension of time limits, where we determine, based on 19 CFR 351.302, that extraordinary circumstances exist. Parties should review Commerce's regulations concerning the extension of time limits and the *Time Limits Final Rule* prior to submitting factual information in these investigations.[44]

Certification Requirements

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information.[45] Parties must use the certification formats provided in 19 CFR 351.303(g).[46] Commerce intends to reject factual submissions if the submitting party does not comply with the applicable certification requirements.

Notification to Interested Parties

Interested parties must submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305. Parties wishing to participate in these investigations should ensure that they meet the requirements of 19 CFR 351.103(d) (*e.g.,* by filing the required letters of appearance). Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[47]

This notice is issued and published pursuant to sections 702 and 777(i) of the Act, and 19 CFR 351.203(c).

Dated: April 23, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and dutiesof the Assistant Secretary for Enforcement and Compliance.

Appendix—Scope of the Investigations

The merchandise subject to these investigations are fully or partially uncured epoxy resins, also known as epoxide resins, polyepoxides, oxirane resins, ethoxyline resins, diglycidyl ether of bisphenol, (chloromethyl)oxirane, or aromatic diglycidyl, which are polymers or prepolymers containing epoxy groups (*i.e.,* three-membered ring structures comprised of two carbon atoms and one oxygen atom). Epoxy resins range in physical form from low viscosity liquids to solids. All epoxy resins are covered by the scope of these investigations irrespective of physical form, viscosity, grade, purity, molecular weight, or molecular structure, and packaging.

Epoxy resins may contain modifiers or additives, such as hardeners, curatives, colorants, pigments, diluents, solvents, thickeners, fillers, plasticizers, softeners, flame retardants, toughening agents, catalysts, Bisphenol F, and ultraviolet light inhibitors, so long as the modifier or additive has not chemically reacted so as to cure the epoxy resin or convert it into a different product no longer containing epoxy groups. Such epoxy resins with modifiers or additives are included in the scope where the epoxy resin component comprises no less than 30 percent of the total weight of the product. The scope also includes blends of epoxy resins with different types of epoxy resins, with or without the inclusion of modifiers and additives, so long as the combined epoxy resin component comprises at least 30 percent of the total weight of the blend.

Epoxy resins that enter as part of a system or kit with separately packaged co-reactants, such as hardeners or curing agents, are within the scope. The scope does not include any separately packaged co-reactants that would not fall within the scope if entered on their own.

The scope includes merchandise matching the above description that has been processed in a third country, including by commingling, diluting, introducing, or removing modifiers or additives, or performing any other processing that would not otherwise remove the merchandise from the scope of the investigations if performed in the subject country.

[39] *See* section 703(a)(1) of the Act.

[40] *Id.*

[41] *See* 19 CFR 351.301(b).

[42] *See* 19 CFR 351.301(b)(2).

[43] *See* 19 CFR 351.302.

[44] *See* 19 CFR 351.301; *see also Extension of Time Limits; Final Rule,* 78 FR 57790 (September 20, 2013) (*Time Limits Final Rule*), available at *https://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm.*

[45] *See* section 782(b) of the Act.

[46] *See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*); *see also* frequently asked questions regarding the *Final Rule,* available at *https://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

[47] *See Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069 (September 29, 2023).

The scope also includes epoxy resin that is commingled or blended with epoxy resin from sources not subject to these investigations. Only the subject component of such commingled products is covered by the scope of these investigations.

Excluded from the scope are phenoxy resins, which are polymers with a weight greater than 11,000 Daltons, a Melt Flow Index (MFI) at 200 °C (392 °F) no less than 4 grams and no greater than 70 grams per 10 min, Glass-Transition Temperatures (Tg) no less than 80°C (176 °F) and no greater than 100°C (212 °F), and which contain no epoxy groups other than at the terminal ends of the molecule.

Excluded from the scope are certain paint and coating products, which are blends, mixtures, or other formulations of epoxy resin, curing agent, and pigment, in any form, packaged in one or more containers, wherein (1) the pigment represents a minimum of 10 percent of the total weight of the product, (2) the epoxy resin represents a maximum of 80 percent of the total weight of the product, and (3) the curing agent represents 5 to 40 percent of the total weight of the product.

Excluded from the scope are preimpregnated fabrics or fibers, often referred to as ''pre-pregs,'' which are composite materials consisting of fabrics or fibers (typically carbon or glass) impregnated with epoxy resin.

This merchandise is currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheading 3907.30.0000. Subject merchandise may also be entered under subheadings 3907.29.0000, 3824.99.9397, 3214.10.0020, 2910.90.9100, 2910.90.9000, 2910.90.2000, and 1518.00.4000. The HTSUS subheadings are provided for convenience and customs purposes only; the written description of the scope is dispositive.

[FR Doc. 2024–09159 Filed 4–26–24; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–166, A–533–926, A–580–919, A–583–876, A–549–850]

Certain Epoxy Resins From the People's Republic of China, India, the Republic of Korea, Taiwan, and Thailand: Initiation of Less-Than-Fair-Value Investigations

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable April 23, 2024.

FOR FURTHER INFORMATION CONTACT: Jacob Waddell or Mark Flessner (the People's Republic of China (China)) at (202) 482–1369 or (202) 482–6312, respectively; Amaris Wade (India) at (202) 482–6334; Laura Delgado (the Republic of Korea (Korea)) at (202) 482–1468; Benito Ballesteros (Taiwan) at (202) 482–7425; and Rachel Jennings (Thailand) at (202) 482–1110, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

The Petitions

On April 3, 2024, the U.S. Department of Commerce (Commerce) received antidumping duty (AD) petitions concerning imports of certain epoxy resins (epoxy resins) from China, India, Korea, Taiwan, and Thailand filed in proper form on behalf of the U.S. Epoxy Resin Producers *Ad Hoc* Coalition (the petitioner).[1] These AD Petitions were accompanied by countervailing duty (CVD) petitions concerning imports of epoxy resins from China, India, Korea, and Taiwan.[2]

Between April 8 and 16, 2024, Commerce requested supplemental information pertaining to certain aspects of the Petitions in supplemental questionnaires.[3] The petitioner responded to Commerce's supplemental questionnaires between April 10 and 18, 2024.[4]

In accordance with section 732(b) of the Tariff Act of 1930, as amended (the Act), the petitioner alleges that imports of epoxy resins from China, India, Korea, Taiwan, and Thailand are being, or are likely to be, sold in the United States at less than fair value (LTFV) within the meaning of section 731 of the Act, and that imports of such products are materially injuring, or threatening material injury to, the epoxy resins industry in the United States. Consistent with section 732(b)(1) of the Act, the Petitions were accompanied by information reasonably available to the petitioner supporting its allegations.

Commerce finds that the petitioner filed the Petitions on behalf of the domestic industry, because the petitioner is an interested party, as defined in section 771(9)(F) of the Act.[5] Commerce also finds that the petitioner demonstrated sufficient industry support for the initiation of the requested LTFV investigations.[6]

Periods of Investigation

Because the Petitions were filed on April 3, 2024, pursuant to 19 CFR 351.204(b)(1), the period of investigation (POI) for the India, Korea, Taiwan, and Thailand LTFV investigations is April 1, 2023, through March 31, 2024. Because China is a non-market economy (NME) country, pursuant to 19 CFR 351.204(b)(1), the POI for the China LTFV investigation is October 1, 2023, through March 31, 2024.

Scope of the Investigations

The products covered by these investigations are epoxy resins from China, India, Korea, Taiwan, and Thailand. For a full description of the scope of these investigations, *see* the appendix to this notice.

Comments on the Scope of the Investigations

On April 8 and 16, 2024, Commerce requested information and clarification from the petitioner regarding the proposed scope to ensure that the scope language in the Petitions is an accurate reflection of the products for which the domestic industry is seeking relief.[7] On April 12 and 18, 2024, the petitioner provided clarifications and revised the scope.[8] The description of merchandise covered by these investigations, as described in the appendix to this notice, reflects these clarifications.

As discussed in the *Preamble* to Commerce's regulations, we are setting aside a period for interested parties to raise issues regarding product coverage

[1] *See* Petitioner's Letter, ''Petitions for the Imposition of Antidumping and Countervailing Duties,'' dated April 3, 2024 (the Petitions). The members of the U.S. Epoxy Resin Producers *Ad Hoc* Coalition are Olin Corporation and Westlake Corporation.

[2] *Id.*

[3] *See* Commerce's Letters, ''Supplemental Questions,'' dated April 8, 2024 (General Issues Questionnaire), and ''Supplemental Questions,'' dated April 8, 2024 (China Supplemental); *see also* Country-Specific Supplemental Questionnaires: India Supplemental, Korea Supplemental, Taiwan Supplemental, and Thailand Supplemental, dated April 9, 2024; and Memorandum, ''Phone Call with Counsel to Petitioner,'' dated April 16, 2024 (April 16 Memorandum).

[4] *See* Petitioner's Letters, ''Petitioner's Response to Volume II Supplemental Questionnaire (China Antidumping),'' dated April 10, 2024, and ''Petitioner's Response to Volume I Supplemental Questionnaire,'' dated April 12, 2024 (First General Issues Supplement); *see also* Country-Specific AD Supplemental Responses: India AD Supplement, Korea AD Supplement, Taiwan AD Supplement, and Thailand AD Supplement, dated April 15, 2024; Petitioner's Letter, ''Petitioner's Response to Second General Issues Supplemental Questionnaire,'' dated April 18, 2024 (Second General Issues Supplement); and Country-Specific AD Supplemental Responses: Second China AD Supplement, Second India AD Supplement, Second Korea AD Supplement, Second Taiwan AD Supplement, and Second Thailand AD Supplement, dated April 18, 2024.

[5] The members of the petitioning coalition are interested parties under section 771(9)(C) of the Act.

[6] *See* section on ''Determination of Industry Support for the Petitions,'' *infra.*

[7] *See* General Issues Questionnaire; *see also* April 16 Memorandum.

[8] *See* First General Issues Supplement at 3–10 and Exhibit I–S4; *see also* Second General Issues Supplement at 2–3 and Exhibit I–SS1.

(*i.e.,* scope).[9] Commerce will consider all scope comments received from interested parties and, if necessary, will consult with interested parties prior to the issuance of the preliminary determinations. If scope comments include factual information,[10] all such factual information should be limited to public information. To facilitate preparation of its questionnaires, Commerce requests that scope comments be submitted by 5:00 p.m. Eastern Time (ET) on May 13, 2024, which is 20 calendar days from the signature date of this notice.[11] Any rebuttal comments, which may include factual information, and should also be limited to public information, must be filed by 5:00 p.m. ET on May 23, 2024, which is 10 calendar days from the initial comment deadline.

Commerce requests that any factual information that parties consider relevant to the scope of these investigations be submitted during that period. However, if a party subsequently finds that additional factual information pertaining to the scope of the investigations may be relevant, the party must contact Commerce and request permission to submit the additional information. All scope comments must be filed simultaneously on the records of the concurrent LTFV and CVD investigations.

Filing Requirements

All submissions to Commerce must be filed electronically via Enforcement and Compliance's Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS), unless an exception applies.[12] An electronically filed document must be received successfully in its entirety by the time and date it is due.

Comments on Product Characteristics

Commerce is providing interested parties an opportunity to comment on the appropriate physical characteristics of epoxy resins to be reported in response to Commerce's AD questionnaires. This information will be used to identify the key physical characteristics of the subject merchandise in order to report the relevant factors of production (FOP) or cost of production (COP) accurately, as well as to develop appropriate product comparison criteria.

Interested parties may provide any information or comments that they feel are relevant to the development of an accurate list of physical characteristics. Specifically, they may provide comments as to which characteristics are appropriate to use as: (1) general product characteristics; and (2) product comparison criteria. We note that it is not always appropriate to use all product characteristics as product comparison criteria. We base product comparison criteria on meaningful commercial differences among products. In other words, although there may be some physical product characteristics utilized by manufacturers to describe epoxy resins, it may be that only a select few product characteristics take into account commercially meaningful physical characteristics. In addition, interested parties may comment on the order in which the physical characteristics should be used in matching products. Generally, Commerce attempts to list the most important physical characteristics first and the least important characteristics last.

In order to consider the suggestions of interested parties in developing and issuing the AD questionnaires, all product characteristics comments must be filed by 5:00 p.m. ET on May 13, 2024, which is 20 calendar days from the signature date of this notice.[13] Any rebuttal comments must be filed by 5:00 p.m. ET on May 23, 2024, which is 10 calendar days from the initial comment deadline. All comments and submissions to Commerce must be filed electronically using ACCESS, as explained above, on the record of each of the LTFV investigations.

Determination of Industry Support for the Petitions

Section 732(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, Commerce shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the ''industry.''

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs Commerce to look to producers and workers who produce the domestic like product. The U.S. International Trade Commission (ITC), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both Commerce and the ITC apply the same statutory definition regarding the domestic like product,[14] they do so for different purposes and pursuant to a separate and distinct authority. In addition, Commerce's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.[15]

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the petitioner does not offer a definition of the domestic like product distinct from the scope of the investigations.[16] Based on our analysis of the information submitted on the record, we have determined that epoxy

[9] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997) (*Preamble*); *see also* 19 CFR 351.312.

[10] *See* 19 CFR 351.102(b)(21) (defining ''factual information'').

[11] *See* 19 CFR 351.303(b)(1).

[12] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011); *see also Enforcement and Compliance: Change of Electronic Filing System Name,* 79 FR 69046 (November 20, 2014) for details of Commerce's electronic filing requirements, effective August 5, 2011. Information on using ACCESS can be found at *https://access.trade.gov/help.aspx* and a handbook can be found at *https://access.trade.gov/help/Handbook_on_Electronic_Filing_Procedures.pdf.*

[13] *See* 19 CFR 351.303(b)(1).

[14] *See* section 771(10) of the Act.

[15] *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644 (CIT 1988), *aff'd Algoma Steel Corp., Ltd.* v. *United States,* 865 F.2d 240 (Fed. Cir. 1989)).

[16] *See* Petitions at Volume I at 17–21 and Exhibits I–18 through I–23; *see also* First General Issues Supplement at 12–15 and Exhibit I–S6; and Second General Issues Supplement at 8.

resins, as defined in the scope, constitute a single domestic like product, and we have analyzed industry support in terms of that domestic like product.[17]

In determining whether the petitioner has standing under section 732(c)(4)(A) of the Act, we considered the industry support data contained in the Petitions with reference to the domestic like product as defined in the ''Scope of the Investigations,'' in the appendix to this notice. To establish industry support, the petitioner provided its members' production data of the domestic like product in 2023 and compared this to total production of the domestic like product by the U.S. epoxy resins industry.[18] We have relied on the data provided by the petitioner for purposes of measuring industry support.[19]

Our review of the data provided in the Petitions, the First General Issues Supplement, the Second General Issues Supplement, and other information readily available to Commerce indicates that the petitioner has established industry support for the Petitions.[20] First, the Petitions established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, Commerce is not required to take further action in order to evaluate industry support (*e.g.,* polling).[21] Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petitions account for at least 25 percent of the total production of the domestic like product.[22] Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petitions account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petitions.[23] Accordingly, Commerce determines that the Petitions were filed on behalf of the domestic industry within the meaning of section 732(b)(1) of the Act.[24]

Allegations and Evidence of Material Injury and Causation

The petitioner alleges that the U.S. industry producing the domestic like product is being materially injured, or is threatened with material injury, by reason of the imports of the subject merchandise sold at LTFV. In addition, the petitioner argues that subject imports from Korea, Taiwan, and Thailand exceed the negligibility threshold provided for under section 771(24)(A) of the Act.[25]

With regard to China, while the allegedly dumped imports do not exceed the statutory requirements for negligibility,[26] the petitioner alleges and provides supporting evidence that: (1) a significant portion of the imported epoxy resins entering from Canada into the U.S. market are produced in China, and once the transshipment issue is corrected, imports from China are not negligible; [27] and (2) there is the potential that imports from China will imminently exceed the negligibility threshold and, therefore, are not negligible for purposes of a threat determination.[28] With regard to India, while the allegedly dumped imports do not exceed the statutory requirements for negligibility,[29] the petitioner alleges and provides supporting evidence that there is the potential that imports from India will imminently exceed the negligibility threshold and, therefore, are not negligible for purposes of a threat determination.[30] The petitioner's arguments regarding the potential for imports from India and China to imminently exceed the negligibility threshold are consistent with the statutory criteria for ''negligibility in threat analysis'' under section 771(24)(A)(iv) of the Act, which provides that imports shall not be treated as negligible if there is a potential that subject imports from a country will imminently exceed the statutory requirements for negligibility.

The petitioner contends that the industry's injured condition is illustrated by the significant volume of subject imports; reduced market share; underselling and price depression and/or suppression; lost sales and revenues; and adverse impact on U.S. shipments, production, capacity utilization, and financial performance.[31] We assessed the allegations and supporting evidence regarding material injury, threat of material injury, causation, as well as negligibility, and we have determined that these allegations are properly supported by adequate evidence, and meet the statutory requirements for initiation.[32]

Allegations of Sales at LTFV

The following is a description of the allegations of sales at LTFV upon which Commerce based its decision to initiate LTFV investigations of imports of epoxy resins from China, India, Korea, Taiwan, and Thailand. The sources of data for the deductions and adjustments relating to U.S. price and normal value (NV) are discussed in greater detail in the Country-Specific AD Initiation Checklists.

U.S. Price

For China, Korea, Taiwan, and Thailand, the petitioner based export price (EP) on pricing information for sales, or offers for sale, of epoxy resins produced in and exported from each country.[33] For Thailand, the petitioner also based EP on transaction-specific average unit values (AUVs) (*i.e.,* month- and port-specific AUVs) derived from official import statistics and tied to ship manifest data.[34] For India, the petitioner based EP on transaction-specific AUVs (*i.e.,* month- and port-specific AUVs)

[17] For a discussion of the domestic like product analysis as applied to these cases and information regarding industry support, *see* Checklists, ''Antidumping Duty Investigation Initiation Checklists: Certain Epoxy Resins from the People's Republic of China, India, the Republic of Korea, Taiwan, and Thailand,'' dated concurrently with, and hereby adopted by, this notice (Country-Specific AD Initiation Checklists), at Attachment II, Analysis of Industry Support for the Antidumping and Countervailing Duty Petitions Covering Certain Epoxy Resins from the People's Republic of China, India, the Republic of Korea, Taiwan, and Thailand (Attachment II). These checklists are on file electronically via ACCESS.

[18] *See* Petitions at Volume I (pages 6–7 and Exhibit I–5; *see also* First General Issues Supplement at 10–12 and Exhibits I–S2 and I–S5; and Second General Issues Supplement at 3–8 and Exhibits I–SS2—I–SS5.

[19] *See* Petitions at Volume I (pages 6–7 and Exhibit I–5); *see also* First General Issues Supplement at 10–12 and Exhibits I–S2 and I–S5; and Second General Issues Supplement at 3–8 and Exhibits I–SS2 through I–SS5. For further discussion, *see* Attachment II of the Country-Specific AD Initiation Checklists.

[20] *See* Attachment II of the Country-Specific AD Initiation Checklists.

[21] *Id.; see also* section 732(c)(4)(D) of the Act.

[22] *See* Attachment II of the Country-Specific AD Initiation Checklists.

[23] *Id.*

[24] *Id.*

[25] *See* Petitions at Volume I (page 22 and Exhibit I–7).

[26] *Id.* at 23–24 and Exhibits I–7, I–14, I–24, and I–25.

[27] *Id.* at 23–25 and Exhibits I–7, I–14, I–24, and I–25.

[28] *Id.* at 23 and Exhibit I–31; *see also* First General Issues Supplement at 15–17 and I–S7.

[29] *See* Petitions at Volume I (page 25–26 and Exhibit I–24).

[30] *Id.* at 25–26.

[31] *Id.* at 22–46 and Exhibits I–4 through I–7, I–14, I–16, I–22, I–24 through I–26, and I–28 through I–31; *see also* First General Issues Supplement at 17 and Exhibit I–S8; and Second General Issues Supplement at 8 and Exhibit I–SS6.

[32] *See* Country-Specific AD Initiation Checklists at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Antidumping and Countervailing Duty Petitions Covering Certain Epoxy Resins from the People's Republic of China, India, the Republic of Korea, Taiwan, and Thailand.

[33] *See* Country-Specific AD Initiation Checklists.

[34] *See* Thailand AD Initiation Checklist.

derived from official import statistics and tied to ship manifest data.[35] For each country, the petitioner made certain adjustments to U.S. price to calculate a net ex-factory U.S. price, where applicable.[36]

Normal Value [37]

For Thailand, the petitioner based NV on home market pricing information it obtained for epoxy resins produced in and sold, or offered for sale, in Thailand during the applicable time period.[38] The petitioner provided information indicating that the prices for epoxy resins sold or offered for sale in Thailand were below the COP. Therefore, for Thailand, the petitioner based NV on constructed value.[39] For India, Korea, and Taiwan, the petitioner stated that it was unable to obtain home market or third country pricing information for epoxy resins to use as a basis for NV.[40] Therefore, for India, Korea, and Taiwan, the petitioner calculated NV based on CV.[41] For further discussion of CV for India, Korea, Taiwan, and Thailand, *see* the section ''Normal Value Based on Constructed Value,'' below.

Commerce considers China to be an NME country.[42] In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by Commerce. Therefore, we continue to treat China as an NME country for purposes of the initiation of the China LTFV investigation. Accordingly, we base NV on FOPs valued in a surrogate market economy country in accordance with section 773(c) of the Act.

The petitioner claims that Malaysia is an appropriate surrogate country for China because it is a market economy that is at a level of economic development comparable to that of China and is a significant producer of comparable merchandise.[43] The petitioner provided publicly available information from Malaysia to value all FOPs except labor.[44] Consistent with Commerce's recent practice in cases involving Malaysia as a surrogate country,[45] to value labor, the petitioner provided labor statistics from another surrogate country, Romania.[46] Based on the information provided by the petitioner, we believe it is appropriate to use Malaysia as a surrogate country for China to value all FOPs except labor and to value labor using labor statistics from Romania for initiation purposes.

Interested parties will have the opportunity to submit comments regarding surrogate country selection and, pursuant to 19 CFR 351.301(c)(3)(i), will be provided an opportunity to submit publicly available information to value FOPs within 30 days before the scheduled date of the preliminary determination.

Factors of Production

Because information regarding the volume of inputs consumed by Chinese producers/exporters was not reasonably available, the petitioner used product-specific consumption rates from a U.S. producer of epoxy resins as a surrogate to value Chinese manufacturers' FOPs (except labor).[47] Additionally, the petitioner calculated factory overhead, selling, general, and administrative (SG&A) expenses, and profit based on the experience of a Malaysian producer of identical merchandise.[48]

Normal Value Based on Constructed Value

As noted above for Thailand, the petitioner provided information indicating that the prices for epoxy resins sold or offered for sale in Thailand were below the COP. Also as noted above, for India, Korea, and Taiwan, the petitioner stated that it was unable to obtain home market or third-country prices for epoxy resins to use as a basis for NV. Therefore, for India, Korea, Taiwan, and Thailand, the petitioner calculated NV based on CV.[49]

Pursuant to section 773(e) of the Act, the petitioner calculated CV as the sum of the cost of manufacturing, SG&A expenses, financial expenses, and profit.[50] For India, Korea, Taiwan, and Thailand, in calculating the cost of manufacturing, the petitioner relied on the production experience and input consumption rates of a U.S. producer of epoxy resins, valued using publicly available information applicable to the respective countries, where applicable.[51] In calculating SG&A expenses, financial expenses, and profit ratios, the petitioner relied on the fiscal year 2022–2023 financial statements of producers of identical merchandise domiciled in India, Korea, Taiwan, and Thailand, respectively.[52]

Fair Value Comparisons

Based on the data provided by the petitioner, there is reason to believe that imports of epoxy resins from China, India, Korea, Taiwan, and Thailand are being, or are likely to be, sold in the United States at LTFV. Based on comparisons of EP to NV in accordance with sections 772 and 773 of the Act, the estimated dumping margins for epoxy resins for each of the countries covered by this initiation are as follows: (1) China—266.37 to 354.99 percent; (2) India—9.92 to 15.68 percent; (3) Korea—35.29 to 57.38 percent; (4) Taiwan—91.15 to 139.29 percent; and (5) Thailand—143.73 to 176.34 percent.[53]

Initiation of LTFV Investigations

Based upon the examination of the Petitions and supplemental responses, we find that they meet the requirements of section 732 of the Act. Therefore, we are initiating LTFV investigations to determine whether imports of epoxy resins from China, India, Korea, Taiwan, and Thailand are being, or are likely to be, sold in the United States at LTFV. In accordance with section 733(b)(1)(A) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will make our preliminary determinations no later than 140 days after the date of these initiations.

[35] *See* India AD Initiation Checklist.

[36] *See* Country-Specific AD Initiation Checklists.

[37] In accordance with section 773(b)(2) of the Act, for the India, Korea, Taiwan, and Thailand investigations, Commerce will request information necessary to calculate the constructed value (CV) and COP to determine whether there are reasonable grounds to believe or suspect that sales of the foreign like product have been made at prices that represent less than the COP of the product.

[38] *See* Thailand AD Initiation Checklist.

[39] Id.

[40] *See* Country-Specific AD Initiation Checklists.

[41] *Id.*

[42] *See, e.g., Certain Freight Rail Couplers and Parts Thereof from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value and Preliminary Affirmative Determination of Critical Circumstances,* 88 FR 15372 (March 13, 2023), and accompanying Preliminary Decision Memorandum at 5, unchanged in *Certain Freight Rail Couplers and Parts Thereof from the People's Republic of China: Final Affirmative Determination of Sales at Less-Than-Fair Value and Final Affirmative Determination of Critical Circumstances,* 88 FR 34485 (May 30, 2023).

[43] *See* China AD Initiation Checklist.

[44] *Id.*

[45] *See, e.g.,* Certain Collated Steel Staples from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; and Final Determination of No Shipments; 2021–2022, 88 FR 85242 (December 7, 2023), and accompanying Issues and Decision Memorandum (IDM) at Comment 2; and *Light-Walled Rectangular Pipe and Tube from the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 88 FR 15671 (March 14, 2023), and accompanying IDM at Comment 2.

[46] *See* China AD Initiation Checklist.

[47] *Id.*

[48] *Id.* As noted above, the petitioner calculated labor using information specific to Romania.

[49] *See* Country-Specific AD Initiation Checklists.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

Respondent Selection

Thailand

In the Petitions, the petitioner identified one company in Thailand (*i.e.,* Aditya Birla Chemicals) as a producer/exporter of epoxy resins and provided independent, third-party information as support.[54] We currently know of no additional producers/exporters of epoxy resins from Thailand.

Accordingly, Commerce intends to individually examine all known producers/exporters in the investigations from Thailand (*i.e.,* the companies cited above). We invite interested parties to comment on this issue. Such comments may include factual information within the meaning of 19 CFR 351.102(b)(21). Parties wishing to comment must do so within three business days of the publication of this notice in the **Federal Register**. Comments must be filed electronically using ACCESS. An electronically filed document must be received successfully in its entirety via ACCESS by 5:00 p.m. ET on the specified deadline. Because we intend to examine all known producers/exporters in Thailand, if no comments are received or if comments received further support the existence of this sole producer/exporter in Thailand, we do not intend to conduct respondent selection and will proceed to issuing the initial AD questionnaires to the companies identified. However, if comments are received which create a need for a respondent selection process, we intend to finalize our decisions regarding respondent selection within 20 days of publication of this notice.

India, Korea, and Taiwan

In the Petitions, the petitioner identified six companies in India, four companies in Korea, and four companies in Taiwan as producers/exporters of epoxy resins.[55] Following standard practice in LTFV investigations involving market economy countries, in the event Commerce determines that the number of companies is large, and it cannot individually examine each company based upon Commerce's resources, where appropriate, Commerce intends to select mandatory respondents based on U.S. Customs and Border Protection (CBP) data for imports under the appropriate Harmonized Tariff Schedule of the United States (HTSUS) subheading(s) listed in the ''Scope of the Investigations,'' in the appendix.

On April 18, 2024, Commerce released CBP data on imports of epoxy resins from India, Korea, and Taiwan under administrative protective order (APO) to all parties with access to information protected by APO and indicated that interested parties wishing to comment on CBP data and/or respondent selection must do so within three business days of the publication date of the notice of initiation of these investigations.[56] Comments must be filed electronically using ACCESS. An electronically filed document must be received successfully in its entirety via ACCESS by 5:00 p.m. ET on the specified deadline. Commerce will not accept rebuttal comments regarding the CBP data or respondent selection.

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305(b). Instructions for filing such applications may be found on Commerce's website at *https://www.trade.gov/administrative-protective-orders.*

China

In the Petitions, the petitioner named 28 companies in China as producers and/or exporters of epoxy resins.[57] Our standard practice for respondent selection in AD investigations involving NME countries is to select respondents based on quantity and value (Q&V) questionnaires in cases where Commerce has determined that the number of companies is large, and it cannot individually examine each company based upon its resources. Therefore, considering the number of producers and/or exporters identified in the Petitions, Commerce will solicit Q&V information that can serve as a basis for selecting exporters for individual examination in the event that Commerce determines that the number is large and decides to limit the number of respondents individually examined pursuant to section 777A(c)(2) of the Act. Because there are 28 Chinese producers and/or exporters identified in the Petitions, Commerce has determined that it will issue Q&V questionnaires to the largest producers and/or exporters that are identified in the CBP data for which there is complete address information on the record.

Commerce will post the Q&V questionnaires along with filing instructions on Commerce's website at *https://www.trade.gov/ec-adcvd-case-announcements.* Producers/exporters of epoxy resins from China that do not receive Q&V questionnaires may still submit a response to the Q&V questionnaire and can obtain a copy of the Q&V questionnaire from Commerce's website. Responses to the Q&V questionnaire must be submitted by the relevant Chinese producers/exporters no later than 5:00 p.m. ET on May 7, 2024, which is two weeks from the signature date of this notice. All Q&V questionnaire responses must be filed electronically via ACCESS. An electronically filed document must be received successfully, in its entirety, by ACCESS no later than 5:00 p.m. ET on the deadline noted above.

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305(b). As stated above, instructions for filing such applications may be found on Commerce's website at *https://www.trade.gov/administrative-protective-orders.*

Separate Rates

In order to obtain separate rate status in an NME investigation, exporters and producers must submit a separate rate application. The specific requirements for submitting a separate rate application in an NME investigation are outlined in detail in the application itself, which is available on Commerce's website at *https://access.trade.gov/Resources/nme/nme-sep-rate.html.* The separate rate application will be due 30 days after publication of this initiation notice. Exporters and producers must file a timely separate rate application if they want to be considered for individual examination. Exporters and producers who submit a separate rate application and have been selected as mandatory respondents will be eligible for consideration for separate rate status only if they respond to all parts of Commerce's AD questionnaire as mandatory respondents. Commerce requires that companies from China submit a response both to the Q&V questionnaire and to the separate rate application by the respective deadlines to receive consideration for separate rate status. Companies not filing a timely Q&V questionnaire response will not receive separate rate consideration.

Use of Combination Rates

Commerce will calculate combination rates for certain respondents that are

[54] *See* Petitions at Volume I (page 17 and Exhibit I–17); *see also* First General Issues Supplement at 2–3 and Exhibits I–S1 and I–S3.

[55] *See* Petitions at Volume I (page 17 and Exhibit I–17); *see also* First General Issues Supplement at 2–3 and Exhibits I–S1 and I–S3; and Second General Issues Supplement at 1.

[56] *See* Memoranda, ''Antidumping Duty Petition of Certain Epoxy Resins from India: U.S. Customs and Border Protection Data Release,'' dated April 19, 2024; ''Epoxy Resins from the Republic of Korea: Release of U.S. Customs and Border Protection Entry Data,'' dated April 18, 2024; and ''Certain Epoxy Resins from Taiwan: Release of U.S. Customs and Border Protection Entry Data,'' dated April 18, 2024.

[57] *See* Petitions at Volume I (page 17 and Exhibit I–17); *see also* First General Issues Supplement at 2 and Exhibit I–S1.

eligible for a separate rate in an NME investigation. The Separate Rates and Combination Rates Bulletin states:

{w}hile continuing the practice of assigning separate rates only to exporters, all separate rates that {Commerce} will now assign in its NME investigation will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applies both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non-investigated firms receiving the {weighted average} of the individually calculated rates. This practice is referred to as the application of ''combination rates'' because such rates apply to specific combinations of exporters and one or more producers. The cash-deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question *and* produced by a firm that supplied the exporter during the period of investigation.[58]

Distribution of Copies of the Petitions

In accordance with section 732(b)(3)(A) of the Act and 19 CFR 351.202(f), copies of the public version of the Petitions have been provided to the governments of China, India, Korea, Taiwan, and Thailand via ACCESS. To the extent practicable, we will attempt to provide a copy of the public version of the Petitions to each exporter named in the Petitions, as provided under 19 CFR 351.203(c)(2).

ITC Notification

Commerce will notify the ITC of our initiation, as required by section 732(d) of the Act.

Preliminary Determinations by the ITC

The ITC will preliminarily determine, within 45 days after the date on which the Petitions were filed, whether there is a reasonable indication that imports of epoxy resins from China, India, Korea, Taiwan, and/or Thailand are materially injuring, or threatening material injury to, a U.S. industry.[59] A negative ITC determination for any country will result in the investigation being terminated with respect to that country.[60] Otherwise, these LTFV investigations will proceed according to statutory and regulatory time limits.

Submission of Factual Information

Factual information is defined in 19 CFR 351.102(b)(21) as: (i) evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). Section 351.301(b) of Commerce's regulations requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted[61] and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct.[62] Time limits for the submission of factual information are addressed in 19 CFR 351.301, which provides specific time limits based on the type of factual information being submitted. Interested parties should review the regulations prior to submitting factual information in these investigations.

Particular Market Situation Allegation

Section 773(e) of the Act addresses the concept of particular market situation (PMS) for purposes of CV, stating that ''if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology.'' When an interested party submits a PMS allegation pursuant to section 773(e) of the Act (*i.e.,* a cost-based PMS allegation), Commerce will respond to such a submission consistent with 19 CFR 351.301(c)(2)(v). If Commerce finds that a cost-based PMS exists under section 773(e) of the Act, then it will modify its dumping calculations appropriately.

Neither section 773(e) of the Act, nor 19 CFR 351.301(c)(2)(v), sets a deadline for the submission of cost-based PMS allegations and supporting factual information. However, in order to administer section 773(e) of the Act, Commerce must receive PMS allegations and supporting factual information with enough time to consider the submission. Thus, should an interested party wish to submit a cost-based PMS allegation and supporting new factual information pursuant to section 773(e) of the Act, it must do so no later than 20 days after submission of a respondent's initial section D questionnaire response.

We note that a PMS allegation filed pursuant to sections 773(a)(1)(B)(ii)(III) or 773(a)(1)(C)(iii) of the Act (*i.e.,* a sales-based PMS allegation) must be filed within 10 days of submission of a respondent's initial section B questionnaire response, in accordance with 19 CFR 351.301(c)(2)(i) and 19 CFR 351.404(c)(2).

Extensions of Time Limits

Parties may request an extension of time limits before the expiration of a time limit established under 19 CFR 351.301, or as otherwise specified by Commerce. In general, an extension request will be considered untimely if it is filed after the expiration of the time limit established under 19 CFR 351.301, or as otherwise specified by Commerce.[63] For submissions that are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. ET on the due date. Under certain circumstances, Commerce may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, we will inform parties in a letter or memorandum of the deadline (including a specified time) by which extension requests must be filed to be considered timely. An extension request must be made in a separate, standalone submission; under limited circumstances we will grant untimely filed requests for the extension of time limits, where we determine, based on 19 CFR 351.302, that extraordinary circumstances exist. Parties should review Commerce's regulations concerning the extension of time limits and the *Time Limits Final Rule* prior to submitting factual information in these investigations.[64]

Certification Requirements

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy

[58] *See* Enforcement and Compliance's Policy Bulletin No. 05.1, regarding, ''Separate-Rates Practice and Application of Combination Rates in Antidumping Investigation involving NME Countries,'' (April 5, 2005) at 6 (emphasis added), available on Commerce's website at *https://access.trade.gov/Resources/policy/bull05-1.pdf.*

[59] *See* section 733(a) of the Act.

[60] *Id.*

[61] *See* 19 CFR 351.301(b).

[62] *See* 19 CFR 351.301(b)(2).

[63] *See* 19 CFR 351.301; *see also Extension of Time Limits; Final Rule,* 78 FR 57790 (September 20, 2013) (*Time Limits Final Rule*), available at *https://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm.*

[64] *See* 19 CFR 351.302; *see also, e.g., Time Limits Final Rule.*

and completeness of that information.[65] Parties must use the certification formats provided in 19 CFR 351.303(g).[66] Commerce intends to reject factual submissions if the submitting party does not comply with the applicable certification requirements.

Notification to Interested Parties

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305. Parties wishing to participate in these investigations should ensure that they meet the requirements of 19 CFR 351.103(d) (*e.g.,* by filing the required letter of appearance). Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[67]

This notice is issued and published pursuant to sections 732(c)(2) and 777(i) of the Act, and 19 CFR 351.203(c).

Dated: April 23, 2024.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix—Scope of the Investigations

The merchandise subject to these investigations are fully or partially uncured epoxy resins, also known as epoxide resins, polyepoxides, oxirane resins, ethoxyline resins, diglycidyl ether of bisphenol, (chloromethyl)oxirane, or aromatic diglycidyl, which are polymers or prepolymers containing epoxy groups (*i.e.,* three-membered ring structures comprised of two carbon atoms and one oxygen atom). Epoxy resins range in physical form from low viscosity liquids to solids. All epoxy resins are covered by the scope of these investigations irrespective of physical form, viscosity, grade, purity, molecular weight, or molecular structure, and packaging.

Epoxy resins may contain modifiers or additives, such as hardeners, curatives, colorants, pigments, diluents, solvents, thickeners, fillers, plasticizers, softeners, flame retardants, toughening agents, catalysts, Bisphenol F, and ultraviolet light inhibitors, so long as the modifier or additive has not chemically reacted so as to cure the epoxy resin or convert it into a different product no longer containing epoxy groups. Such epoxy resins with modifiers or additives are included in the scope where the epoxy resin component comprises no less than 30 percent of the total weight of the product. The scope also includes blends of epoxy resins with different types of epoxy resins, with or without the inclusion of modifiers and additives, so long as the combined epoxy resin component comprises at least 30 percent of the total weight of the blend.

Epoxy resins that enter as part of a system or kit with separately packaged co-reactants, such as hardeners or curing agents, are within the scope. The scope does not include any separately packaged co-reactants that would not fall within the scope if entered on their own.

The scope includes merchandise matching the above description that has been processed in a third country, including by commingling, diluting, introducing, or removing modifiers or additives, or performing any other processing that would not otherwise remove the merchandise from the scope of the investigations if performed in the subject country.

The scope also includes epoxy resin that is commingled or blended with epoxy resin from sources not subject to these investigations. Only the subject component of such commingled products is covered by the scope of these investigations.

Excluded from the scope are phenoxy resins, which are polymers with a weight greater than 11,000 Daltons, a Melt Flow Index (MFI) at 200 °C (392 °F) no less than 4 grams and no greater than 70 grams per 10 min, Glass-Transition Temperatures (Tg) no less than 80 °C (176 °F) and no greater than 100 °C (212 °F), and which contain no epoxy groups other than at the terminal ends of the molecule.

Excluded from the scope are certain paint and coating products, which are blends, mixtures, or other formulations of epoxy resin, curing agent, and pigment, in any form, packaged in one or more containers, wherein (1) the pigment represents a minimum of 10 percent of the total weight of the product, (2) the epoxy resin represents a maximum of 80 percent of the total weight of the product, and (3) the curing agent represents 5 to 40 percent of the total weight of the product.

Excluded from the scope are preimpregnated fabrics or fibers, often referred to as ''pre-pregs,'' which are composite materials consisting of fabrics or fibers (typically carbon or glass) impregnated with epoxy resin.

This merchandise is currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheading 3907.30.0000. Subject merchandise may also be entered under subheadings 3907.29.0000, 3824.99.9397, 3214.10.0020, 2910.90.9100, 2910.90.9000, 2910.90.2000, and 1518.00.4000. The HTSUS subheadings are provided for convenience and customs purposes only; the written description of the scope is dispositive.

[FR Doc. 2024–09161 Filed 4–26–24; 8:45 am]

BILLING CODE 3510–DS–P

[65] *See* section 782(b) of the Act.

[66] *See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*). Additional information regarding the *Final Rule* is available at *https://access.trade.gov/Resources/filing/index.html.*

[67] *See Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069 (September 29, 2023).

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; NIST Associates Information System

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 January 8, 2024 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Institute of Standards and Technology (NIST), Commerce.

Title: NIST Associates Information System.

OMB Control Number 0693–0067.

Form Number(s):

Type of Request: Revision of a current information collection.

Number of Respondents: 4,000.

Average Hours per Response: 50 minutes.

Burden Hours: 2,167.

Needs and Uses: NIST Associates (NA) will include guest researchers, research associates, contractors, and other non-NIST employees that require access to the NIST campuses or resources. The NIST Associates Information System (NAIS) information collection instruments(s) are completed by incoming NAs. They are asked to provide personal identifying data including home address, date and place of birth, employer name and address, and basic security information. The data provided by the collection instruments is input into NAIS which automatically populates the appropriate forms, and is routed through the approval process. NIST's Office of Security receives security forms through the NAIS process and is able to allow preliminary access to NIST for NAs. The data collected is the basis for further security investigations as necessary.

Affected Public: Individuals or households.

Frequency: Once.

Respondent's Obligation: Required to obtain or retain benefits.

This information collection request may be viewed at *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*. 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 0693–0067.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–09167 Filed 4–26–24; 8:45 am]

BILLING CODE 3510–13–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 Fisheries Greater Atlantic Region Vessel Identification Requirements

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 February 14, 2024, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic and Atmospheric Administration, Commerce.

Title: NOAA Fisheries Greater Atlantic Region Vessel Identification Requirements.

OMB Control Number: 0648–0350.

Form Number(s): None.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: 3,935.

Average Hours per Response: 45 minutes (0.75 hours) to affix vessel information to the required locations.

Total Annual Burden Hours: 2,952.

Needs and Uses: This request is for extension of a current information collection. Regulations at 50 CFR 648.8 and 697.8 require that owners of vessels over 25 ft (7.6 m) in registered length that have federal permits to fish in the Greater Atlantic Region display the vessel's name and official number. The name and number must be of a specific size at specified locations: the vessel name must be affixed to the port and starboard sides of the bow and, if possible, on its stern. The official number must be displayed on the port and starboard sides of the deckhouse or hull, and on an appropriate weather deck to be clearly visible from enforcement vessels and aircraft. The success of fisheries management programs depends upon regulatory compliance. The vessel identification requirement, which is required of all federally permitted fishing vessels in the Greater Atlantic region, is essential to facilitate enforcement. The ability to link fishing or other activities to a vessel owner or operator are crucial to the enforcement of regulations issued under the authority of the Magnuson-Stevens Fishery Conservation and Management Act. When this information is clearly displayed, it enables enforcement personnel to easily identify Federal permit holders while engaged in fishing.

Affected Public: Individuals or households and business or other for-profit organizations.

Frequency: Once per year.

Respondent's Obligation: Mandatory.

Legal Authority: 50 CFR 648.8 and 697.8.

This information collection request may be viewed at *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.* 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 0648–0350.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–09173 Filed 4–26–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Draft Supplemental Programmatic Environmental Assessment for Fisheries Research Conducted and Funded by the Alaska Fisheries Science Center; Correction

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

ACTION: Notice of availability of a Draft Supplemental Programmatic Environmental Assessment; correction.

SUMMARY: NMFS is correcting the link that was in the **ADDRESSES** of the Notice of Availability to the ''Draft Supplemental Programmatic Environmental Assessment (SPEA) for Fisheries Research Conducted and Funded by the Alaska Fisheries Science Center.'' This notice provides a correction to that website address; all other information is unchanged. The correct weblink is *https://www.fisheries.noaa.gov/action/draft-supplemental-programmatic-environmental-assessment-fisheries-research-conducted-and-0.*

DATES: Comments and information must be received no later than June 18, 2024.

ADDRESSES: Comments on the Draft SPEA should be addressed to Rebecca Reuter, Environmental Compliance Coordinator, NOAA/NMFS/AFSC, 7600 Sand Point Way NE, Seattle, WA 98115

The mailbox address for providing email comments is: *nmfs.afsc.spea@noaa.gov.*

NMFS is not responsible for email comments sent to addresses other than the one provided here. Comments sent via email, including all attachments, must not exceed a 10-megabyte file size.

A copy of the Draft SPEA may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *https://www.fisheries.noaa.gov/action/draft-supplemental-programmatic-environmental-assessment-fisheries-research-conducted-and-0.*

Documents cited in this notice may also be viewed, by appointment, during regular business hours at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Rebecca Reuter, email: *rebecca.reuter@noaa.gov,* phone: (206) 526–4234.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of April 19, 2024, in FR Doc. 2024–07096, on page 28749, correct the link in the **ADDRESSES** to say: *https://www.fisheries.noaa.gov/action/draft-supplemental-programmatic-environmental-assessment-fisheries-research-conducted-and-0.*

Dated: April 19, 2024.

Robert Foy,

Science and Research Director, Alaska Fisheries Science Center, National Marine Fisheries Service.

[FR Doc. 2024–09122 Filed 4–26–24; 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; Fishermen's Contingency Fund

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 January 19, 2024 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic and Atmospheric Administration (NOAA), Commerce.

Title: Fishermen's Contingency Fund.

OMB Control Number: 0648–0042.

Form Number(s): NOAA Forms 88–164, 88–166.

Type of Request: Regular submission [Extension of a current information collection].

Number of Respondents: 20.

Average Hours per Response: 15 minutes for a report, 45 minutes for a claim application.

Total Annual Burden Hours: 160.

Needs and Uses: This request is for extension of a currently approved information collection. United States (U.S.) commercial fishermen may file claims for compensation for losses of, or damage to, fishing gear or vessels, plus 50 percent of resulting economic losses, attributable to oil and gas activities on the U.S. Outer Continental Shelf. To obtain compensation, applicants must comply with requirements set forth in 50 CFR part 296.

The requirements include a ''report'' within 15 days of the date the vessel first returns to port after the casualty incident to gain a presumption of eligible causation, and an ''application'' within 90 days of when the applicant first became aware of the loss and/or damage.

The report is NOAA Form 88–166 and it requests identifying information such as Respondent's name; address; social security number; and casualty location. NOAA usually completes the information in the report during a telephone call with the respondent.

The application is NOAA Form 88–164 and it requires the respondent to provide information on the property and economic losses and/or damages including type of damage; purchase date and price of lost/damaged gear; and income from recent fishing trips. It also includes an affidavit by which the applicant attests to the truthfulness of the claim.

Affected Public: Individuals or households; business or other for-profit organizations.

Frequency: On Occasion.

Respondent's Obligation: Required to Obtain or Retain Benefits.

Legal Authority: Title IV of the Outer Continental Shelf Lands Act Amendments of 1978 (43 U.S.C. 1841) authorizes the Fishermen's Contingency Fund (Fund or FCF) program to compensate U.S. commercial fishermen for losses of, or damages to, fishing gear or vessels, plus 50% of resulting gross economic loss, attributable to oil and gas activities on the OCS. Program requirements are set forth in 50 CFR part 296.

This information collection request may be viewed at *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.* 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 0648–0082.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–09141 Filed 4–26–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Solicitation of Membership Nominations for the Advisory Committee on Excellence in Space (ACES)

AGENCY: Office of Space Commerce, National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Solicitation of membership nominations.

SUMMARY: NOAA is seeking up to 25 individuals to serve on the Advisory Committee on Excellence in Space (ACES), a Federal advisory committee. Members of the committee will evaluate economic, technological, and institutional developments relating to nongovernmental space activities and submit advice and recommendations on promising new ideas and approaches for Federal policies and programs. The ACES membership should consist of a variety of space policy, engineering, technical, science, legal, and finance professionals with significant experience in the commercial space industry.

DATES: Submit nominations no later than May 29, 2024. Applications received after the deadline may be considered for future membership cycles.

ADDRESSES: Submit nominations via email to *space.commerce@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Jason Y. Kim, Chief of Staff, NOAA Office of Space Commerce, 68015 Herbert C. Hoover Bldg., 1401 Constitution Ave. NW, Washington, DC 20230; Email: *space.commerce@noaa.gov;* Telephone: 202–482–5827.

SUPPLEMENTARY INFORMATION: The Department of Commerce chartered ACES on March 4, 2024, to provide advice and recommendations to the

Under Secretary of Commerce for Oceans and Atmosphere (Under Secretary) or the Director of the Office of Space Commerce (OSC) on matters relating to OSC's statutory purview. A list of topics within that purview is provided in the ACES charter at *https://www.space.commerce.gov/aces/.* ACES will assist NOAA to obtain information and advice from a variety of knowledgeable and independent perspectives.

ACES will function solely in an advisory capacity and in accordance with the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. 1001 *et seq.* ACES will not exercise program management or regulatory development responsibilities nor make any decisions directly affecting the programs on which it provides advice.

Committee members will generally serve for a term of two years and may serve additional terms, if reappointed. Nominees for membership must be able to attend committee meetings approximately twice per year; members may not send alternates. Members shall not be compensated for their participation.

ACES will have a fairly balanced membership consisting of no more than 25 members serving in a Representative or Special Government Employee (as defined in 18 U.S.C. 202(a)) capacity. The membership should be a mix of industry leaders at the executive level and non-industry members from academia, not-for-profit organizations (*e.g.,* foundations, think tanks), and other entities (*e.g.,* state governments, tribal nations). Some members may represent entities that are NOAA licensees. OSC seeks geographic diversity to ensure representation of space communities throughout the United States. Where possible, OSC will also consider the ethnic, racial, and gender diversity and various abilities of the United States population.

Nominations are encouraged from all interested U.S. persons and organizations representing interests affected by commercial space policies, regulations, operations, and activities. Nominations should include the individual's name and organizational affiliation, a brief description of the nominee's qualifications and interest in serving on ACES, a resume, and no more than three supporting letters describing the nominee's qualifications and interest in serving. Each submission should also provide the nominee's home address, business address, phone number(s), and email address. Self-nominations are acceptable.

Privacy Act Statement

Authority. The collection of information concerning nominations to ACES is authorized under the FACA, 5 U.S.C. 1001 *et seq.,* and its implementing regulations, 41 CFR part 102–3, and in accordance with the Privacy Act of 1974, as amended, (Privacy Act) 5 U.S.C. 552a.

Purpose. The collection of names, contact information, resumes, professional information, and qualifications is required in order for the Under Secretary or the OSC Director to appoint members to ACES.

Routine Uses. NOAA will use the nomination information for the purpose set forth above. The Privacy Act of 1974 authorizes disclosure of the information collected to NOAA staff for work-related purposes and for other purposes only as set forth in the Privacy Act and for routine uses published in the Privacy Act System of Records Notice COMMERCE/DEPT–11, Candidates for Membership, Members, and Former Members of Department of Commerce Advisory Committees, available at *https://www.commerce.gov/opog/privacy/SORN/SORN-DEPT-11,* and the System of Records Notice COMMERCE/DEPT–18, Employees Personnel Files Not Covered by Notices of Other Agencies, available at *https://www.commerce.gov/opog/privacy/SORN/SORN-DEPT-18.*

Disclosure. Furnishing the nomination information is voluntary; however, if the information is not provided, the individual would not be considered for appointment as a member of ACES.

Richard DalBello,

Director, NOAA Office of Space Commerce.

[FR Doc. 2024–08630 Filed 4–26–24; 8:45 am]

BILLING CODE 3511–43–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD916]

Schedule for Atlantic Highly Migratory Species Outreach Workshops

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

ACTION: Notice of public outreach workshops.

SUMMARY: Five free Atlantic Highly Migratory Species (HMS) Outreach Workshops will be held from April 29, 2024 through May 3, 2024 in locations across Puerto Rico. These workshops are being offered to be responsive to stakeholder requests for additional outreach in Puerto Rico and U.S. Caribbean communities. The objectives of the HMS Outreach Workshops are to educate fishers, dealers, and the general public on HMS regulations, distribute outreach materials, and assist fishers in applying for HMS permits.

DATES: The HMS Outreach Workshops will be held April 29, 2024 through May 3, 2024. See the **SUPPLEMENTARY INFORMATION** section for the specific dates and times.

ADDRESSES: The HMS Outreach Workshops will be held in Aguadilla, Cabo Rojo, Ponce, Arecibo, and Dorado, Puerto Rico. See the **SUPPLEMENTARY INFORMATION** section for the specific locations.

FOR FURTHER INFORMATION CONTACT: Delisse Ortiz by email at *delisse.ortiz@noaa.gov* or by phone at 301–427–8530.

SUPPLEMENTARY INFORMATION: Atlantic HMS fisheries are managed under the 2006 Consolidated HMS Fishery Management Plan and its amendments pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*) and consistent with the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*). HMS implementing regulations are at 50 CFR part 635.

Atlantic Highly Migratory Species Outreach Workshop

In recent years, HMS fisheries stakeholders, including fishers, dealers, and the general public, have requested that NMFS prioritize HMS fisheries management education and outreach in the U.S. Caribbean, specifically in Puerto Rico. To be responsive to stakeholder needs in Puerto Rico, NMFS is carrying out free HMS Outreach Workshops across five locations in Puerto Rico. The workshops are designed to educate fishers, dealers, and the general public on HMS regulations, distribute outreach materials, and assist fishers and dealers in applying for HMS permits. The increased engagement, outreach, and education in the U.S. Caribbean as a result of the HMS Outreach Workshops will help meet NMFS's goal of promoting sustainable fisheries and address key shark management outreach requests by our stakeholders in that region. These workshops are also consistent with NMFS's effort to encourage the involvement of disadvantaged or underserved communities consistent with Executive Orders 14008, 12898, and 13895.

Workshop Dates, Times, and Locations

1. April 29, 2024, 4 p.m.–6 p.m. AST, Anfiteatro Municipio de Aguadilla, Calle Ruiz Belvis, Aguadilla, PR, 00603.

2. April 30, 2024, 4:30 p.m.–6:30 p.m. AST, Boquerón Yacht Club/Club Náutico de Boquerón, 2RGF+GQ Cabo Rojo, PR 00623.

3. May 1, 2024, 4 p.m.–6 p.m. AST, Villa Pesquera La Guancha, 80 Avenida Padre Noel, Ponce, PR 00716.

4. May 2, 2024, 4:30 p.m.–6:30 p.m. AST, Villa Pesquera Jarealito, Barrio Jarealito Carretera #681, Arecibo, PR 00612.

5. May 3, 2024, 5:30 p.m.–7:30 p.m. AST, Club Náutico y Villa Pesquera, FPGC+8WJ, Calle Madre Perla, Dorado, PR, 00646.

Additional free HMS Outreach Workshops will be conducted in 2024 and will be announced in a future notice.

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

Dated: April 24, 2024.

Everett Wayne Baxter,

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

[FR Doc. 2024–09138 Filed 4–26–24; 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; Cooperative Game Fish Tagging Report

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 January 16, 2024 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic and Atmospheric Administration, Commerce.

Title: Cooperative Game Fish Tagging Report.

OMB Control Number: 0648–0247.

Form Number(s): 88–162.

Type of Request: Regular submission, extension of a current information collection.

Number of Respondents: 500.

Average Hours per Response: Two minutes to complete the fish tag card.

Total Annual Burden Hours: 167 hours.

Needs and Uses: This request is for extension of a current information collection. The Cooperative Game Fish Tagging Program was initiated in 1971 as part of a comprehensive research program resulting from passage of Public Law 86–359, Study of Migratory Game Fish, and other legislative acts under which the National Marine Fisheries Service (NMFS) operates. The Cooperative Tagging Center attempts to determine the migration patterns of, and other biological information for, billfish, tunas, and swordfish. The Fish Tag Issue Report card is a necessary part of the tagging program. Fishermen volunteer to tag and release their catch. When requested, NMFS provides the volunteers with fish tags for their use when they release their fish. Usually a group of five tags is sent at one time, each attached to a Report card, which is pre-printed with the first and last tag numbers received, and has spaces for the respondent's name, address, date, and club affiliation (if applicable). He/she fills out the card with information when a fish is tagged and mails it to NMFS.

Information on each species is used by NMFS to determine migratory patterns, distance traveled, stock boundaries, age, and growth. These data are necessary input for developing management criteria by regional fishery management councils, states, and NMFS. The tag report cards are necessary to provide tags to the volunteer angler, record when and where the fish was tagged, the species, its estimated length and weight, tag number, and information on the tagger for follow-ups if the tagged fish is recovered. Failure to obtain these data would make management decisions very difficult and would be contrary to the NMFS Marine Recreational Fishing policy objectives. Anglers are made aware of the tagging program through several forms of media: newspaper and magazine articles, through both The Billfish Foundation and the Southeast Fisheries Science Center websites, peer review papers, and by word of mouth.

Affected Public: Individuals or households.

Frequency: Occasionally.

Respondent's Obligation: Voluntary.

Legal Authority: 16 U.S.C. 760e Name of Law: Study of Migratory Game Fish;

This information collection request may be viewed at *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.* 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 0648–0247.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–09168 Filed 4–26–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD914]

Western Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Western Pacific Fishery Management Council (Council) will hold meetings of its Archipelagic Plan Team (APT) and Pelagic Plan Team (PPT) to discuss fishery management issues and develop recommendations for future management of fisheries in the Western Pacific Region.

DATES: The APT will meet on Monday and Tuesday, May 13–14, 2024, between 8:30 a.m. and 4 p.m., Hawaii Standard Time (HST). The APT will meet jointly with the PPT on Wednesday, May 15, 2024, between 8:30 a.m. and 4 p.m., HST. The PPT will meet on Thursday and Friday, May 16–17, 2024, between 8:30 a.m. and 4 p.m., HST. For specific times and agendas, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will be held in a hybrid format with in-person and remote participation (Webex) options available for the members, and public attendance limited to web conference via Webex. In-person attendance for

members will be hosted at the Council office, 1164 Bishop Street, Suite 1400, Honolulu, HI 96813. Specific information on joining the meeting, connecting to the web conference and making oral public comments will be posted on the Council website at *www.wpcouncil.org.* For assistance with the web conference connection, contact the Council office at (808) 522–8220.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director, Western Pacific Fishery Management Council; phone: (808) 522–8220 (voice) or (808) 522–8226 (fax).

SUPPLEMENTARY INFORMATION: The APT meeting will be held Monday and Tuesday, May 13–14, 2024, between 8:30 a.m. and 4 p.m., Hawaii Standard Time (HST) (7:30 a.m. to 3 p.m., Samoa Standard Time (SST); 4:30 a.m. to 12 p.m. on May 14–15, 2023, Chamorro Standard Time (ChST)). The APT will meet jointly with the PPT on Wednesday, May 15, 2024, between 8:30 a.m. and 4 p.m., HST (7:30 a.m. to 3 p.m. Samoa Standard Time (SST); 4:30 a.m. to 12 p.m. on May 16, 2024, Chamorro Standard Time (ChST)). The PPT will meet on Thursday and Friday, May 16–17, 2024, between 8:30 a.m. and 4 p.m., HST (7:30 a.m. to 3 p.m., Samoa Standard Time (SST); 4:30 a.m. to 12 p.m. on May 17–18, 2024, Chamorro Standard Time (ChST)). Opportunities to present oral public comment will be provided on the agenda. The order of the agenda may change, and will be announced in advance at the meeting. The meeting may run past the scheduled times noted above to complete scheduled business.

Agenda for the Archipelagic Plan Team Meeting

Monday, May 13, 2024, 8:30 a.m. to 4 p.m., HST (7:30 a.m. to 3 p.m., Samoa Standard Time (SST); 4:30 a.m. to 12 p.m. on May 14, 2024, Chamorro Standard Time (ChST))

1. Welcome and introductions
2. Approval of Draft APT Agenda
3. Report on Previous APT Recommendations
4. 2023 Annual Stock Assessment and Fishery Evaluation (SAFE) Reports
   - A. Fishery Performance
   - i. Archipelagic Fishery Performance Modules
   - a. American Samoa
   - b. Guam
   - c. Commonwealth of the Northern Mariana Islands (CNMI)
   - d. Hawaii
   - ii. Ecosystem Component Species Discussion
   - a. Adding/Removing ECS from the Fishery Ecosystem Plans (FEPs)
   - b. Triggers for Management Action
   - c. Points of Emphasis for Requested Office of Sustainable Fisheries Presentation
   - B. Ecosystem and Climate Considerations
   - i. Protected Species
   - ii. Life History and Length-Derived variables
   - iii. Biomass Estimates for Coral Reef Ecosystem Components
5. Discussions
6. Public Comment
7. 2023 Archipelagic Annual SAFE Reports (continued)
   - A. Administrative Reports
   - i. Federal Permit and Logbook Data
   - ii. Regulatory Actions
   - iii. Discussions
   - B. Discussion: Archipelagic SAFE Report Matters
   - i. Changing American Samoa BMUS Reporting Scheme
   - ii. Other Items

Tuesday, May 14, 2024, 8:30 a.m. to 4 p.m., HST (7:30 a.m. to 3 p.m., Samoa Standard Time (SST); 4:30 a.m. to 12 p.m. on May 15, 2024, Chamorro Standard Time (ChST))

8. APT Review: Working Group Progress
   - A. Territorial Non-Commercial Modules
   - B. Uku Annual Catch Limit (ACL) Monitoring
   - C. Oceanic Whitetip Shark Interactions in Bottomfish Fisheries
9. Council Actions
   - A. American Samoa Bottomfish Management Unit Species (BMUS) Revision
   - B. Precious Coral Essential Fish Habitat (EFH) Update
   - C. ACL Specifications
   - i. Guam BMUS
   - ii. Hawaii Deep 7 Bottomfish
10. Ongoing and Upcoming Uku Efforts
    - A. Ecosystem-Based Fishery Management (EBFM) Initiative
    - B. Data Survey Project
    - C. Research Stock Assessment
11. Public Comment
12. Discussion and Archipelagic Plan Team Recommendations

Agenda for the Joint Archipelagic and Pelagic Plan Teams Meeting

Wednesday, May 15, 2024, 8:30 a.m. to 4 p.m., HST (7:30 a.m. to 3 p.m., Samoa Standard Time (SST); 4:30 a.m. to 12 p.m. on May 16, 2024, Chamorro Standard Time (ChST))

1. PPT Welcome and introductions
2. Approval of draft PPT agenda
3. 2023 Annual SAFE Reports
   - A. Fisher Observations
   - i. American Samoa
   - ii. CNMI
   - iii. Guam
   - iv. Hawaii
   - B. Ecosystem Component Species Discussion
   - i. Oceanic and Climate Variables
   - a. Dashboard Presentation (and Relation to Council's Online Portals)
   - b. Discussion: Incorporating Fishery-Ecosystem Relationships
   - ii. Socioeconomics
   - a. Equity and Environmental Justice (EEJ) Subsection
   - b. Discussion: Overlap Between Hawaii FEP and Pelagic FEP
   - iii. Essential Fish Habitat
   - iv. Marine Planning
4. Online Portals for SAFE Reports
   - A. Review New Section—Pelagic Socioeconomics
   - B. Next Steps
5. Plan team Review: Working Group and Action Item Progress
   - A. Hawaii Non-Commercial Module
   - B. Automation
   - C. Marine Planning Module Revisions
   - D. Regulatory Timelines
   - E. Plan team Style Guide
6. Discussion: Archipelagic and Pelagic SAFE Report Matters
   - A. Uncertainty Values
   - B. Non-disclosed Data
   - C. Other Items
7. Program Planning
   - A. Council Five-Year Program Plan
   - B. Magnuson-Stevens Reauthorization Act Research Priorities 2025–2029
   - C. Climate Ecosystems and Fisheries Initiative (CEFI)
   - D. Small-Boat Fisheries
   - i. Project Update
   - ii. MUS Discussion
8. Other Issues
9. Public Comment
10. Discussion and Joint Plan Team Recommendations
11. Other Business and APT Closing

Agenda for the Pelagic Plan Team Meeting

Thursday, May 16, 2024, 8:30 a.m. to 4 p.m., HST (7:30 a.m. to 3 p.m., Samoa Standard Time (SST); 4:30 a.m. to 12 p.m. on May 17, 2024, Chamorro Standard Time (ChST))

1. Report on Previous PPT Recommendations
2. 2023 Pelagic Annual SAFE Reports
   - A. Fishery Data Modules
   - i. American Samoa
   - ii. CNMI
   - iii. Guam
   - iv. Hawaii
   - v. International
   - B. Ecosystem Considerations Modules
   - i. Protected Species
3. PPT Review: Working Group and Action Item Progress

A. Shallow-set Longline Turtle Trip Interaction Limit Evaluation Working Group Report

B. Life History Module Development

C. Discussion: Assessment of Creel Survey Design for American Samoa Trolling

D. Incorporating Additional Biological Opinion (BiOp) Monitoring Requirements

4. Public Comment

Friday, May 17, 2024, 8:30 a.m. to 4 p.m., HST (7:30 a.m. to 3 p.m., Samoa Standard Time (SST); 4:30 a.m. to 12 p.m. on May 18, 2024, Chamorro Standard Time (ChST))

5. Discussion: Pelagic SAFE Report Matters

A. Removal of Stacked Bar Charts from Report

B. Other Items

6. BiOp Reasonable and Prudent Measures (RPM) Implementation Working Group Report and Timeline for Council Action

A. Crew Training Program

B. Insular False Killer Whale Overlap Area Observer Coverage

7. Electronic Monitoring Pre-Implementation Program Update from Electronic Technologies Steering Committee

8. Characterizing Cookie Cutter Shark Interactions in the Hawaii Longline Fishery

9. Characterizing Hawaii Shortline Fisheries

10. International Fisheries Updates

11. Discussions

12. Public Comment

13. Pelagic Plan Team Recommendations

14. Other Business and PPT Closing

Special Accommodations

These meetings are accessible to people with disabilities. Please direct requests for sign language interpretation or other auxiliary aids to Kitty M. Simonds (see **FOR FURTHER INFORMATION CONTACT** section above) at least 5 days prior to the meeting date.

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

Dated: April 23, 2024.

Rey Israel Marquez,

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

[FR Doc. 2024–09077 Filed 4–26–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD913]

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a hybrid meeting.

SUMMARY: The North Pacific Fishery Management Council (Council) Fishery Monitoring Advisory Committee (FMAC) will meet May 13, 2024 through May 14, 2024.

DATES: The meetings will be held on Monday, May 13, 2024, from 9 a.m. to 4 p.m. and on Tuesday, May 14, 2024, from 8:30 a.m. to 4 p.m., Alaska time.

ADDRESSES: The meeting will be a hybrid meeting. On Monday, May 13, attend in-person at North Pacific Fishery Management Council office, 1007 W 3rd Ave., Anchorage, Suite 400. On Tuesday, May 14, attend in person at the North Pacific Research Board office, 1007 West Third Ave., Suite 100 Anchorage, AK 99501 or join online through the link *https://meetings.npfmc.org/Meeting/Details/3044.*

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 are given under **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: Sara Cleaver, Council staff; phone: (907) 271–2809; email: *sara.cleaver@noaa.gov.* For technical support, please contact Council administrative staff, email: *npfmc.admin@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Agenda

Monday, May 13, 2024, Through Tuesday, May 14, 2024

The May 2024 FMAC agenda will include: (a) updates since the last FMAC meeting; (b) an abbreviated 2023 Observer Annual report; (c) NMFS updates, including budget, changes to data collections in 2024, supreme court cases, start-up with the Pacific cod trawl cooperative, (d) observer availability issues, and (e) other business.

The agenda is subject to change, and the latest version will be posted at *https://meetings.npfmc.org/Meeting/Details/3044* prior to the meeting, along with meeting materials.

Connection Information

You can attend the meeting online using a computer, tablet, or smartphone; or by phone only. Connection information will be posted online at: *https://meetings.npfmc.org/Meeting/Details/3044.* If you are attending the meeting in-person, please note that all attendees will be required to wear a mask.

Public Comment

Public comment letters will be accepted and should be submitted electronically to *https://meetings.npfmc.org/Meeting/Details/3044.*

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

Dated: April 24, 2024.

Rey Israel Marquez,

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

[FR Doc. 2024–09150 Filed 4–26–24; 8:45 am]

BILLING CODE 3510–22–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Privacy Act of 1974; System of Records

AGENCY: Corporation for National and Community Service.

ACTION: Notice of modified systems of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, the Office of Diversity, Equity, Inclusion, and Accessibility of the Corporation for National and Community Service (operating as AmeriCorps) is issuing a public notice of its intent to modify a system of records, Discrimination Complaint Files–Corporation–10, which will be renamed ''CNCS–10–CEO–CRCM–Civil Rights Case Management System of Records.'' The Office of Diversity, Equity, Inclusion, and Accessibility maintains CNCS–10–CEO–CRCM–Civil Rights Case Management System, which contains program discrimination complaints alleging unlawful discrimination under Title VI of the Civil Rights Act of 1964, as amended, arising within programs or activities conducted or assisted by AmeriCorps. The revisions update the system name, authority of the system, purpose of the system, addresses of the system location, system managers, the categories of records in the system, the categories of individuals in the system, the routine uses of the records, the safeguards, retention and disposal, notification procedures, records access procedures, notification procedures, and contesting record procedures.

DATES: Any comments must be received on or before May 29, 2024. Unless comments are received that would require a revision, this modified system of records will become effective on May 29, 2024.

ADDRESSES: You may submit comments identified by system name and number by any of the following methods:

1. Electronically through *regulations.gov.* Once you access *regulations.gov,* find the web page for this SORN by searching for CNCS–10–CEO–CRCM–Civil Rights Case Management.

2. By email at *privacy@americorps.gov.*

3. By mail: AmeriCorps, Attn: Bilal Razzaq, Chief Privacy Officer, OIT, 250 E Street SW, Washington, DC 20525.

4. By hand delivery or courier to AmeriCorps at the address for mail between 9:00 a.m. and 4:00 p.m. Eastern Standard Time, Monday through Friday, except for federal holidays.

Please note that all submissions received may be posted without change to *regulations.gov,* including any personal information. Commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: If you have general questions about the system of records, please contact ZhuoHong Liu at *zliu@americorps.gov,* by phone at 202–938–7868, or mail them to the address in the **ADDRESSES** section above. Please include the system of records' name and number.

SUPPLEMENTARY INFORMATION: AmeriCorps proposes to amend the existing system of records, Discrimination Complaint Files–Corporation–10, which was last published in the **Federal Register** in 67 FR 4404 (January 30, 2002).

The proposed amendments rename the system of records as ''CNCS–10–CEO–CRCM–Civil Rights Case Management System of Records'' (CRCM). The CRCM holds the agency's records for every part of AmeriCorps' Title VI Civil Rights discrimination complaints from intake to resolution and reporting.

The proposed amendments update the legal authorities of the system to include Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, January 20, 2021; Executive Order 14091, Further Advancing Racial Equity and Support for Underserved Communities Throughout the Federal Government, February 22, 2023; Executive Order 14096, Revitalizing Our Nation's Commitment to Environmental Justice for All, April 21, 2023. The legal authority for maintaining records covered by EEOC/GOVT–1, Equal Employment Opportunity in the Federal Government Complaint and Appeal Records system of records notice is excluded.

The proposed amendments convey that the Equal Employment Opportunity complaint records of federal employees and applicants are covered by the government-wide system of records EEOC/GOVT–1, Equal Employment Opportunity in the Federal Government Complaint and Appeal Records (last published 81 FR 81116, Nov. 17, 2016), and are no longer listed as records in CRCM.

The proposed amendments update the address of the system, purpose of the system, the system manager, the categories of records, the categories of individuals, the system location, storage, safeguards, retention and disposal, notification procedures, records access procedures, and contesting record procedures.

The proposed amendments revise former Routine Uses 6, 7, 8 and 9, and reorganize the Routine Uses. The former Routine Use 7 is replaced by Routine Use B. The former Routine Use 9 is replaced by Routine Use C. The former Routine Use 6 is replaced by Routine Use K. The former Routine Use 8 is replaced by Routine Use N. The former Routine Uses 1, 2, 3, 4, 5, 10, and 11 are reorganized into Routine Uses O, P, Q, R, S, T and U.

The proposed amendments add new Routine Uses A, D, E, F, G, H, I, J, L, and M to meet the current programmatic needs and the requirements of the Office of Management and Budget (OMB) Memorandum M–17–12, Preparing for and Responding to a Breach of Personally Identifiable Information (Jan. 3, 2017).

In accordance with 5 U.S.C. 552a(r), AmeriCorps has provided a report of this system of records to the Office of Management and Budget and to Congress.

SYSTEM NAME AND NUMBER:

CNCS–10–CEO–CRCM–Civil Rights Case Management System of Records

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

This system of records is maintained by the Office of Diversity, Equity, Inclusion, and Accessibility, Office of the Chief Executive Officer, AmeriCorps, 250 E Street SW, Washington, DC 20525.

SYSTEM MANAGER(S):

Director, Office of Diversity, Equity, Inclusion, and Accessibility, Office of the Chief Executive Officer, 250 E Street SW, Washington, DC 20525.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*); Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, January 20, 2021; Executive Order 14091, Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, February 22, 2023; Executive Order 14096, Revitalizing Our Nation's Commitment to Environmental Justice for All, April 21, 2023; the Rehabilitation Act of 1973, as amended; Title IX of the Education Amendments of 1972, as amended; the Age Discrimination Act of 1975, as amended; the Domestic Volunteer Service Act of 1973, as amended; and the National and Community Service Act of 1990, as amended.

PURPOSE(S) OF THE SYSTEM:

CRCM enables AmeriCorps' Office of Diversity, Equity, Inclusion, and Accessibility to modernize the Title VI Civil Rights complaint filing management and conduct streamlined complaint intake, counseling, and investigation under current legal authorities.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The system covers individuals who have filed informal or formal complaints with, or against, AmeriCorps, including any recipient of services, programs, or benefits from AmeriCorps or one of its programs; AmeriCorps members, applicants, or trainees for volunteer or service status, or employees of a grantee or program beneficiary.

CATEGORIES OF RECORDS IN THE SYSTEM:

The identity and contact information of complainants, including first, middle, and last names, email address, phone number, address, city, state, zip code, and any accommodation needed; information of program or person involved; complaint details and complaint processing and status information; other information produced during the course of processing a complaint, such as Reports of Investigation, counseling documents, case decisions, and relevant correspondence, including settlement and mediation agreements.

RECORD SOURCE CATEGORIES:

(1) Complainants, witnesses, etc. in discrimination complaints; (2) Reports of Investigation and Counselors' Reports; (3) copies of documents relevant to investigations; (4) records of hearings on complaints; and (5) correspondence.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b), all or a portion of the records or information contained in this system of records may be disclosed as a routine use pursuant to 5 U.S.C. 552a(b)(3) under the circumstances or for the purposes described below, to the extent such disclosures are compatible with the purposes for which the information was collected:

A. To the U.S. Department of Justice (DOJ), including the U.S. Attorney's Offices, or other federal agencies conducting litigation or proceedings before any court, adjudicative, or administrative body, when it is relevant or necessary to the litigation or proceeding and one of the following is a party to the litigation or has an interest in such litigation:

(1) AmeriCorps;

(2) Any employee or former employee of AmeriCorps in his/her official capacity;

(3) Any employee or former employee of AmeriCorps in his/her individual capacity, but only when DOJ or AmeriCorps has agreed to represent the employee; or

(4) The United States or any agency thereof.

B. To a congressional office in response to an inquiry from that congressional office which is made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration or General Services Administration, pursuant to records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency or organization for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to the audit or oversight function.

E. To the Executive Office of the President in response to an inquiry from that office made at the request of the subject of a record, or a third party on that person's behalf, or for a purpose compatible with the reason for which the records are collected or maintained.

F. To an official of another federal agency to provide information needed in the performance of official duties related to reconciling or reconstructing data files or to enable that agency to respond to an inquiry by the individual to whom the record pertains.

G. To state, territorial, and local governments and tribal organizations to provide information needed in response to a court order and/or for discovery purposes related to litigation, when the disclosure is compatible with the purpose for which the records were compiled.

H. To appropriate agencies, entities, and persons when:

(1) AmeriCorps suspects or has confirmed that there has been a breach of the system of records;

(2) AmeriCorps has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, AmeriCorps (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 AmeriCorps in connection with its efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

I. To another federal agency or federal entity, when AmeriCorps 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.

J. To an appropriate federal, state, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

K. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings, when it is relevant and necessary to the litigation or proceeding.

L. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for AmeriCorps, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same requirements and limitations on disclosure as are applicable to AmeriCorps officers and employees.

M. To appropriate third parties contracted by AmeriCorps to investigate a complaint or appeal filed by an employee or applicant, or to facilitate and conduct mediation or other alternative dispute resolution (ADR) procedures or programs.

N. To any official or designee charged with the responsibility to conduct qualitative assessments at a designated statistical agency and other well established and trusted public or private research organizations, academic institutions, or agencies for an evaluation, study, research, or other analytical or statistical purpose.

O. Disclosure including referral:

(1) To a federal, state, or local agency charged with the responsibility of investigating, enforcing, or implementing the statutes, rules, regulations, or orders that authorize AmeriCorps' maintenance of this system;

(2) to an investigator, counselor, grantee or other recipient of federal financial assistance or hearing officer or arbitrator charged with the above responsibilities;

(3) any and all appropriate and necessary uses of such records in a court of law or before an administrative board or hearing; and

(4) such other referrals as may be necessary to carry out the enforcement and implementation of the statutes, rules, regulations, or orders that authorize AmeriCorps' maintenance of this system.

P. To the Congressional committees having legislative oversight over the program involved, including when actions are proposed to be undertaken by suspending or terminating or refusing to grant or to continue federal financial assistance for violation of the statutes, rules, regulations, or orders that apply to recipients of federal financial assistance from AmeriCorps.

Q. To any source, either private or governmental, to the extent necessary to secure from source information relevant to, and sought in furtherance of, a legitimate investigation or Equal

Employment Opportunity counseling matter.

R. To a contractor, grantee or other recipient of federal financial assistance, when the record to be released reflects serious inadequacies with the recipient's personnel, and disclosure of the record is for the purpose of permitting the recipient to effect corrective action in the Government's best interests.

S. To any party pursuant to the receipt of a valid subpoena.

T. To federal, state, local and professional licensing authorities when the record to be released reflects on the moral, educational, or vocational qualifications of an individual seeking to be licensed.

U. To the Office of Government Ethics (OGE) for any purpose consistent with OGE's mission, including the compilation of statistical data.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

AmeriCorps stores records in this system electronically.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by the complainant's name.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

The applicable records retention and disposition schedules are General Records Schedule (GRS) 2.3, item 110 and GRS 2.3, item 111. The disposition authority for Title VI Civil Rights discrimination informal complaint case file is DAA–GRS–2018–0002–0012. The disposition is temporary, and records will be destroyed 3 years after resolution of a case, but longer retention is authorized if required for business use. The disposition authority for Title VI Civil Rights discrimination formal complaint case files is DAA–GRS–2018–0002–0013. The disposition is temporary, and records will be destroyed 7 years after resolution of a case, but longer retention is authorized if required for business use.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

AmeriCorps safeguards records in this system according to applicable laws, rules, and policies, including all applicable AmeriCorps automated systems security and access policies. AmeriCorps has strict controls in place to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RECORD ACCESS PROCEDURES:

In accordance with 45 CFR part 2508—Implementation of the Privacy Act of 1974, as amended, individuals wishing to access their own records stored within the system of records may contact the FOIA Officer/Privacy Act Officer by sending (1) an email to *FOIA@americorps.gov* or (2) a letter addressed to the System Manager, Attention Privacy Inquiry. Individuals who make a request must include enough identifying information (*i.e.,* full name, current address, date, and signature) to locate their records, indicate that they want to access their records, and be prepared to confirm their identity as required by 45 CFR part 2508.

CONTESTING RECORD PROCEDURES:

All requests to contest or amend information maintained in the system will be directed to the FOIA Officer/ Privacy Act Officer. Individuals who make a request must include enough identifying information to locate their records, in the manner described above in the Record Access Procedures section. Requests should state clearly and concisely what information is being contested, the reasons for contesting it, and the proposed amendment to the information.

NOTIFICATION PROCEDURES:

Any individual desiring to contest or amend information not subject to exemption may contact the FOIA Officer/Privacy Act Officer via the contact information in the Record Access Procedures section. Individuals who make a request must include enough identifying information to locate their records, indicate that they want to be notified whether their records are included in the system, and be prepared to confirm their identity as required by 45 CFR part 2508.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Discrimination Complaint Files–Corporation–10 issued 67 FR 4395–4410 (January 30, 2002).

Prabhjot Bajwa,

Senior Agency Official for Privacy and Chief Information Officer.

[FR Doc. 2024–09147 Filed 4–26–24; 8:45 am]

BILLING CODE 6050–28–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2024–0003; OMB Control Number 0704–0483]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement (DFARS); Independent Research and Development Technical Descriptions

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice.

SUMMARY: The Defense Acquisition Regulations System has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by May 29, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://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.

You may also submit comments, identified by docket number and title, by the following method: Federal eRulemaking Portal: *https://www.regulations.gov.* Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Tucker Lucas, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS), Independent Research and Development Technical Descriptions; OMB Control Number 0704–0483.

Type of Request: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Respondent's Obligation: Required to obtain or retain benefits.

Frequency: On Occasion

Number of Respondents: 79.

Responses per Respondent: Approximately 66.82.

Annual Responses: 5,279.

Average Burden per Response: 0.5 hour.

Annual Burden Hours: 2,640.

Needs and Uses: DFARS 231.205–18 requires contractors to report independent research and development (IR&D) projects to the Defense Technical Information Center (DTIC) using DTIC's online IR&D database. The inputs must be updated at least annually and when the project is completed. The data provide in-process information on IR&D projects for which DoD reimburses the contractor as an allowable indirect expense. In addition to improving DoD's ability to determine whether contractor IR&D costs are allowable, the data provide visibility into the technical content of industry IR&D activities to meet DoD needs.

DoD Clearance Officer: Mr. Tucker Lucas. Requests for copies of the information collection proposal should be sent to Mr. Lucas at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil*.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

[FR Doc. 2024–09117 Filed 4–26–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2024–0004; OMB Control Number 0704–0214]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement Part 217, Special Contracting Methods

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice.

SUMMARY: The Defense Acquisition Regulations System has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by May 29, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://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.

You may also submit comments, identified by docket number and title, by the following method: Federal eRulemaking Portal: *https://www.regulations.gov.* Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Tucker Lucas, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 217, Special Contracting Methods, and related clauses at 252.217; OMB Control Number 0704–0214.

Type of Request: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Respondent's Obligation: Required to obtain or retain benefits.

Frequency: On Occasion

Number of Respondents: 4,815.

Responses per Respondent: Approximately 6.4.

Annual Responses: 30,758.

Average Burden per Response: Approximately 7.5 hours.

Annual Burden Hours: 229,436.

Needs and Uses: DFARS part 217 prescribes policies and procedures for acquiring supplies and services by special contracting methods. Contracting officers use the required information as follows:

DFARS 217.7004(a): When solicitations permit the exchange (or trade-in) of personal property and application of the exchange allowance to the acquisition of similar property, offerors must provide the prices for the new items being acquired both with and without any exchange. Contracting officers use the information to make an informed decision regarding the reasonableness of the prices for both the new and trade-in items.

DFARS 217.7404–3(b): When awarded an undefinitized contract action, contractors are required to submit a qualifying proposal in accordance with the definitization schedule provided in the contract. Contracting officers use this information to complete a meaningful analysis of a contractor's proposal in a timely manner.

DFARS 217.7505(d): When responding to sole-source solicitations that include the acquisition of replenishment parts, offerors submit price and quantity data on any Government orders for the replenishment part(s) issued within the most recent 12 months. Contracting officers use this information to evaluate recent price increases for sole-source replenishment parts.

DFARS clause 252.217–7012: Included in master agreements for repair and alteration of vessels, paragraph (d) of the clause requires contractors to show evidence of insurance under the agreement. Contracting officers use this information to ensure that the contractor is adequately insured when performing work under the agreement. Paragraphs (f) and (g) of the clause require contractors to notify the contracting officer of any property loss or damage for which the Government is liable under the agreement and submit a request, with supporting documentation, for reimbursement of the cost of replacement or repair. Contracting officers use this information to stay informed of lost or damaged property for which the Government is liable, and to determine the appropriate course of action for replacement or repair of the property.

DFARS provision 252.217–7026: Included in certain solicitations for supplies that are being acquired under other than full and open competition, the provision requires the apparently successful offeror to identify their sources of supply so that competition can be enhanced in future acquisitions.

DFARS clause 252.217–7028: When performing under contracts for overhaul, maintenance, and repair, contractors must submit a work request and proposal for ''over and above'' work that is within the scope of the contract, but not covered by the line item(s) under the contract, and necessary in order to satisfactorily complete the contract. This requirement allows the Government to review the need for pending work before the contractor begins performance.

DoD Clearance Officer: Mr. Tucker Lucas. Requests for copies of the information collection proposal should be sent to Mr. Lucas at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

[FR Doc. 2024–09118 Filed 4–26–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2024–0016; OMB Control Number 0704–0255]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement (DFARS); Construction and Architect-Engineer Contracts

AGENCY: Defense Acquisition Regulations System; Department of Defense (DoD).

ACTION: Notice and request for comments regarding a proposed extension of an approved information collection requirement.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, DoD announces the proposed extension of a public information collection requirement and seeks public comment on the provisions thereof. DoD invites comments on: whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; the accuracy of DoD's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. The Office of Management and Budget (OMB) has approved this information collection for use under Control Number 0704–0255 through August 31, 2024. DoD proposes that OMB approve an extension of the information collection requirement, to expire three years after the approval date.

DATES: DoD will consider all comments received by June 28, 2024.

ADDRESSES: You may submit comments, identified by OMB Control Number 0704–0255, using either of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: osd.dfars@mail.mil.* Include OMB Control Number 0704–0255 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.

FOR FURTHER INFORMATION CONTACT: Mr. Jon Snyder, at 703–945–5341.

SUPPLEMENTARY INFORMATION:

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 236, Construction and Architect-Engineer Contracts, and related clauses at 252.236; OMB Control Number 0704–0255.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Respondent's Obligation: Required to obtain or retain benefits.

Frequency: On occasion.

Number of Respondents: 1,477.

Responses per Respondent: Approximately 5.53.

Annual Responses: 8,169.

Average Burden per Response: Approximately 11.157 hours.

Annual Burden Hours: 91,143.

Needs and Uses: DoD contracting officers need this information to evaluate contractor proposals for contract modifications; to determine that a contractor has removed obstructions to navigation; to review contractor requests for payment for mobilization and preparatory work; to determine reasonableness of costs allocated to mobilization and demobilization; and to determine eligibility for the 20 percent evaluation preference for United States firms in the award of some overseas construction contracts.

DFARS 236.570(a) prescribes use of the contract clause at DFARS 252.236–7000, Modification Proposals—Price Breakdown, in all fixed-price construction solicitations and contracts. The clause requires the contractor to submit a price breakdown with any proposal for a contract modification.

DFARS 236.570(b) prescribes use of the following contract clauses in fixed-price construction contracts and solicitations as applicable:

(1) The clause at DFARS 252.236–7002, Obstruction of Navigable Waterways, which requires the contractor to notify the contracting officer of obstructions in navigable waterways.

(2) The clause at DFARS 252.236–7003, Payment for Mobilization and Preparatory Work, which requires the contractor to provide supporting documentation when submitting requests for payment for mobilization and preparatory work.

(3) The clause at DFARS 252.236–7004, Payment for Mobilization and Demobilization, which permits the contracting officer to require the contractor to furnish cost data justifying the percentage of the cost split between mobilization and demobilization, if the contracting officer believes that the proposed percentages do not bear a reasonable relation to the cost of the work.

DFARS 236.570(c) prescribes use of the following solicitation provisions in solicitations for military construction contracts that are funded with military construction appropriations and are estimated to exceed $1,000,000:

(1) The provision at DFARS 252.236–7010, Overseas Military Construction—Preference for United States Firms, which requires an offeror to specify whether or not it is a United States firm when contract performance will be in a United States outlying area in the Pacific or in a country bordering the Arabian Gulf.

(2) The provision at DFARS 252.236–7012, Military Construction on Kwajalein Atoll—Evaluation Preference, requires an offeror to specify whether it is a United States firm, or on Kwajalein Atoll, status as a Marshallese firm, when contract performance is expected to exceed $1 million and will be on Kwajalein Atoll.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

[FR Doc. 2024–09060 Filed 4–26–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2024–0015; OMB Control Number 0704–0479]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement; Earned Value Management System

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice and request for comments regarding a proposed extension of an approved information collection requirement.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, DoD announces the proposed extension of a public information collection requirement and seeks public comment on the provisions thereof. DoD invites comments on: whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; the accuracy of DoD's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the

burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. The Office of Management and Budget (OMB) has approved this information collection requirement for use under Control Number 0704–0479 through August 31, 2024. DoD proposes that OMB approve an extension of the information collection requirement, to expire three years after the approval date.

DATES: DoD will consider all comments received by June 28, 2024.

ADDRESSES: You may submit comments, identified by OMB Control Number 0704–0479, using either of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: osd.dfars@mail.mil.* Include OMB Control Number 0704–0479 in the subject line of the message.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Jon Snyder, at 703–945–5341.

SUPPLEMENTARY INFORMATION:

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Business Systems-Definition and Administration; DFARS 234, Earned Value Management System; OMB Control Number 0704–0479.

Affected Public: Businesses and other for-profit entities.

Respondent's Obligation: Required to obtain or retain benefits.

Frequency: On occasion.

Number of Respondents: 10.

Responses per Respondent: 1.

Annual Responses: 10.

Average Burden per Response: 676 hours.

Annual Burden Hours: 6,760.

Needs and Uses: The contract clause at DFARS 252.242–7005, Contractor Business Systems, requires contractors to respond to written determinations of significant deficiencies in the contractor's business systems as defined in the clause. The information contractors are required to submit in response to findings of significant deficiencies in their accounting system, estimating system, material management and accounting system and purchasing system has previously been approved by the Office of Management and Budget under separate clearance requests. This information collection specifically addresses information required by DFARS clause 252.234–7002, Earned Value Management System, for contractors to respond to determinations of significant deficiencies in a contractor's Earned Value Management System (EVMS). The requirements apply to entities that are contractually required to maintain an EVMS. DoD needs this information to document actions to correct significant deficiencies in a contractor's EVMS. DoD contracting officers use the information to mitigate the risk of unallowable and unreasonable costs being charged on government contracts.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

[FR Doc. 2024–09061 Filed 4–26–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board; Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Research and Engineering (USD(R&E)), Defense Science Board, Department of Defense (DoD).

ACTION: Notice of Federal advisory committee meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the Defense Science Board (DSB) will take place.

DATES: Closed to the public Wednesday, May 1, 2024, from 9:00 a.m. to 4:45 p.m.; closed to the public Thursday, May 2, 2024 from 9:00 a.m. to 3:30 p.m.

ADDRESSES: The address of the closed meeting is the Pentagon, Room 3A912A, Washington, DC 20301.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth J. Kowalski, Designated Federal Officer (DFO): (703) 571–0081 (Voice), (703) 697–1860 (Facsimile), *elizabeth.j.kowalski.civ@mail.mil* (Email). Mailing address is Defense Science Board, 3140 Defense Pentagon, Washington, DC 20301–3140. Website: *http://www.acq.osd.mil/dsb/.* The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the DFO, the DSB was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its May 1–2, 2024 meeting. Accordingly, the Advisory Committee Management Officer for the DoD, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

This meeting is being held under the provisions of chapter 10 of title 5 United States Code (U.S.C.) (commonly known as the ''Federal Advisory Committee Act'' or ''FACA''), 5 U.S.C. 552b(c) (commonly known as the ''Government in the Sunshine Act''), and sections 102–3.140 and 102–3.150 of title 41 Code of Federal Regulations (CFR).

Purpose of the Meeting: The mission of the DSB is to provide independent advice and recommendations on matters relating to the DoD's scientific and technical enterprise. The objective of the meeting is to obtain, review, and evaluate classified information related to the DSB's mission. DSB membership will meet with DoD Leadership to discuss classified current and future national security challenges and priorities within the DoD.

Agenda: The meeting will begin on Wednesday, May 1, 2024 at 9:00 a.m. Ms. Betsy Kowalski, DFO and Dr. Eric Evans, Chair of the DSB, will provide classified opening remarks regarding ongoing studies. Following break, DSB Members will read classified reports/executive summaries in preparation for deliberation and voting. The documents reviewed will include the DSB Task Force on DoD Dependencies on Critical Infrastructure report/executive summary; DSB Task Force on Commercial Space System Access and Integrity report/executive summary; the DSB Task Force on Future Cyber Warfighting Capabilities of the DoD report/executive summary; DSB Task Force to Advise Implementation and Prioritization of National Security Innovation Activities executive summary; the DSB Task Force on Digital Engineering Capability to Automate Testing and Evaluation report/executive summary; and the DSB 2024 Summer Study on Climate Change and Global Security report/executive summary. Following break, the Honorable Michael McCord, Under Secretary of Defense (Comptroller)/Chief Financial Officer, will provide a classified briefing on his views of current DoD strategy, challenges, and priorities. Next, Mr. Doug Beck, Defense Innovation Unit (DIU) Director, will provide a classified briefing on his views of DIU's strategy, challenges, and priorities. Finally, DSB Members will deliberate and vote on the DSB Task Force on DoD Dependencies on Critical Infrastructure report/executive summary; DSB Task Force on Commercial Space System Access and Integrity report/executive summary; and the DSB Task Force on Future Cyber Warfighting Capabilities of the DoD report/executive summary. The meeting will adjourn at 4:45 p.m. On Thursday, May 2, 2024, Dr. Lora Weiss, Senior

Vice President at Pennsylvania State University, will provide a classified briefing on semiconductor manufacturing. Next, DSB Members will deliberate and vote on the DSB Task Force to Advise Implementation and Prioritization of National Security Innovation Activities executive summary; the DSB Task Force on Digital Engineering Capability to Automate Testing and Evaluation report/executive summary; and the DSB 2024 Summer Study on Climate Change and Global Security report/executive summary. Following break, Dr. William LaPlante, Under Secretary for Acquisition and Sustainment (A&S), will provide a classified briefing on his views of current A&S strategy, challenges, and priorities. Finally, DSB members will have a classified plenary discussion regarding briefer remarks and ongoing studies. The meeting will adjourn at 3:30 p.m.

Meeting Accessibility: In accordance with 5 U.S.C. 1009(d) and 41 CFR 102–3.155, the DoD has determined that the DSB meeting will be closed to the public. Specifically, the USD(R&E), in consultation with the DoD Office of the General Counsel, has determined in writing that the meeting will be closed to the public because it will consider matters covered by 5 U.S.C. 552b(c)(1). The determination is based on the consideration that it is expected that discussions throughout will involve classified matters of national security concern. Such classified material is so intertwined with the unclassified material that it cannot reasonably be segregated into separate discussions without defeating the effectiveness and meaning of the overall meetings. To permit the meeting to be open to the public would preclude discussion of such matters and would greatly diminish the ultimate utility of the DSB's findings and recommendations to the Secretary of Defense and to the USD(R&E).

Written Statements: In accordance with 5 U.S.C. 1009(a)(3) and 41 CFR 102–3.105(j) and 102–3.140, interested persons may submit a written statement for consideration by the DSB at any time regarding its mission or in response to the stated agenda of a planned meeting. Individuals submitting a written statement must submit their statement to the DSB DFO at the email address provided in the **FOR FURTHER INFORMATION CONTACT** section at any point; however, if a written statement is not received at least three calendar days prior to the meeting, which is the subject of this notice, then it may not be provided to or considered by the DSB until a later date.

Dated: April 23, 2024.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2024–09088 Filed 4–26–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Uniform Formulary Beneficiary Advisory Panel; Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Personnel and Readiness (USD(P&R)), Department of Defense (DoD).

ACTION: Notice of Federal advisory committee meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the Uniform Formulary Beneficiary Advisory Panel (UFBAP) will take place.

DATES: Open to the public Wednesday, June 26, 2024, from 10:00 a.m. to 1:00 p.m. Eastern Standard Time.

ADDRESSES: The meeting will be held telephonically or via conference call. The phone number for the remote access on June 26, 2024, is: CONUS: 1–888–831–4306; OCONUS: 1–210–234–8694; PARTICIPANT CODE: 9136304.

These numbers and the dial-in instructions will also be posted on the UFBAP website at: *https://www.health.mil/Military-Health-Topics/Access-Cost-Quality-and-Safety/Pharmacy-Operations/BAP.*

FOR FURTHER INFORMATION CONTACT: Designated Federal Official (DFO) Captain Tiffany F. Cline, USN, 703–681–2890 (voice), *dha.ncr.j-6.mbx.baprequests@health.mil* (email). Mailing address is 7700 Arlington Boulevard, Suite 5101, Falls Church, VA 22042–5101. Website: *https://www.health.mil/Military-Health-Topics/Access-Cost-Quality-and-Safety/Pharmacy-Operations/BAP.* The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of chapter 10 of title 5, United States Code (U.S.C.) (commonly known as ''the Federal Advisory Committee Act'' or ''FACA''), 5 U.S.C. 552b (commonly known as the ''Government in the Sunshine Act''), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: The UFBAP will review and comment on recommendations made by the Pharmacy and Therapeutics Committee to the Director, Defense Health Agency regarding the Uniform Formulary.

Agenda:

1. 10:00 a.m.–10:10 a.m. Sign in for UFBAP members
2. 10:10 a.m.–10:40 a.m. Welcome and Opening Remarks
   a. Welcome, Opening Remarks, and Introduction of UFBAP Members by CAPT Tiffany F. Cline, DFO, UFBAP
   b. Public Written Comments by CAPT Tiffany F. Cline, DFO, UFBAP
   c. Opening Remarks by Dr. Pamela Schweitzer, UFBAP Chair
   d. Introductory Remarks by Dr. Edward Vonberg, Chief, Formulary Management Branch
3. 10:40 a.m.–11:45 a.m. Scheduled Therapeutic Class Reviews
4. 11:45 a.m.–12:30 p.m. Newly Approved Drugs Review
5. 12:30 p.m.–12:45 p.m. Pertinent Utilization Management Issues
6. 12:45 p.m.–1:00 p.m. Closing remarks
   a. Closing Remarks by UFBAP Co-Chair
   b. Closing Remarks by DFO, UFBAP

Meeting Accessibility: Pursuant to 5 U.S.C. 1009(a)(1) and 41 CFR 102–3.140 through 102–3.165, and subject to the availability of phone lines, this meeting is open to the public. Telephone lines are limited and available to the first 220 people dialing in. There will be 220 lines total: 200 domestic and 20 international, including leader lines.

Written Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140(c), and 5 U.S.C. 1009(a)(3), interested persons or organizations may submit written statements to the UFBAP about its mission and/or the agenda to be addressed in this public meeting. Written statements should be submitted to the UFBAP's DFO. The DFO's contact information can be found in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Written comments or statements must be received by the UFBAP's DFO at least five (5) calendar days prior to the meeting so they may be made available to the UFBAP for its consideration prior to the meeting. Written comments received are releasable to the public. The DFO will review all submitted written statements and provide copies to UFBAP.

Dated: April 23, 2024.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2024–09080 Filed 4–26–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2024–SCC–0018]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Formula Grant EASIE Annual Performance Report

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before May 29, 2024.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Crystal Moore, (202) 987–0607.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Formula Grant EASIE Annual Performance Report.

OMB Control Number: 1810–0726.

Type of Review: Revision of a currently approved ICR.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 1,300.

Total Estimated Number of Annual Burden Hours: 14,300.

Abstract: The purpose of Indian Education Formula Grant to Local Agencies, as authorized under section 6116 of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA) is to assist grantees to provide Indian students with the opportunity to meet the same challenging state standards as all other students and meet the unique educational and culturally related academic needs of Indian students. The Indian Education Formula Grant (Assistance Listing Number 84.060A), is neither competitive nor discretionary and requires the annual submission of the application from either a local education agency, tribe, Indian organization, or Indian community-based organization. The amount of the award for each applicant is determined by a formula based on the reported number of Indian students identified in the application, the state per pupil expenditure, and the total appropriation available. The Office of Indian Education (OIE) of The Department of Education (ED) collects annual performance data within the same system that collects the annual application. The application and the annual performance report are both housed in the OMB *MAX/Connect.gov* Survey. Clearance was granted for the Electronic Application System for Indian Education (EASIE) Annual Performance Report (EASIE Part III) in a revised information collection by OIE. This is a request for revision of this collection. We have removed the fax number fields from this collection. In addition, we propose revisions that will clarify instructions and improve usability.

Dated: April 23, 2024.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2024–09075 Filed 4–26–24; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2024–0054; FRL–11671–01–OCSPP]

Agency Information Collection Activities; Proposed Renewal of an Existing ICR Collection and Request for Comment; Pesticide Registration Fees Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA), this document announces the availability of and solicits public comment on the following Information Collection Request (ICR) that EPA is planning to submit to the Office of Management and Budget (OMB): ''Pesticide Registration Fees Program,'' identified by EPA ICR No. 2330.05 and OMB Control No. 2070–0179. This ICR represents a renewal of an existing ICR that is currently approved through January 31, 2025. Before submitting the ICR to OMB for review and approval under the PRA, EPA is soliciting comments on specific aspects of the information collection that is summarized in this document. The ICR and accompanying material are available in the docket for public review and comment.

DATES: Comments must be received on or before June 28, 2024.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2024–0054, through *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Carolyn Siu, Mission Support Division (7602M), Office of Program Support, Office of Chemical Safety and Pollution Prevention, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 719–1649; email address: *siu.carolyn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What information is EPA particularly interested in?

Pursuant to PRA section 3506(c)(2)(A) (44 U.S.C. 3506(c)(2)(A)), EPA

specifically solicits comments and information to enable it to:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility.

2. Evaluate the accuracy of the Agency's estimates 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.

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 submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

II. What information collection activity or ICR does this action apply to?

Title: Pesticide Registration Fees Program.

EPA ICR No.: 2330.05.

OMB Control No.: 2070–0179.

ICR status: This ICR is currently approved through January 31, 2025. Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the Code of Federal Regulations (CFR), after appearing in the **Federal Register** when approved, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers for certain EPA regulations is consolidated in 40 CFR 9.

Abstract: This ICR covers the paperwork burden hours and costs associated with the information collection activities under the pesticide registration fee program. Pesticide registrants are required by statute to pay an annual registration maintenance fee for all products registered under sections 3 and 24(c) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). In addition, the Pesticide Registration Improvement Act (PRIA) amended FIFRA in 2004 to create a registration service fee system for applications for specific pesticide registration, amended registration, and associated tolerance actions as per FIFRA section 33. This ICR specifically covers the activities related to the collection of the annual registration maintenance fees, the registration service fees, and the burden associated with the submission of requests for fees to be waived.

Burden statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 1.17 hours per response. Burden is defined in 5 CFR 1320.3(b).

The ICR, which is available in the docket along with other related materials, provides a detailed explanation of the collection activities and the burden estimate that is only briefly summarized here.

Respondents/affected entities: Entities potentially affected are those that are pesticide importers, which include the following North American Industrial Classification System (NAICS) codes ranging from Pesticide and other agricultural chemical manufacturing (NAICS 3250A1); Other Basic Inorganic Chemical Manufacturing (NAICS 32518); Other Basic Organic Chemical Manufacturing (NAICS 32519); and Regulation of Agricultural Marketing and Commodities (NAICS 9641).

Respondent's obligation to respond: Mandatory, per FIFRA sections 4(i)(5) and 33.

Forms: EPA Form 8570–30.

Frequency of response: Annually and on occasion.

Total estimated number of potential respondents: 2,252.

Total estimated average number of responses for each respondent: 1.

Total estimated annual burden hours: 8,732 hours.

Total estimated annual respondent costs: $ 821,741, which includes an estimated cost of $0 for capital investment or maintenance and operational costs.

III. Are there changes in the estimates from the last approval?

There is an increase of 511 hours in the total estimated respondent burden compared with that identified in the ICR currently approved by OMB, which is due to an increase of 369 in the estimated number of respondents. There is an increase of $134,440 in labor costs for the regulated community related to updated wage rates. These are adjustments.

In addition, OMB has asked us to replace the format EPA has historically used for ICR Supporting Statements with the 18-question format that is used by other federal agencies and departments. The 18-question format is based on the submission instructions to agencies that appear on the OMB submission form. Although this supporting statement has been modified to reflect the 18-question format, the change in format has not changed the information collection activities or related estimated burden and costs. EPA welcomes your feedback on whether this improves the presentation of the information collection activities and related burden and costs estimates.

IV. What is the next step in the process for this ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. EPA will issue another **Federal Register** document pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: April 23, 2024.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2024–09095 Filed 4–26–24; 8:45 am]

BILLING CODE 6560–50–P

FARM CREDIT ADMINISTRATION

Sunshine Act Meetings

TIME AND DATE: 10 a.m., Thursday, May 9, 2024.

PLACE: You may observe this meeting in person at 1501 Farm Credit Drive, McLean, Virginia 22102–5090, or virtually. If you would like to observe, at least 24 hours in advance, visit FCA.gov, select ''Newsroom,'' then select ''Events.'' From there, access the linked ''Instructions for board meeting visitors'' and complete the described registration process.

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED: The following matters will be considered:

- Approval of Minutes for April 11, 2024
- Report on 2022 Census of Agriculture

CONTACT PERSON FOR MORE INFORMATION: If you need more information or

assistance for accessibility reasons, or have questions, contact Ashley Waldron, Secretary to the Board. Telephone: 703–883–4009. TTY: 703–883–4056.

Ashley Waldron,

Secretary to the Board.

[FR Doc. 2024–09337 Filed 4–25–24; 4:15 pm]

BILLING CODE 6705–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meetings

TIME AND DATE: 11:05 a.m. on Thursday, April 25, 2024.

PLACE: The meeting was held in the Board Room located on the sixth floor of the FDIC Building located at 550 17th Street NW, Washington, DC.

STATUS: Closed.

MATTERS TO BE CONSIDERED: The Board of Directors of the Federal Deposit Insurance Corporation met to consider matters related to the Corporation's supervision, corporate, and resolution activities. In calling the meeting, the Board determined, on motion of Director Rohit Chopra (Director, Consumer Financial Protection Bureau) seconded by Director Michael J. Hsu (Acting Comptroller of the Currency), and concurred in by Chairman Martin J. Gruenberg, Vice Chairman Travis J. Hill, and Director Jonathan P. McKernan, that Corporation business required its consideration of the matters which were to be the subject of this meeting on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A), and (c)(9)(B) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A), and (c)(9)(B)).

CONTACT PERSON FOR MORE INFORMATION: Requests for further information concerning the meeting may be directed to Debra A. Decker, Executive Secretary of the Corporation, at 202–898–8748.

Dated this the 25th day of April, 2024.

Federal Deposit Insurance Corporation.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2024–09295 Filed 4–25–24; 4:15 pm]

BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies Extension of Comment Period

The company listed in this notice has 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 application listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank indicated below and at the offices of the Board of Governors. The public record of the application, including all comments received, also is available on the Board's public website at: *https://www.federalreserve.gov/foia/capital-one-discover-application-materials.htm*. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)), as well as the standards enumerated in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Comments received are subject to public disclosure. In general, comments received will be made available without change and will not be modified to remove personal or business information including confidential, contact, or other identifying information. Comments should not include any information such as confidential information that would not be appropriate for public disclosure.

The comment period for this application has been extended for good cause in order to provide additional opportunity for interested persons to submit comments. Comments regarding each of these applications must be received at the Reserve Bank indicated or at 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 May 31, 2024.

A. Federal Reserve Bank of Richmond (Brent B. Hassell, Assistant Vice President) P.O. Box 27622, Richmond, Virginia 23261 or electronically to *Comments.applications@rich.frb.org*:

1. *Capital One Financial Corporation, McLean, Virginia;* to acquire Discover Financial Services, Riverwoods, Illinois, and thereby indirectly acquire Discover Bank, Greenwood, Delaware. In connection with this application, Capital One Financial Corporation to acquire DFS Services LLC, Riverwoods, Illinois; Discover Financial Services (Canada), Inc., Vancouver, British Columbia, Canada; PULSE Network LLC, Houston, Texas; and Diners Club International Ltd., Riverwoods, Illinois, and thereby engage in activities closely related to banking including extending credit and servicing loans, activities related to extending credit, and data processing pursuant to section 225.28(b)(1), (b)(2), and (b)(14), respectively, of the Board's Regulation Y.

Board of Governors of the Federal Reserve System.

Ann Misback,

Secretary of the Board.

[FR Doc. 2024–09170 Filed 4–26–24; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm*. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments received are subject to public disclosure. In general, comments received will be made available without change and will not be modified to remove personal or business information including confidential, contact, or other identifying information. Comments should not

include any information such as confidential information that would not be appropriate for public disclosure.

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 May 14, 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:*

1. *The BG 2024 Trust, Milwaukee, Wisconsin, Ben Grimstad, Decorah, Iowa, and Peter J. Wilder, Pewaukee, Wisconsin, as co-trustees, and Padrin Grimstad, Decorah, Iowa, individually, and as Grantor; the JG 2024 Trust, Milwaukee, Wisconsin, Joseph Grimstad, Decorah, Iowa, and Peter J. Wilder, as co-trustees, and Ann Grimstad, Decorah, Iowa, individually, and as Grantor;* to join the Grimstad Family Control Group, a group acting in concert, to acquire voting shares of Security Agency, Incorporated, and thereby indirectly acquire voting shares of Decorah Bank and Trust Company, both of Decorah, Iowa.

B. *Federal Reserve Bank of San Francisco* (Joseph Cuenco, Assistant Vice President, Formations & Transactions) 101 Market Street, San Francisco, California 94105–1579. Comments can also be sent electronically to *sf.fisc.comments.applications@sf.frb.org:*

1. *The Burge Living Trust Dated September 28, 1994, Krystal Burge and Everett Burge, both individually, and as co-trustees, Amber Kay Burge, all of Kingman, Arizona; Chad Everett Burge, Prescott, Arizona; Everett Burge Dynasty Trust, Kingman, Arizona, Krystal Burge and Everett Burge, as co-trustees; Aaron Dean Dynasty, LLC, Kingman, Arizona, Krystal Burge and Everett Burge, Managing Directors; Tiffany Oder (also known as Tiffany Rae Zee Burge), The M & K Peterson Living Trust Dated November 17, 1998 and Any Amendments Thereto, Mark T. Peterson and Kara E. Peterson, both individually, and as co-trustees, and The Kara Peterson Dynasty Trust, Mark T. Peterson and Kara E. Peterson, as co-trustees, all of Paradise Valley, Arizona;* to form the Burge-Peterson Family Control Group, a group acting in concert, to acquire additional voting shares of Community Bancshares, Inc., and thereby indirectly acquire voting shares of Mission Bank, both of Kingman, Arizona.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2024–09140 Filed 4–26–24; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, without revision, the Recordkeeping and Disclosure Requirements and Provisions Associated with Real Estate Appraisal Standards (FR Y–30; OMB No. 7100–0250).

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, *nuha.elmaghrabi@frb.gov,* (202) 452–3884.

Office of Management and Budget (OMB) Desk Officer for the Federal Reserve Board, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. The OMB inventory, as well as copies of the PRA Submission, supporting statements (which contain more detailed information about the information collections and burden estimates than this notice), and approved collection of information instrument(s) are available at *https://www.reginfo.gov/public/do/PRAMain.* These documents are also available on the Federal Reserve Board's public website at *https://www.federalreserve.gov/apps/reportingforms/review* or may be requested from the agency clearance officer, whose name appears above.

Final Approval Under OMB Delegated Authority of the Extension for Three Years, Without Revision, of the Following Information Collection

Collection title: Recordkeeping and Disclosure Requirements and Provisions Associated with Real Estate Appraisal Standards.

Collection identifier: FR Y–30.

OMB control number: 7100–0250.

General description of collection: Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (12 U.S.C. 3331 *et seq.*) requires that, for federally related transactions,[1] regulated institutions obtain real estate appraisals performed by certified or licensed appraisers in conformance with uniform appraisal standards. The Board's regulations implementing title XI of FIRREA, contained in the Board's Regulation Y—Bank Holding Companies and Change in Bank Control (12 CFR part 225), include certain recordkeeping requirements that apply to respondents. The Board and other supervisory agencies also have issued Interagency Appraisal and Evaluation Guidelines (the Guidelines) that convey supervisory expectations relating to real estate appraisals and evaluations used to support real estate-related financial transactions.[2] These Guidelines recommend that institutions adopt certain policies and procedures to ensure compliance with title XI of FIRREA and Regulation Y.

Frequency: Event-generated.

Respondents: State member banks, bank holding companies, and nonbank subsidiaries of bank holding companies.

Total estimated number of respondents: 1,866.

Total estimated annual burden hours: 28,340.[3]

[1] A ''federally related transaction'' means any real estate-related financial transaction which (A) a federal financial institutions regulatory agency or the Resolution Trust Corporation engages in, contracts for, or regulates, and (B) requires the services of an appraiser. 12 U.S.C. 3350(4). The term ''real estate-related financial transaction'' means any transaction involving (A) the sale, lease, purchase, investment in or exchange of real property, including interests in property, or the financing thereof, (B) the refinancing of real property or interests in real property, and (C) the use of real property or interests in property as security for a loan or investment, including mortgage-backed securities. 12 U.S.C. 3350(5).

[2] SR 10–16, available at *https://www.federalreserve.gov/boarddocs/srletters/2010/sr1016.htm.*

[3] More detailed information regarding this collection, including more detailed burden estimates, can be found in the OMB Supporting Statement posted at *https://www.federalreserve.gov/apps/reportingforms/review.* On the page displayed at the link, you can find the OMB Supporting

Continued

Current actions: On December 26, 2023, the Board published a notice in the **Federal Register** (88 FR 88920) requesting public comment for 60 days on the extension, without revision, of the FR Y–30. The comment period for this notice expired on February 26, 2024. The Board did not receive any comments.

Board of Governors of the Federal Reserve System, April 23, 2024.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2024–09116 Filed 4–26–24; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to extend for three years, without revision, the International Applications and Prior Notifications under Subparts A and C of Regulation K (FR K–1; OMB No. 7100–0107).

DATES: Comments must be submitted on or before June 28, 2024.

ADDRESSES: You may submit comments, identified by FR K–1, by any of the following methods:

- Agency Website: *https://www.federalreserve.gov/.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include the OMB number or FR number in the subject line of the message.
- *FAX:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Federal Reserve Board of Governors, Attn: Ann E. Misback, Secretary of the Board, Mailstop M–4775, 2001 C St NW, Washington, DC 20551.

All public comments are available from the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, comments will not be edited to remove any confidential business information, identifying information, or contact information. Public comments may also be viewed electronically or in paper in Room M–4365A, 2001 C St NW, Washington, DC 20551, between 9:00 a.m. and 5:00 p.m. on weekdays, except for Federal holidays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, commenters may send a copy of their comments to the Office of Management and Budget (OMB) Desk Officer for the Federal Reserve Board, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street, NW, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, *nuha.elmaghrabi@frb.gov,* (202) 452–3884.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

During the comment period for this proposal, a copy of the proposed PRA OMB submission, including the draft reporting form and instructions, supporting statement (which contains more detail about the information collection and burden estimates than this notice), and other documentation, will be made available on the Board's public website at *https://www.federalreserve.gov/apps/reportingforms/home/review* or may be requested from the agency clearance officer, whose name appears above. Final versions of these documents will be made available at *https://www.reginfo.gov/public/do/PRAMain,* if approved.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal Under OMB Delegated Authority To Extend for Three Years, Without Revision, the Following Information Collection

Collection title: International Applications and Prior Notifications under Subparts A and C of Regulation K.

Collection identifier: *FR K–1.*

OMB control number: 7100–0107.

General description of collection: Subpart A of Regulation K, International Banking Operations (12 CFR part 211, subpart A), governs the foreign investments and activities of member banks, Edge and agreement corporations, bank holding companies (BHCs), and certain investments by foreign organizations. Subpart C of Regulation K, Export Trading Companies (12 CFR part 211, subpart C), governs investments in export trading companies by eligible investors.[1] The FR K–1 information collection comprises a reporting form, as well as certain reporting and recordkeeping requirements contained in these subparts of Regulation K that are not directly reflected in the FR K–1 form, and a disclosure requirement (via newspaper notice) for certain transactions. The FR K–1 form contains

Statement by referencing the collection identifier, FR Y–30.

[1] Eligible investors are BHCs, banker's banks, foreign banking organizations, and Edge and agreement corporations that are subsidiaries of BHCs but are not subsidiaries of banks. 12 CFR 211.32(d).

eleven attachments associated with the application and notification requirements in Subparts A and C of Regulation K. The Board requires the information collected by the FR K–1 for regulatory and supervisory purposes and to allow the Board to fulfill its statutory obligations under the Federal Reserve Act (FRA) and the Bank Holding Company Act of 1956 (BHC Act).

Frequency: Event-generated.

Respondents: Member banks, Edge and agreement corporations, BHCs, and with regard to certain investments, foreign organizations.

Total estimated number of respondents: 119.

Total estimated annual burden hours: 1,009.[2]

Board of Governors of the Federal Reserve System, April 23, 2024.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2024–09115 Filed 4–26–24; 8:45 am]

BILLING CODE 6210–01–P

GENERAL SERVICES ADMINISTRATION

[Notice–IEB–2024–03; Docket No. 2024–0002; Sequence No. 21]

Privacy Act of 1974; Rescindment of a System of Records Notice

AGENCY: General Services Administration (GSA).

ACTION: Rescindment of a System of Records Notice.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, notice is given that the General Services Administration (GSA) proposes to rescind a System of Records Notice, GSA/GOVT–10, *Login.gov*. This system of records contains information related to the development and operation of a citizen-centric platform for delivering government services through a centralized single sign-on platform.

DATES: This system of records stopped being maintained in 2017.

ADDRESSES: Comments may be submitted to the Federal eRulemaking Portal, *http://www.regulations.gov*. Submit comments by searching for GSA/GOVT–10.

FOR FURTHER INFORMATION CONTACT: Call or email Richard Speidel, Chief Privacy Officer at (202) 969–5830 and *gsa.privacyact@gsa*.gov.

SUPPLEMENTARY INFORMATION: GSA proposes to rescind a System of Records Notification, GSA/GOVT–10, *Login.gov.* This Notice is being rescinded because no records were ever collected under the government-wide SORN GSA/GOVT–10. GSA/GOVT–10 was published in the **Federal Register** in August 2016 and is directed to a version of *Login.gov* that did not enter production. No records were ever collected or used under this proposed system of records.

Agency-specific SORN GSA/TTS–1 was published less than five months later and includes an administratively incorrect attempt to rescind GSA/GOVT–10. The following rescindment attempt appears in the Supplementary Information section of GSA/TTS–1 (January 19, 2017):

''The previously published notice, at 81 FR 57912, on August 24, 2016, is being replaced.''

GSA did not timely file a SORN rescindment notice for GSA/GOVT–10 at the time of publication of GSA/TTS–1. The present notice addresses this issue.

Moreover, this rescindment addresses an instance where the same number was inadvertently used for two separate Notices. GSA published GSA/GOVT–10 (*Login.gov*) in 2016 and inadvertently reused the same SORN number for GSA/GOVT–10 (Federal Acquisition Regulation (FAR) Data Collection System), which was published in 2017. This rescindment action resolves the discrepancy with only the 2017 GSA/GOVT–10 (Federal Acquisition Regulation (FAR) Data Collection System) remaining in effect.

SYSTEM NAME:

Login.gov.

SYSTEM NUMBER:

GSA/GOVT–10.

HISTORY:

This system was previously published in the **Federal Register** at 81 FR 57912, August 24, 2016.

Richard Speidel,

Chief Privacy Officer, Office of Enterprise Data & Privacy Management, General Services Administration.

[FR Doc. 2024–09106 Filed 4–26–24; 8:45 am]

BILLING CODE 6820–AB–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve a revision of the currently approved information collection project: ''The AHRQ Safety Program for Telemedicine: Improving the Diagnostic Process and Improving Antibiotic Use.'' In accordance with the Paperwork Reduction Act of 1995, AHRQ invites the public to comment on this proposed information collection.

DATES: Comments on this notice must be received by June 28, 2024.

ADDRESSES: Written comments should be submitted to: Doris Lefkowitz, Reports Clearance Officer, AHRQ, by email at *REPORTSCLEARANCE OFFICER@ahrq.hhs.gov*.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by email at *REPORTSCLEARANCE OFFICER@ahrq.hhs.gov*.

SUPPLEMENTARY INFORMATION:

Proposed Project

AHRQ Safety Program for Telemedicine: Improving Antibiotic Use

This Information Collection Request (ICR) is for a revision to the AHRQ Safety Program for Telemedicine: Improving the Diagnostic Process and Improving Antibiotic Use. These changes include the removal of the Diagnostic Process Cohort, updates to the Improving Antibiotic Use Data Collection Tools and changing the name of the project to the ''AHRQ Safety Program for Telemedicine: Improving Antibiotic Use.'' The OMB control number for the AHRQ Safety Program for Telemedicine is 0935–0265 and will expire on April 30, 2026. Supporting documents can be downloaded from OMB's website at: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202303-0935-001.* AHRQ is requesting a new expiration date, three years from approval.

Since the project received OMB approval, there have been two developments that require changes to

[2] More detailed information regarding this collection, including more detailed burden estimates, can be found in the OMB Supporting Statement posted at *https://www.federalreserve.gov/apps/reportingforms/home/review*. On the page displayed at the link, you can find the OMB Supporting Statement by referencing the collection identifier, FR K–1.

the project's goals and design. First, the Improving the Diagnostic Process Cohort was canceled because there was insufficient recruitment. Second, the materials approved by OMB for the Improving Antibiotic Use Cohort included a single version of the Structural Assessment and Participant Experience Survey, to be completed by all participants in the improving antibiotic use cohort. However, following pre-recruitment discussions with AHRQ's Technical Expert Panel (TEP) and potential participants, it was learned that the target audience for the improving antibiotic use cohort is comprised of healthcare providers from two distinctly different settings (brick-and-mortar and telemedicine-only) settings. Providers that practice in brick-and-mortar settings provide care both in-person and via telemedicine whereas providers that practice in telemedicine-only settings provide care exclusively using telemedicine. Based on this information AHRQ decided to create separate data collection tools, one for providers in a brick-and-mortar setting, and one for providers in telemedicine only. Practices and providers receive information about the program from newsletters, listservs, and direct outreach through public and private organizations. They attend an information webinar and may join the program if interested and eligible.

As in the currently approved design, the program will incorporate CUSP strategies to improve antibiotic prescribing in telemedicine. The new program goals are to:

- Identify best practices in implementing interventions to improve antibiotic use in telemedicine.
- Determine how best to adapt CUSP to enhance antibiotic use in telemedicine.
- Use a CUSP approach to design and implement the interventions for improving antibiotic use across telemedicine practices.
- Reduce inappropriate antibiotic prescribing among telemedicine practices.

To achieve these goals the following data collections will be implemented:

1. *Structural Assessment Antibiotic Use Cohort*—There will be two versions of the Structural Assessment, one for providers in a brick-and-mortar setting, and one for providers in telemedicine only. Both versions ask the same questions but vary slightly in how they refer to the practice. The assessment asks about the practice's characteristics, experience related to antibiotic stewardship activities, and any existing supports the practice may have in place that are intended to improve antibiotic prescribing. The assessment will be administered to the Safety Program leader/champion at each participating brick-and-mortar practice or telemedicine-only organization at baseline (pre-intervention) and at the end of the intervention. The results will be used to assess changes in the practice's infrastructure and capacity to implement the Safety Program over time. The data will provide information about any existing quality improvement initiatives currently in place, their existing infrastructure and capacity to carry out the program, as well as changes in the infrastructure and quality improvement activities as a result of participation in the Safety Program.

2. *Medical Office Survey on Patient Safety Culture (MOSOPS):* As currently approved, the Safety Program for Telemedicine included completion of the MOSOPS by all participating staff across all participating practices. In this revision, AHRQ will administer the MOSOPS to HCPs practicing in brick-and-mortar settings only. The MOSOPS was designed to assess key characteristics of HCPs working in-person in a single medical office and results are unlikely to be reliable or valid if administered among HCPs practicing in telemedicine-only settings. The MOSOPS will be administered to all participating staff at brick-and-mortar practices at baseline (pre-intervention) and at the end of the intervention. The survey collects information on patient safety issues, patient safety culture, medical errors, and event reporting. The data will be used to assess changes in safety culture following implementation of the Safety Program.

3. *Participant Experience Survey Antibiotic Use Cohort*—Based on feedback from the TEP and conversations with telemedicine-only organizations, this revision includes changes to the Participant Experience Survey as well as unique versions for brick-and-mortar and telemedicine-only participants. The survey will be administered to the clinical leader/champion at each practice at the end of the program (post-intervention). The survey will assess how participants approached implementation of the Safety Program.

4. *Semi-Structured Interviews Antibiotic Use Cohort*—A proportion of practices from both brick-and-mortar practices and telemedicine-only organizations will be selected to participate in telephone/virtual discussions to understand the facilitators and barriers to implementing the Safety Program. This interview guide includes four core domains that are intended to capture characteristics of health care providers (physicians, nurse practitioners, and physician assistants) and their perception of the AHRQ Safety Program for Telemedicine: Improving Antibiotic Use (''the Safety Program'') on pre- and post-implementation changes. All interviews will occur at the end of the intervention period

5. *Antibiotic Prescription Data Template Antibiotic Use Cohort*—Each month starting at baseline (pre-intervention) until the end of the intervention, each participating practice will extract antibiotic prescribing data from their electronic health record (EHR) system. The data will be submitted quarterly using a secure online data submission portal. The prescribing data will evaluate changes in antibiotic usage, clinical outcomes, and other effectiveness measures resulting from participation in the Safety Program. Based on feedback from participants in the prior AHRQ Safety Program, this updated version includes revisions to the EHR template to simplify the data requested in the template from aggregate to visit-level. Participating practices will submit two key types of data related to antibiotic prescribing: (1) Total antibiotic prescriptions per 100 respiratory tract infection telemedicine visits and (2) Antibiotic prescriptions per 100 antibiotic-inappropriate respiratory tract infection telemedicine visits. This data will be an important way for the practice to monitor its prescribing practices throughout the course of the program and will be used by the assessment team to monitor and describe prescribing trends across practices enrolled in the program.

This study is being conducted by AHRQ through its contractor, NORC at the University of Chicago and Johns Hopkins Medicine, pursuant to AHRQ's statutory authority to conduct and support research on healthcare and on systems for the delivery of such care, including activities with respect to the quality, effectiveness, efficiency, appropriateness, and value of healthcare services and with respect to quality measurement and improvement. 42 U.S.C. 299a(a)(1) and (2).

Method of Collection

To minimize respondent burden and to permit the electronic submission of survey responses and data collection forms, the structural assessment, AHRQ MOSOPS, participant experience survey, and antibiotic prescription data template will be web-based and deployed using a well-designed, low burden, and respondent-friendly survey

administration process. In addition, the EHR data extracted by practice staff that are requested for this program may already be collected by practices as part of their ongoing quality improvement initiatives. Practices will receive access to the online data collection platform and detailed instructions on completing the online forms and EHR data submissions.

Estimated Annual Respondent Burden

Exhibit 1 shows the estimated annualized burden hours for the respondents' time to participate in this project.

1. Structural Assessment Antibiotic Use Cohort—The assessment will be administered twice to the Safety Program leader/champion at each participating brick-and-mortar practice or telemedicine-only organization, once at baseline (pre-intervention) and again at the end of the intervention. AHRQ expects 188 respondents at each administration. The Assessment requires 12 minutes to complete.

2. Medical Office Survey on Patient Safety (MOSOPS)—The MOSOPS will be completed by all participating staff at brick-and-mortar practices to assess patient safety issues, medical errors, and event reporting practices. The survey will be completed twice, once at baseline (pre-intervention) and at the end of the intervention to measure the changes in patient safety culture resulting from participation in the Safety Program. The survey will be completed by 438 staff members at each administration and requires 30 minutes to complete.

3. Participant Experience Survey Antibiotic Use Cohort—The Participant Experience Survey will be administered once to the Safety Program leader/champion at the end of the intervention to assess participant engagement and progress; understand providers' experience using materials and participating in the Safety Program; and identify processes used and changes made to implement and sustain the Safety Program. The survey is estimated to require 20 minutes to complete.

4. Semi-Structured Interviews Antibiotic Use Cohort—Semi-structured interviews will be conducted at the end of the intervention among clinical and professional support staff from a sample of practices to collect qualitative information on the implementation of the program. Interviews will be conducted with 18 participating practices/organizations and requires one hour to complete.

5. Antibiotic Prescription Data Template Antibiotic Use Cohort—The Antibiotic Prescription Data Template will be completed each month and submitted quarterly starting in the baseline (pre-intervention) period until the end of the intervention to measure changes in antibiotic usage resulting from the intervention. The data will be extracted from the practice/organization's electronic health records, by a staff member, and entered into the data template. AHRQ expects 225 practices/organizations to extract data monthly for 18 months. Each monthly data extraction should require one hour of a staff members time.

The total burden for the respondents' time to participate in this research is estimated to be 4,644 hours.

EXHIBIT 1—ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents *	Number of responses per respondent	Hours per response	Total burden hours
1. Structural Assessment	188	2	12/60	75
2. MOSOPS (brick-and-mortar only)	438	2	30/60	438
3. Participant Experience Survey	188	1	20/60	63
4. Semi-structured interviews	18	1	1	18
5. Antibiotic Prescription Data Template	225	18	1	4,050
Total	1,057	na	na	4,644

* Annualized number of respondents is based on maximum practices recruited, assuming 50% of the practices are telemedicine-only and 50% are brick-and-mortar, and 75% response rate for forms 1 and 3, 50% response rate for form 2, and 90% response rate for forms 4 and 5.

Exhibit 2 shows the estimated annualized cost burden based on the respondents' time to complete the data collection forms. The total cost burden is estimated to be $348,868.

EXHIBIT 2—ESTIMATED ANNUALIZED COST BURDEN

Form name	Total burden hours	Average hourly wage rate **	Total burden cost
1. Structural Assessment	75	[a] $114.76	$8,607
2. MOSOPS (brick-and-mortar only).			
a. Physicians	219	[a] 114.76	25,132
b. Other Health Practitioners	219	[b] 32.78	7,179
3. Participant Experience Survey	63	[a] 114.76	7,115
4. Semi-structured qualitative interviews	18	[a] 114.76	2,066
5. Antibiotic Prescription Data Template	4,050	[c] 73.77	298,769
Total	4,644	.....	348,868

** Annualized number of respondents is based on maximum practices recruited, assuming 50% of the practices are telemedicine-only and 50% are brick-and-mortar, and 75% response rate for forms 1 and 3, 50% response rate for form 2, and 90% response rate for forms 4 and 5.

** National Compensation Survey: Occupational wages in the United States May 2022 "U.S. Department of Labor, Bureau of Labor Statistics:" *https://www.bls.gov/oes/current/oes_stru.htm.*

[a] Based on the mean wages for *29–1069 Physicians and Surgeons, All Other.*

[b] Based on the mean wages for *29–9099 Miscellaneous Health Practitioners and Technical Workers: Healthcare Practitioners and Technical Workers, All Other.*

[c] Based on an average of the mean wages for *29–1069 Physicians and Surgeons, All Other* and *29–9099 Miscellaneous Health Practitioners and Technical Workers: Healthcare Practitioners and Technical Workers, All Other.*

Request for Comments

In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501–3520, comments on AHRQ's information collection are requested with regard to any of the following: (a) whether the proposed collection of information is necessary for the proper performance of AHRQ's health care research and health care information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: April 23, 2024.

Marquita Cullom,

Associate Director.

[FR Doc. 2024–09071 Filed 4–26–24; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day-24–1074]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled ''Colorectal Cancer Control Program (CRCCP) Monitoring Activities'' to the Office of Management and Budget (OMB) for review and approval. CDC previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on December 22, 2023 to obtain comments from the public and affected agencies. CDC received one comment related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. Comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

Colorectal Cancer Control Program (CRCCP) Monitoring Activities (OMB Control No. 0920–1074)—Reinstatement—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

CDC is requesting a Reinstatement of OMB No. 0920–1074. Colorectal cancer (CRC) is the second leading cause of death from cancer in the United States among cancers that affect both men and women. There is substantial evidence that CRC screening reduces the incidence of and death from the disease. Screening for CRC can detect disease early when treatment is more effective, and prevent cancer by finding and removing precancerous polyps. Of individuals diagnosed with early stage CRC, more than 90% live five or more years. To reduce CRC morbidity, mortality, and associated costs, use of CRC screening tests must be increased among age-eligible adults with the lowest CRC screening rates.

The purpose of the Colorectal Cancer Control Program (CRCCP) is to partner with health systems and their individual primary care clinics to implement evidence-based interventions (EBIs) to increase CRC screening among defined populations of adults ages 50–75 that have CRC screening rates lower than the national, regional, or local rate. In 2020, CDC issued the funding opportunity, Public Health and Health System Partnerships to Increase Colorectal Cancer Screening in Clinical Settings (DP20–2002), a five-year cooperative agreement to increase CRC screening among defined populations of adults ages 50–75 that have CRC screening rates lower than the national, regional, or local rate. DP20–2002 funds recipients to partner with health systems and their primary care clinics to implement multiple EBIs, partner with organizations to support implementation of EBIs in those clinics, and collect high-quality clinic-level data to monitor EBI implementation and assess screening rate changes.

CDC proposes information collection using three data collection tools: the Annual Awardee Survey, Clinic-Level Data Collection Instrument, and Quarterly Program Update.

The Annual Awardee Survey is administered once per year and assesses: program management, clinic readiness assessment activities, data management, technical assistance (TA) needs, partnerships, and the effect of COVID–19 on CRC implementation. The Clinic-Level Information Collection Instrument is administered three months following each program year end and assesses: health system and

clinic characteristics; program reach; CRC screening practices and outcomes; clinics' quality improvement and monitoring activities; EBI implementation, and additional factors that affect EBI implementation over time. The Quarterly Program Update is administered in the month following each program quarter (*i.e.,* October, January, April, July) and collects standardized recipient-level information on aspects of program management, including: quarterly program expenditures, current staff vacancies, program successes and challenges, current TA needs, and the effect of COVID–19 on CRCCP implementation at the recipient level. These data are collected quarterly to facilitate rapid reporting of programmatic information to support CDC program consultants in providing tailored and meaningful TA.

This information collection enables CDC to gauge progress in meeting CRCCP program goals and monitor implementation activities, evaluate outcomes, and identify recipients' TA needs. In addition, data collected will inform program improvement and help identify successful activities that need to be maintained, replicated, or expanded. OMB approval is requested for three years. The total estimated annualized burden is 760 hours. There is no cost to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hr)
CRCCP Recipients	CRCCP Annual Awardee Survey	35	1	15/60
	CRCCP Clinic-level Information Collection Instrument.	35	24	50/60
	CRCCP Quarterly Program Update	35	4	22/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Public Health Ethics and Regulations, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2024–09145 Filed 4–26–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Meeting of the Healthcare Infection Control Practices Advisory Committee

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the Centers for Disease Control and Prevention announces the following meeting for the Healthcare Infection Control Practices Advisory Committee (HICPAC). This virtual meeting is open to the public, limited only by the number of audio and web conference lines (500 audio and web conference lines are available). Time will be available for public comment. Registration is required.

DATES: The meeting will be held on June 6, 2024, from 9 a.m. to 5 p.m., EDT, and June 7, 2024, 9 a.m. to 12 p.m., EDT.

ADDRESSES: To register for this web conference, please go to: *www.cdc.gov/hicpac.* All registered participants will receive the meeting link and instructions shortly before the meeting. Please click the link below to join the June 6 webinar: *https://cdc.zoomgov.com/j/1619798307?pwd=cmdUT3lFNHFCNitXZElUdkdnZDRmQT09.*

Passcode: fHTc=?7n.

Please click the link below to join the June 7 Webinar: *https://cdc.zoomgov.com/j/1615598629?pwd=Ny9pcjhROGR2dGZNeUlmaTQvQWZxZz09.*

Passcode: 8rLxq?*f.

FOR FURTHER INFORMATION CONTACT: Sydnee Byrd, M.P.A., HICPAC, Division of Healthcare Quality Promotion, NCEZID, CDC, 1600 Clifton Road NE, Mailstop H16–3, Atlanta, Georgia 30329–4027, Telephone: (404) 718–8039; Email: *hicpac@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: The Committee is charged with providing advice and guidance to the Director, Division of Healthcare Quality Promotion (DHQP), the Director, National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), the Director, CDC, and the Secretary, Department of Health and Human Services, regarding (1) the practice of healthcare infection prevention and control; (2) strategies for surveillance, prevention, and control of infections, antimicrobial resistance, and related events in settings where healthcare is provided; and (3) periodic updating of CDC guidelines and other policy statements regarding prevention of healthcare-associated infections and healthcare-related conditions.

Matters to be Considered: The agenda will include the following updates: The Healthcare Personnel Guideline Workgroup; Isolation Precautions Guideline Workgroup; NHSN workgroup; and Dental Unit Waterlines Guideline Update. Agenda items are subject to change.

Public Participation

Oral Public Comment: This meeting will include time for members of the public to make an oral comment. Priority will be given to individuals who submit a request to make an oral public comment before the meeting according to the procedures below: All persons interested in making an oral public comment at the June 6–7, 2024 HICPAC meeting must submit a request between May 13, 2024, and May 24, 2024, at *https://www.cdc.gov/hicpac/meeting.html* no later than 11:59 p.m., EDT, May 22, 2024, according to the instructions provided on the HICPAC website. If the number of persons requesting to speak is greater than can be reasonably accommodated during the scheduled time, CDC will conduct a lottery draw to determine the speakers for the scheduled public comment session. CDC staff will notify individuals regarding their request to speak by email on May 27, 2024.

The Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and

Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2024–09090 Filed 4–26–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC–2024–0034]

Meeting of the Advisory Committee to the Director (ACD), Centers for Disease Control and Prevention

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting and request for comment.

SUMMARY: In accordance with the Federal Advisory Committee Act, the Centers for Disease Control and Prevention (CDC) announces the following meeting for the Advisory Committee to the Director, Centers for Disease Control and Prevention (ACD, CDC). This meeting is open to the public. The meeting will be webcast live via the World Wide Web.

DATES: The meeting will be held on June 6, 2024, from 10 a.m. to 3 p.m., EDT (times subject to change).

The public may submit written comments from April 29, 2024 through May 24, 2024.

ADDRESSES: No registration is required to view the meeting via the World Wide Web. Information for accessing the webcast will be available at *https://www.cdc.gov/about/advisory-committee-director/.*

Written comments: You may submit comments identified by Docket No. CDC–2024–0034 by either of the following methods below. Do not submit comments for the docket by email. CDC does not accept comments for the docket by email.

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Tiffany Brown, JD MPH, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H21–10, Atlanta, Georgia 30329–4027. Attn: Docket number CDC–2024–0034.

Instructions: All submissions received must include the Agency name and Docket Number. All relevant comments received in conformance with the *https://www.regulations.gov,* suitability policy will be posted without change to *https://www.regulations.gov,* including any personal information provided. For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.* Written public comments submitted up to 72 hours prior to the ACD meeting will be provided to ACD members before the meeting. Written comments received in advance of the meeting will be included in the official record of the meeting.

FOR FURTHER INFORMATION CONTACT: Tiffany Brown, JD MPH, Centers for Disease Control and Prevention, Office of the Chief of Staff, 1600 Clifton Road NE, Mailstop H21–10, Atlanta, Georgia 30329–4027, Telephone: (404) 498–6655; Email Address: *ACDirector@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: The Advisory Committee to the Director, CDC, shall (1) make recommendations to the Director regarding ways to prioritize the activities of the agency in alignment with the CDC Strategic Plan required under section 305(c); H.R. 2617–1252; (2) advise on ways to achieve or improve performance metrics in relation to the CDC Strategic Plan, and other relevant metrics, as appropriate; (3) provide advice and recommendations on the development of the Strategic Plan, and any subsequent updates, as appropriate; (4) advise on grant, cooperative agreements, contracts, or other transactions, as applicable; (5) provide other advice to the Director, as requested, to fulfill duties under sections 301 and 311; and (6) appoint subcommittees. The committee recommends ways to prioritize CDC's activities, improve results, and address health disparities. It also provides guidance to help CDC work more effectively with its various private and public sector constituents to make health protection a practical reality.

Matters to be Considered: The agenda will include an update on CDC priorities from the CDC Director, discussions on CDC's work to address equity and social determinants of health, lab readiness and response improvement efforts, programmatic updates, and updates from the ACD Data and Surveillance Workgroup and the Communications and Public Engagement Workgroup. Agenda items are subject to change as priorities dictate.

Public Participation

Interested persons or organizations are invited to participate by submitting written views, recommendations, and data. Please note that comments received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. Comments will be posted on *https://www.regulations.gov.* Therefore, do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. If you include your name, contact information, or other information that identifies you in the body of your comments, that information will be on public display. CDC will review all submissions and may choose to redact, or withhold, submissions containing private or proprietary information such as Social Security numbers, medical information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. CDC will carefully consider all comments submitted into the docket.

Written Public Comment: The docket will be opened to receive written comments on April 29, 2024 through May 24, 2024.

The Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2024–09081 Filed 4–26–24; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3462–PN]

Medicare Program; Application by The Compliance Team (TCT) for Continued CMS Approval of its Home Infusion Therapy (HIT) Accreditation Program

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice with request for comment.

SUMMARY: This notice acknowledges the receipt of an application from The Compliance Team (TCT) for continued approval by the Centers for Medicare & Medicaid Services (CMS) of TCT's national accrediting organization program for suppliers providing home infusion therapy (HIT) services and that wish to participate in the Medicare or Medicaid programs. The statute requires that within 60 days of receipt of an organization's complete application, CMS will publish a notice that identifies the national accrediting body making the request, describes the nature of the request, and provides at least a 30-day public comment period.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, by May 29, 2024.

ADDRESSES: In commenting, refer to file code CMS–3462–PN.

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–3462–PN, P.O. Box 8016, Baltimore, MD 21244–8010.

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–3462–PN, 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: Shannon Freeland, (410) 786–4348.

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: *https://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 commenter will take actions to harm 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. Background

Home infusion therapy (HIT) is a treatment option for Medicare beneficiaries with a wide range of acute and chronic conditions. Section 5012 of the 21st Century Cures Act (Pub. L. 114–255, enacted December 13, 2016) added section 1861(iii) to the Social Security Act (the Act), establishing a new Medicare benefit for HIT services. Section 1861(iii)(1) of the Act defines ''home infusion therapy'' as professional services, including nursing services; training and education not otherwise covered under the Durable Medical Equipment (DME) benefit; remote monitoring; and other monitoring services. HIT must be furnished by a qualified HIT supplier and furnished in the individual's home. The individual must:

- Be under the care of an applicable provider (that is, physician, nurse practitioner, or physician assistant); and
- Have a plan of care established and periodically reviewed by a physician in coordination with the furnishing of home infusion drugs under Part B, that prescribes the type, amount, and duration of infusion therapy services that are to be furnished.

Section 1861(iii)(3)(D)(i)(III) of the Act requires that a qualified HIT supplier be accredited by an accrediting organization (AO) designated by the Secretary in accordance with section 1834(u)(5) of the Act. Section 1834(u)(5)(A) of the Act identifies factors for designating AOs and in reviewing and modifying the list of designated AOs. These statutory factors are as follows:

- The ability of the organization to conduct timely reviews of accreditation applications.
- The ability of the organization to take into account the capacities of suppliers located in a rural area (as defined in section 1886(d)(2)(D) of the Act).
- Whether the organization has established reasonable fees to be charged to suppliers applying for accreditation.
- Such other factors as the Secretary determines appropriate.

Section 1834(u)(5)(B) of the Act requires the Secretary to designate AOs to accredit HIT suppliers furnishing HIT no later than January 1, 2021. Section 1861(iii)(3)(D)(i)(III) of the Act requires a ''qualified home infusion therapy supplier'' to be accredited by a CMS-approved AO, pursuant to section 1834(u)(5) of the Act.

On March 1, 2019, we published a solicitation notice entitled, ''Medicare Program; Solicitation of Independent Accrediting Organizations to Participate in the Home Infusion Therapy Supplier Accreditation Program'' (84 FR 7057). This notice informed national AOs that accredit HIT suppliers of an opportunity to submit applications to participate in the HIT supplier accreditation program. We stated that complete applications would be considered for the January 1, 2021 designation deadline if received by February 1, 2020. Regulations for the approval and oversight of AOs for HIT organizations are located at 42 CFR part 488, subpart L. The requirements for HIT suppliers are located at 42 CFR part 486, subpart I.

II. Approval of Deeming Organization

Section 1834(u)(5) of the Act and regulations at 42 CFR 488.1010 require that our findings concerning review and approval of a national accrediting organization's requirements consider, among other factors, the applying accrediting organization's requirements for accreditation; survey procedures; resources for conducting required surveys; capacity to furnish information for use in enforcement activities; monitoring procedures for provider entities found not in compliance with the conditions or requirements; and ability to provide CMS with the necessary data.

Our rules at 42 CFR 488.1020(a) require that we publish, after receipt of an organization's complete application, a notice that identifies the national accrediting body making the request, describes the nature of the request, and provides at least a 30-day public comment period. Pursuant to our rules at 42 CFR 488.1010(d), we have 210 days from the receipt of a complete application to publish notice of approval or denial of the application.

The purpose of this proposed notice is to inform the public of The Compliance Team's (TCT's) request for CMS' continued recognition of its HIT accreditation program. This notice also solicits public comment on whether TCT's requirements meet or exceed the Medicare requirements of participation for HIT services.

III. Evaluation of Deeming Authority Request

In the September 23, 2019 **Federal Register**, we published TCT's initial application for recognition as an accreditation organization for HIT (84 FR 49736). On September 28, 2020, we published notification of their approval as such an organization, effective October 1, 2020 through October 1, 2024 (85 FR 60799). TCT has since submitted all the necessary materials to enable us to make a determination concerning its request for continued recognition of its HIT accreditation program. This application was determined to be complete on March 2, 2024. Under section 1834(u)(5) of the Act and 42 CFR 488.1010 (Application and re-application procedures for national home infusion therapy accrediting organizations), our review and evaluation of TCT will be conducted in accordance with, but not necessarily limited to, the following factors:

- The equivalency of TCT's standards for HIT as compared with CMS' HIT requirements for participation in the Medicare program.
- TCT's survey process to determine the following:

++ The composition of the survey team, surveyor qualifications, and the ability of the organization to provide continuing surveyor training.

++ The comparability of TCT's to CMS' standards and processes, including survey frequency, and the ability to investigate and respond appropriately to complaints against accredited facilities.

++ TCT's processes and procedures for monitoring a HIT supplier found out of compliance with TCT's program requirements.

++ TCT's capacity to report deficiencies to the surveyed facilities and respond to the facility's plan of correction in a timely manner.

++ TCT's capacity to provide CMS with electronic data and reports necessary for effective assessment and interpretation of the organization's survey process.

++ The adequacy of TCT's staff and other resources, and its financial viability.

++ TCT's capacity to adequately fund required surveys.

++ TCT's policies with respect to whether surveys are announced or unannounced, to ensure that surveys are unannounced.

++ TCT's agreement to provide CMS with a copy of the most current accreditation survey together with any other information related to the survey as CMS may require (including corrective action plans).

++ TCT's policies and procedures to avoid conflicts of interest, including the appearance of conflicts of interest, involving individuals who conduct surveys, audits or participate in accreditation decisions.

++ TCT's agreement or policies for voluntary and involuntary termination of HIT suppliers.

++ TCT's agreement or policies for voluntary and involuntary termination of the HIT AO program.

IV. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping, or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

V. 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.

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Trenesha Fultz-Mimms, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Trenesha Fultz-Mimms,

Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2024–09172 Filed 4–26–24; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–9148–N]

Medicare and Medicaid Programs; Quarterly Listing of Program Issuances—January through March 2024

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: This quarterly notice lists CMS manual instructions, substantive and interpretive regulations, and other **Federal Register** notices that were published in the 3-month period, relating to the Medicare and Medicaid programs and other programs administered by CMS.

FOR FURTHER INFORMATION CONTACT: It is possible that an interested party may need specific information and not be able to determine from the listed information whether the issuance or regulation would fulfill that need. Consequently, we are providing contact persons to answer general questions concerning each of the addenda published in this notice.

Addenda	Contact	Phone No.
I CMS Manual Instructions	Ismael Torres	(410) 786–1864
II Regulation Documents Published in the **Federal Register**	Terri Plumb	(410) 786–4481
III CMS Rulings	Tiffany Lafferty	(410)786–7548
IV Medicare National Coverage Determinations	Wanda Belle, MPA	(410) 786–7491
V FDA-Approved Category B IDEs	John Manlove	(410) 786–6877
VI Collections of Information	William Parham	(410) 786–4669
VII Medicare—Approved Carotid Stent Facilities	Sarah Fulton, MHS	(410) 786–2749
VIII American College of Cardiology-National Cardiovascular Data Registry Sites	Sarah Fulton, MHS	(410) 786–2749
IX Medicare's Active Coverage-Related Guidance Documents	Lori Ashby, MA	(410) 786–6322
X One-time Notices Regarding National Coverage Provisions	JoAnna Baldwin, MS	(410) 786–7205
XI National Oncologic Positron Emission Tomography Registry Sites	David Dolan, MBA	(410) 786–3365
XII Medicare—Approved Ventricular Assist Device (Destination Therapy) Facilities	David Dolan, MBA	(410) 786–3365
XIII Medicare—Approved Lung Volume Reduction Surgery Facilities	Sarah Fulton, MHS	(410) 786–2749
XIV Medicare—Approved Bariatric Surgery Facilities	Sarah Fulton, MHS	(410) 786–2749

Addenda	Contact	Phone No.
XV Fluorodeoxyglucose Positron Emission Tomography for Dementia Trials	David Dolan, MBA	(410) 786–3365
All Other Information	Annette Brewer	(410) 786–6580

SUPPLEMENTARY INFORMATION:

I. Background

The Centers for Medicare & Medicaid Services (CMS) is responsible for administering the Medicare and Medicaid programs and coordination and oversight of private health insurance. Administration and oversight of these programs involves the following: (1) furnishing information to Medicare and Medicaid beneficiaries, health care providers, and the public; and (2) maintaining effective communications with CMS regional offices, state governments, state Medicaid agencies, state survey agencies, various providers of health care, all Medicare contractors that process claims and pay bills, National Association of Insurance Commissioners (NAIC), health insurers, and other stakeholders. To implement the various statutes on which the programs are based, we issue regulations under the authority granted to the Secretary of the Department of Health and Human Services under sections 1102, 1871, 1902, and related provisions of the Social Security Act (the Act) and Public Health Service Act. We also issue various manuals, memoranda, and statements necessary to administer and oversee the programs efficiently.

Section 1871(c) of the Act requires that we publish a list of all Medicare manual instructions, interpretive rules, statements of policy, and guidelines of general applicability not issued as regulations at least every 3 months in the **Federal Register**.

II. Format for the Quarterly Issuance Notices

This quarterly notice provides only the specific updates that have occurred in the 3-month period along with a hyperlink to the full listing that is available on the CMS website or the appropriate data registries that are used as our resources. This is the most current up-to-date information and will be available earlier than we publish our quarterly notice. We believe the website list provides more timely access for beneficiaries, providers, and suppliers. We also believe the website offers a more convenient tool for the public to find the full list of qualified providers for these specific services and offers more flexibility and ''real time'' accessibility. In addition, many of the websites have listservs; that is, the public can subscribe and receive immediate notification of any updates to the website. These listservs avoid the need to check the website, as notification of updates is automatic and sent to the subscriber as they occur. If assessing a website proves to be difficult, the contact person listed can provide information.

III. How to Use the Notice

This notice is organized into 15 addenda so that a reader may access the subjects published during the quarter covered by the notice to determine whether any are of particular interest. We expect this notice to be used in concert with previously published notices. Those unfamiliar with a description of our Medicare manuals should view the manuals at *http://www.cms.gov/manuals.*

The Director of the Office of Strategic Operations and Regulatory Affairs of the Centers for Medicare & Medicaid Services (CMS), Kathleen Cantwell, having reviewed and approved this document, authorizes Trenesha Fultz-Mimms, who is the **Federal Register** Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Trenesha Fultz-Mimms,

Federal Register Liaison, Department of Health and Human Services.

BILLING CODE 4120–01–P

Publication Dates for the Previous Four Quarterly Notices

We publish this notice at the end of each quarter reflecting information released by CMS during the previous quarter. The publication dates of the previous four Quarterly Listing of Program Issuances notices are: May 12, 2023 (88 FR 30752), August 4, 2023 (88 FR 51814), October 26, 2023 (88 FR 73591) and January 30, 2024 (89 FR 5897). We are providing only the specific updates that have occurred in the 3-month period along with a hyperlink to the website to access this information and a contact person for questions or additional information.

Addendum I: Medicare and Medicaid Manual Instructions (January through March 2024)

The CMS Manual System is used by CMS program components, partners, providers, contractors, Medicare Advantage organizations, and State Survey Agencies to administer CMS programs. It offers day-to-day operating instructions, policies, and procedures based on statutes and regulations, guidelines, models, and directives. In 2003, we transformed the CMS Program Manuals into a web user-friendly presentation and renamed it the CMS Online Manual System.

How to Obtain Manuals

The Internet-only Manuals (IOMs) are a replica of the Agency's official record copy. Paper-based manuals are CMS manuals that were officially released in hardcopy. The majority of these manuals were transferred into the Internet-only manual (IOM) or retired. Pub 15-1, Pub 15-2 and Pub 45 are exceptions to this rule and are still active paper-based manuals. The remaining paper-based manuals are for reference purposes only. If you notice policy contained in the paper-based manuals that was not transferred to the IOM, send a message via the CMS Feedback tool.

Those wishing to subscribe to old versions of CMS manuals should contact the National Technical Information Service, Department of Commerce, 5301 Shawnee Road, Alexandria, VA 22312 Telephone (703-605-6050). You can download copies of the listed material free of charge at: http://cms.gov/manuals.

How to Review Transmittals or Program Memoranda

Those wishing to review transmittals and program memoranda can access this information at a local Federal Depository Library (FDL). Under the FDL program, government publications are sent to approximately 1,400 designated libraries throughout the United States. Some FDLs may have arrangements to transfer material to a local library not designated as an FDL. Contact any library to locate the nearest FDL. This information is available at http://www.gpo.gov/libraries/

In addition, individuals may contact regional depository libraries that receive and retain at least one copy of most federal government publications, either in printed or microfilm form, for use by the general public. These libraries provide reference services and interlibrary loans; however, they are not sales outlets. Individuals may obtain information about the location of the nearest regional depository library from any library. CMS publication and transmittal numbers are shown in the listing entitled Medicare and Medicaid Manual Instructions. To help FDLs locate the materials, use the CMS publication and transmittal numbers. For example, to find the manual Updates to Medicare Benefit Policy Manual and Medicare Claims Processing Manual for Marriage and Family Therapists (MFTs) and Mental Health Counselors (MHCs) (CMS-Pub. 100-02) Transmittal No. 12448.

Addendum I lists a unique CMS transmittal number for each instruction in our manuals or program memoranda and its subject number. A transmittal may consist of a single or multiple instruction(s). Often, it is necessary to use information in a transmittal in conjunction with information currently in the manual.

Fee-For Service Transmittal Numbers

Please Note: Beginning Friday, March 20, 2020, there will be the following change regarding the Advance Notice of Instructions due to a CMS internal process change. Fee-For Service Transmittal Numbers will no longer be determined by Publication. The Transmittal numbers will be issued by a single numerical sequence beginning with Transmittal Number 10000.

For the purposes of this quarterly notice, we list only the specific updates to the list of manual instructions that have occurred in the 3-month period. This information is available on our website at www.cms.gov/Manuals.

Transmittal Number	Manual/Subject/Publication Number
Medicare General Information (CMS-Pub. 100-01)	
12531	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
Medicare Benefit Policy (CMS-Pub. 100-02)	
12448	Updates to Medicare Benefit Policy Manual and Medicare Claims Processing Manual for Marriage and Family Therapists (MFTs) and Mental Health Counselors (MHCs)
12497	Pulmonary Rehabilitation, Cardiac Rehabilitation and Intensive Cardiac Rehabilitation (PR/CR/ICR) Expansion of Supervising Practitioners
12532	Update to Pub. 100-02 Medicare Benefit Policy Manual, Chapter 15, Section 110.8 Durable Medical Equipment Prosthetics Orthotics and Supplies (DMEPOS) Benefit Category Determinations and Add Section 145 Lymphedema Compression Treatment Items
Medicare National Coverage Determination (CMS-Pub. 100-03)	
	None
Medicare Claims Processing (CMS-Pub. 100-04)	
12439	January 2024 Update of the Ambulatory Surgical Center (ASC) Payment System

12442	Quarterly Update for the Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Competitive Bidding Program (CBP) – April 2024
12443	Clinical Laboratory Fee Schedule – Medicare Travel Allowance Fees for Collection of Specimens and New Updates for 2024
12446	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12448	Updates to Medicare Benefit Policy Manual and Medicare Claims Processing Manual for Marriage and Family Therapists (MFTs) and Mental Health Counselors (MHCs
12449	April 2024 Quarterly Update to Healthcare Common Procedure Coding System (HCPCS) Codes Used for Skilled Nursing Facility (SNF) Consolidated Billing (CB) Enforcement
12451	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12452	Implementation of System Edits for Direct Graduate Medical Education (DGME) and Kidney Acquisition Pass-Thru Amount Fields of the Provider Specific File (PSF)
12453	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12455	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12456	New Physician Specialty Code for Epileptologists
12462	Update to the Payment for Grandfathered Tribal Federally Qualified Health Centers (FQHCs) for Calendar Year (CY) 2024
12472	File Conversions Related to the Spanish Translation of the Healthcare Common Procedure Coding System (HCPCS) Descriptions
12473	Indian Health Services (IHS) Hospital Payment Rates for Calendar Year 2024
12474	Quarterly Update to the End-Stage Renal Disease Prospective Payment System (ESRD PPS)
12475	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12476	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12491	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12494	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12497	Pulmonary Rehabilitation, Cardiac Rehabilitation and Intensive Cardiac Rehabilitation (PR/CR/ICR) Expansion of Supervising Practitioners
12498	Remittance Advice Remark Code (RARC), Claims Adjustment Reason Code (CARC), Medicare Remit Easy Print (MREP) and PC Print Update
12499	Combined Common Edits/Enhancements Modules (CCEM) Code Set Update
12500	Issued to a specific audience, not posted to Internet/Intranet due to Sensitivity of Instruction
12501	Quarterly Update to the Medicare Physician Fee Schedule Database (MPFSDB) - April 2024 Update
12503	July 2024 Healthcare Common Procedure Coding System (HCPCS) Quarterly Update Reminder
12504	Home Infusion Therapy (HIT) Payment Rates and Instructions for Retrieving the January 2024 Home Infusion Therapy (HIT) Services Payment Rates Through the CMS Mainframe Telecommunications System
12511	Manual Updates to Chapters 1 and 17 of the Medicare Claims Processing Manual to Reflect Policies Finalized in the Calendar Year (CY) 2024 Physician Fee Schedule Final Rule
12517	Update of Internet Only Manual (IOM), Pub. 100-04, Chapter 8 - Outpatient ESRD Hospital, Independent Facility, and Physician/Supplier Claims
12519	Quarterly Update for Clinical Laboratory Fee Schedule (CLFS) and Laboratory Services Subject to Reasonable Charge Payment
12521	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12522	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12527	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12530	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12535	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12540	Changes to the Laboratory National Coverage Determination (NCD) Edit Software for July 2024
12547	July 2024 Quarterly Average Sales Price (ASP) Medicare Part B Drug Pricing Files and Revisions to Prior Quarterly Pricing Files
12551	April 2024 Integrated Outpatient Code Editor (I/OCE) Specifications Version 25.1
12552	April 2024 Update of the Hospital Outpatient Prospective Payment System (OPPS)
12553	April Quarterly Update for 2024 Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) Fee Schedule
Medicare Secondary Payer (CMS-Pub. 100-05)	
12438	Issued to a specific audience, not posted to Internet/Intranet due to Sensitivity of Instruction
Medicare Financial Management (CMS-Pub. 100-06)	
12456	New Physician Specialty Code for Epileptologists Claims Processing Timeliness - All Claims Part E - Interest Payment Data Classification of Claims for Counting Physician/Limited License Physician Specialty Codes Exhibit
12457	Notice of New Interest Rate for Medicare Overpayments and Underpayments -2nd Quarter Notification for FY 2024
12492	The Fiscal Intermediary Shared System (FISS) Submission of Copybook Files to the Provider and Statistical Reimbursement (PS&R) System
12507	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12509	Updating Chapter 3, Sections 200.5 - 200.8, Limitation on Recoupment; Medicare Overpayments Manual Administrative Law Judge (ALJ) Third level and Subsequent Levels of Administrative Appeals Actions on a Valid Notification for the ALJ or Subsequent Level Appeal Request Remanded back to the QIC from the ALJ Actions to Take After the ALJ or Subsequent Level Appeal Decision The Revised Overpayment Letter for ALJ and Subsequent Decisions Obligation to Pay Interest on Underpayments 935 Interest Calculation Assessment of 935 Interest Interest Rate and Calculation Periods on Recouped Funds for the Purposes of Paying 935 Interest Calculations for Each 30-Day Period at the ALJ or Subsequent Level Decision Timeframes when Calculation the 935 Interest Computing 935 Interest on Favorable Decisions from the ALJ and Subsequent Levels Tracking and Report the 935 Interest Payments
Medicare State Operations Manual (CMS-Pub. 100-07)	

217	Revisions to the State Operating Manual (SOM) Chapter 2; Community Mental Health Center (CMHC)
218	Revisions to the State Operating Manual (SOM), Appendix F-Community Mental Health Centers
Medicare Program Integrity (CMS-Pub. 100-08)	
12458	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12469	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12478	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12505	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12512	Documentation Requirements for Refillable Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS
12514	Fourth Policy Change Request (CR) Regarding Implementation of the Provider Enrollment, Chain and Ownership System (PECOS) 2.0
12515	Updates of Chapter 4, Chapter 8, and Exhibits in Publication (Pub.) 100-08, Including Prioritization and Payment Suspension Language Guidance Investigations CMS Approval Terminating the Payment Suspension DME Payment Suspensions (MACs and UPICs Non-DME National Payment Suspensions (MACs and UPICs)
12520	Issued to a specific audience, not posted to Internet/Intranet due to Confidentiality of Instruction
12524	Stay of Enrollment Revalidation Solicitations Non-Responses to Revalidation and Extension Requests Receipt and Processing of Revalidation Applications
12528	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12541	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12542	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12543	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12544	Issued to a specific audience, not posted to Internet/Intranet due to Confidentiality of Instruction
12545	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
Medicare Contractor Beneficiary and Provider Communications (CMS-Pub. 100-09)	
	None
Medicare Quality Improvement Organization (CMS- Pub. 100-10)	
	None
Medicare Program of All-Inclusive Care for the Elderly (CMS- Pub. 100-11)	
	None
Medicare End Stage Renal Disease Network Organizations (CMS Pub 100-14)	
	None
Medicaid Program Integrity Disease Network Organizations (CMS Pub 100-15)	
	None
Medicare Managed Care (CMS-Pub. 100-16)	
130	Update to Section 20.2.1 and 20.2.5-20 2.7 on the definitions of dual eligible special needs plans (D-SNPs) and additional requirements for certain D-SNPs General Definitions Eligibility Definitions D-SNP Definitions Definition of a D-SNP Definition of a FIDE SNP Definition of HIDE SNP Coordination-only D-SNPs Applicable Integrated Plan Additional Requirements for Certain D-SNPs Application of Frailty Adjustment for FIDE SNPs Medicaid Carve-Outs and FIDE SNP and HIDE SNP Status Benefit Flexibility Eligibility Requirements Characteristics and Categories of Flexible Supplemental benefits Benefit Flexibility Approval Process State D-SNP-only Contracts Limiting Certain MA Contracts to D-SNPs State Notification to CMS Integrated Materials
Medicare Business Partners Systems Security (CMS-Pub. 100-17)	
	None
Medicare Prescription Drug Benefit (CMS-Pub. 100-18)	
	None
Demonstrations (CMS-Pub. 100-19)	
12412	Accountable Care Organization (ACO) REACH PY2023 Part Five – Implementation
12459	Issued to a specific audience, not posted to Internet/Intranet due to a Sensitivity of Instruction
12465	Enhancing Oncology Model (EOM) Monthly Enhanced Oncology Services (MEOS) Prohibited Codes Updates
12480	Payment of M0010 Enhancing Oncology Model (EOM) Monthly Enhanced Oncology Services (MEOS) Claims for Beneficiaries Receiving Care in an Inpatient Setting
12496	Making Care Primary (MCP) Model Implementation
12536	Guiding an Improved Dementia Experience (GUIDE) Model Implementation
12538	Making Care Primary (MCP) Model Implementation
One Time Notification (CMS-Pub. 100-20)	
12440	International Classification of Diseases, 10th Revision (ICD-10) and Other Coding Revisions to National Coverage Determinations (NCDs)--April 2024 Update--CR 2 of 2
12441	International Classification of Diseases, 10th Revision (ICD-10) and Other Coding Revisions to National Coverage Determinations (NCDs)--April 2024 Update--CR 1 of 2
12444	International Classification of Diseases, 10th Revision (ICD-10) and Other Coding Revisions to National Coverage Determinations (NCDs)--January 2024 Update
12447	Modifications to the Automated Duplicate Primary Payer (DPP) Process
12450	Updating Fiscal Intermediary Shared System (FISS) Editing for Practice Locations to Bypass Non-OPPS Provider
12454	System Updates to Lump Sum Utility for Addition of Wage Index Fields
12463	Fiscal Intermediary Shared System (FISS) - Delete Obsolete Reason Codes - Part 3
12464	Fiscal Intermediary Shared System (FISS) - Delete Obsolete Reason Codes – Part
12470	Issued to a specific audience, not posted to Internet/Intranet due to a

	Confidentiality of Instruction
12481	User Enhancement Change Request (UECR): ViPS Medicare System (VMS) - Add System Auditing Function Expert (SAFE) system to Online Documentation System (OLDS) for Error Messages
12482	User Enhancement Change Request (UECR): ViPS Medicare System (VMS) - Create Multi-line Add Functionality and View Only Mode to the Message File (MSSG)
12483	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12484	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12485	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12486	User Enhancement Change Request (UECR): ViPS Medicare System (VMS) – FIND Command for SuperOp Value Set Definition Screen
12487	User Enhancement Change Request (UECR): ViPS Medicare System (VMS) – FIND Command for Super Definition Screen
12488	User Enhancement Change Request (UECR): ViPS Medicare System (VMS) – Update Electronic Funds Transfer (EFT) Process when a Change of Information (COI) Is Received
12489	User Enhancement Change Request (UECR): ViPS Medicare System (VMS) – Update Paging on Claim/Pricing Inquiry Split Screen
12490	User Enhancement Change Request (UECR): ViPS Medicare System (VMS)- Update Suppression Adjustment Force Code Processing
12493	International Classification of Diseases, 10th Revision (ICD-10) and Other Coding Revisions to National Coverage Determinations (NCDs)--July 2024 Update
12506	User Enhancement Change Request (UECR): New Multi- Carrier System (MCS) Inquiry Search Screen Using a Procedure Code to Display an Associated Edit or Audit
12508	Appropriate Use Criteria for Advanced Diagnostic Imaging Policy Update in the Calendar Year 2024 Physician Fee Schedule Final Rule
12510	User Enhancement Change Request (UECR): ViPS Medicare System (VMS) - Cancellation Process Phase 2
12513	Change Request (CR) to Implement the Medicare Program Final Action: Treatment of Medicare Part C Days in the Calculation of a Hospital's Medicare Disproportionate Patient Percentage
12518	Report of Hospice Election for Part D (Response File)
12537	Issued to a specific audience, not posted to Internet/Intranet due to a Confidentiality of Instruction
12539	Implementation to Expand Monetary Amount Fields Related to Billing and Payment to Accommodate 10-Digits in Length ($99,999,999.99) - Phase 3
12549	Fiscal Intermediary Shared System (FISS) User Enhancement Change Request (UECR) - Expiration of a Unique Tracking Number (UTN) on the Prior Authorization (PA) Tracking File
Medicare Quality Reporting Incentive Programs (CMS- Pub. 100-22)	
	None
State Payment of Medicare Premiums (CMS-Pub.100-24)	
	None
Information Security Acceptable Risk Safeguards (CMS-Pub. 100-25)	
	None

For questions or additional information, contact Ismael Torres (410-786-1864).

Addendum II: Regulation Documents Published in the Federal Register (January through March 2024)

Regulations and Notices

Regulations and notices are published in the daily **Federal Register**. To purchase individual copies or subscribe to the **Federal Register,** contact GPO at www.gpo.gov/fdsys. When ordering individual copies, it is necessary to cite either the date of publication or the volume number and page number.

The **Federal Register** is available as an online database through GPO Access. The online database is updated by 6 a.m. each day the **Federal Register** is published. The database includes both text and graphics from Volume 59, Number 1 (January 2, 1994) through the present date and can be accessed at http://www.gpoaccess.gov/fr/index.html. The following website http://www.archives.gov/federal-register/ provides information on how to access electronic editions, printed editions, and reference copies.

For questions or additional information, contact Terri Plumb (410-786-4481).

Addendum III: CMS Rulings (January through March 2024)

CMS Rulings are decisions of the Administrator that serve as precedent final opinions and orders and statements of policy and interpretation. They provide clarification and interpretation of complex or ambiguous provisions of the law or regulations relating to Medicare, Medicaid, Utilization and Quality Control Peer Review, private health insurance, and related matters.

The rulings can be accessed at http://www.cms.gov/Regulations-and-Guidance/Guidance/Rulings.

For questions or additional information, contact Tiffany Lafferty (410-786-7548).

Addendum IV: Medicare National Coverage Determinations (January through March 2024)

Addendum IV includes completed national coverage determinations (NCDs), or reconsiderations of completed NCDs, from the quarter covered by this notice. Completed decisions are identified by the section of the NCD Manual (NCDM) in which the decision appears, the title, the date the publication was issued, and the effective date of the decision. An NCD is a determination by the Secretary for whether or not a particular item or service is covered nationally under the Medicare Program (title XVIII of the Act), but does not include a determination of the code, if any, that is assigned to a particular covered item or service, or payment determination for a particular covered item or service. The entries below include information concerning completed decisions, as well as sections on

program and decision memoranda, which also announce decisions or, in some cases, explain why it was not appropriate to issue an NCD. Information on completed decisions as well as pending decisions has also been posted on the CMS website. For the purposes of this quarterly notice, there were no specific updates to national coverage determinations (NCDs), or reconsiderations of completed NCDs published in the 3-month period. This information is available at: www.cms.gov/medicare-coverage-database/.

For questions or additional information, contact Wanda Belle, MPA (410-786-7491).

Addendum V: FDA-Approved Category B Investigational Device Exemptions (IDEs) (January through March 2024)

(Inclusion of this addenda is under discussion internally.)

Addendum VI: Approval Numbers for Collections of Information (January through March 2024)

All approval numbers are available to the public at Reginfo.gov. Under the review process, approved information collection requests are assigned OMB control numbers. A single control number may apply to several related information collections. This information is available at www.reginfo.gov/public/do/PRAMain.

For questions or additional information, contact William Parham (410-786-4669).

Addendum VII: Medicare-Approved Carotid Stent Facilities (January through March 2024)

Addendum VII includes listings of Medicare-approved carotid stent facilities. All facilities listed meet CMS standards for performing carotid artery stenting for high risk patients. On March 17, 2005, we issued our decision memorandum on carotid artery stenting. We determined that carotid artery stenting with embolic protection is reasonable and necessary only if performed in facilities that have been determined to be competent in performing the evaluation, procedure, and follow-up necessary to ensure optimal patient outcomes. We have created a list of minimum standards for facilities modeled in part on professional society statements on competency. All facilities must at least meet our standards in order to receive coverage for carotid artery stenting for high risk patients. For the purposes of this quarterly notice, we are providing only the specific updates that have occurred in the 3-month period. This information is available at: http://www.cms.gov/MedicareApprovedFacilitie/CASF/list.asp#TopOfPage

For questions or additional information, contact Sarah Fulton, MHS (410-786-2749).

Facility	Provider Number	Date Approved	State
The following facility has editorial changes (in bold).			
FROM: Saint John's Hospital and Health Center **TO: Saint John's Health Center** 2121 Santa Monica Boulevard Santa Monica, CA 90404	050290	02/09/2007	Ca

Addendum VIII: American College of Cardiology's National Cardiovascular Data Registry Sites (January through March 2024)

The initial data collection requirement through the American College of Cardiology's National Cardiovascular Data Registry (ACC-NCDR) has served to develop and improve the evidence base for the use of ICDs in certain Medicare beneficiaries. The data collection requirement ended with the posting of the final decision memo for Implantable Cardioverter Defibrillators on February 15, 2018.

For questions or additional information, contact Sarah Fulton, MHS (410-786-2749).

Addendum IX: Active CMS Coverage-Related Guidance Documents (January through March 2024)

CMS issued a guidance document on November 20, 2014 titled "Guidance for the Public, Industry, and CMS Staff: Coverage with Evidence Development Document". Although CMS has several policy vehicles relating to evidence development activities including the investigational device exemption (IDE), the clinical trial policy, national coverage determinations and local coverage determinations, this guidance document is principally intended to help the public understand CMS's implementation of coverage with evidence development (CED) through the national coverage determination process. The document is available at http://www.cms.gov/medicare-coverage-database/details/medicare-coverage-document-details.aspx?MCDId=27.

CMS published three proposed guidance documents on June 22, 2023 to provide a framework for more predictable and transparent evidence development and encourage innovation and accelerate beneficiary access to new items and services. The documents are available at:

https://www.cms.gov/medicare-coverage-database/view/medicare-coverage-document.aspx?mcdid=35&docTypeId=1&sortBy=title&bc=16

https://www.cms.gov/medicare-coverage-database/view/medicare-coverage-document.aspx?mcdid=34&docTypeId=1&sortBy=title&bc=16

https://www.cms.gov/medicare-coverage-database/view/medicare-coverage-document.aspx?mcdid=33&docTypeId=1&sortBy=title&bc=16

For questions or additional information, contact Lori Ashby, MA (410 786 6322).

Addendum X: List of Special One-Time Notices Regarding National Coverage Provisions (January through March 2024)

There were no special one-time notices regarding national coverage provisions published in the 3-month period. This information is available at http://www.cms.gov .

For questions or additional information, contact JoAnna Baldwin, MS (410-786 7205).

Addendum XI: National Oncologic PET Registry (NOPR) (January through March 2024)

Addendum XI includes a listing of National Oncologic Positron Emission Tomography Registry (NOPR) sites. We cover positron emission tomography (PET) scans for particular oncologic indications when they are performed in a facility that participates in the NOPR.

In January 2005, we issued our decision memorandum on **positron emission tomography** (PET) scans, which stated that CMS would cover PET scans for particular oncologic indications, as long as they were performed in the context of a clinical study. We have since recognized the National Oncologic PET Registry as one of these clinical studies. Therefore, in order for a beneficiary to receive a Medicare-covered PET scan, the beneficiary must receive the scan in a facility that participates in the registry. There were no additions, deletions, or editorial changes to the listing of National Oncologic Positron Emission Tomography Registry (NOPR) in the 3-month period. This information is available at http://www.cms.gov/MedicareApprovedFacilitie/NOPR/list.asp#TopOfPage.

For questions or additional information, contact David Dolan, MBA (410-786-3365).

Addendum XII: Medicare-Approved Ventricular Assist Device (Destination Therapy) Facilities (January through March 2024)

Addendum XII includes a listing of Medicare-approved facilities that receive coverage for ventricular assist devices (VADs) used as destination therapy. All facilities were required to meet our standards in order to receive coverage for VADs implanted as destination therapy. On October 1, 2003, we issued our decision memorandum on VADs for the clinical indication of destination therapy. We determined that VADs used as destination therapy are reasonable and necessary only if performed in facilities that have been determined to have the experience and infrastructure to ensure optimal patient outcomes. We established facility standards and an application process. All facilities were required to meet our standards in order to receive coverage for VADs implanted as destination therapy.

For the purposes of this quarterly notice, we are providing only the specific updates to the list of Medicare-approved facilities that meet our standards that have occurred in the 3-month period. This information is available at http://www.cms.gov/MedicareApprovedFacilitie/VAD/list.asp#TopOfPage.

For questions or additional information, contact David Dolan, MBA, (410-786-3365).

Facility	Provider Number	Date of Initial Certification	Date of Re-certification	State
The following facility is a new listing.				
Virtua Our Lady of Lourdes Medical Center 1600 Haddon Avenue Camden, NJ 08103 Other information: DNV ID #: C644464 Previous Re-certification Dates: n/a	310029	01/03/2023		NJ
The following facilities have editorial changes (in bold).				
Inova Fairfax Hospital 3300 Gallows Road Falls Church, VA 22042 Other information: Joint Commission ID #: 6351 Previous Re-certification Dates: 12/09/2008; 03/22/2011; 05/01/2013; 06/09/2015; 07/25/2017; 9/25/2019; 11/17/2021	490063	12/09/2008	**10/28/2023**	VA
St. Vincent Hospital and Health Care Services, Inc. 2001 West 86th Street Indianapolis, IN 46260 Other information: Joint Commission ID #: 7178 Previous Re-certification Dates: 12/16/2008; 05/17/2011; 06/25/2013; 05/19/2015; 06/13/2017; 7/31/2019; 11/06/2021	150084	12/16/2008	**11/08/2023**	IN

MultiCare Tacoma General Hospital 315 Martin Luther King Jr. Way Tacoma, WA 98338 Other information: DNV ID #: C565359 Previous Re-certification Dates: 11/03/2010; 11/14/2012; 11/18/2014; 12/06/2016; 02/09/2021	500129	11/03/2010	**02/09/2024**	WA
Loyola University Medical Center 2160 South First Avenue Maywood, IL 60153 Other information: Joint Commission ID #: 7288 Previous Re-certification Dates: 05/10/2011; 04/16/2013; 03/17/2015; 05/09/2017; 6/26/2019; 11/17/2021	140276	01/30/2004	**12/01/2023**	IL
Mayo Clinic Arizona 5777 East Mayo Boulevard Phoenix, AZ 85054 Other information: Joint Commission ID #: 261796 Previous Re-certification Dates: 01/27/2009; 04/29/2011; 03/20/2013; 03/24/2015; 05/19/2017; 8/14/2019; 10/30/2021	030103	01/27/2009	**11/29/2023**	AZ
St. Luke's University Hospital 801 Ostrum Street Bethlehem, PA 18015 Other information: Joint Commission ID #: 6024 Previous Re-certification Dates: 12/18/2014; 01/24/2017; 03/06/2019; 10/30/2021	390049	12/18/2014	**12/06/2023**	PA
Baystate Medical Center 759 Chestnut Street Springfield, MA 01199 Other information: Joint Commission ID #: 2768 Previous Re-certification Dates: 07/18/2017; 9/11/2019; 12/04/2021	220077	07/18/2017	**12/20/2023**	MA
Intermountain Healthcare Health Services Inc. 5121 South Cottonwood Street Murray, UT 84107 Other information: Joint Commission ID #: 9540 Previous Re-certification Dates: 10/31/2008; 12/07/2010; 12/11/2012; 12/16/2014; 01/24/2017; 3/13/2019; 11/11/2021	460010	10/31/2008	**11/15/2023**	UT
UCSF Medical Center 505 Parnassus Avenue San Francisco, CA 94143 Other information: Joint Commission ID #: 10095 Previous Re-certification Dates: 09/19/2012; 11/04/2014; 12/06/2016; 1/30/2019; 11/18/2021	050454	09/19/2012	**12/13/2023**	CA
University of Washington Medical Center 1959 Northeast Pacific Street, Box 356151 Seattle, WA 98195-6151 Other information: Joint Commission ID #: 9626 Previous Re-certification Dates: 02/10/2009; 10/18/2011; 11/22/2013; 12/08/2015; 12/05/2017; 11/20/2019; 01/26/2022	500008	02/10/2009	**01/24/2024**	WA

Hartford Hospital 80 Seymour Street Hartford, CT 06102-5037 Other information: Joint Commission ID #: 2649 Previous Re-certification Dates: 03/31/2009; 11/16/2011; 10/22/2013; 10/20/2015; 11/14/2017; 12/10/2019; 12/15/2021	070025	03/31/2009	**01/05/2024**	CT
Hackensack University Medical Center 30 Prospect Avenue Hackensack, NJ 07601 Other information: Joint Commission ID #: 5934 Previous Re-certification Dates: 10/20/2015; 09/19/2017; 10/4/2019; 12/15/2021	310001	10/20/2015	**01/18/2024**	NJ
Mayo Clinic Florida 4500 San Pablo Road Jacksonville, FL 32224 Other information: Joint Commission ID #: 369946 Previous Re-certification Dates: 03/17/2009; 10/19/2011; 09/24/2013; 09/15/2015; 10/03/2017; 11/6/2019; 01/15/2022	100151	03/17/2009	**02/02/2024**	FL

Addendum XIII: Lung Volume Reduction Surgery (LVRS) (January through March 2024)

Addendum XIII includes a listing of Medicare-approved facilities that are eligible to receive coverage for lung volume reduction surgery. Until May 17, 2007, facilities that participated in the National Emphysema Treatment Trial were also eligible to receive coverage. The following three types of facilities are eligible for reimbursement for Lung Volume Reduction Surgery (LVRS):

- National Emphysema Treatment Trial (NETT) approved (Beginning 05/07/2007, these will no longer automatically qualify and can qualify only with the other programs);
- Credentialed by the Joint Commission (formerly, the Joint Commission on Accreditation of Healthcare Organizations (JCAHO)) under their Disease Specific Certification Program for LVRS; and
- Medicare approved for lung transplants.

Only the first two types are in the list. For the purposes of this quarterly notice, there are no additions and deletions to a listing of Medicare-approved facilities that are eligible to receive coverage for lung volume reduction surgery. This information is available at www.cms.gov/MedicareApprovedFacilitie/LVRS/list.asp#TopOfPage.

For questions or additional information, contact Sarah Fulton, MHS (410-786-2749).

Addendum XIV: Medicare-Approved Bariatric Surgery Facilities (January through March 2024)

Addendum XIV includes a listing of Medicare-approved facilities that meet minimum standards for facilities modeled in part on professional society statements on competency. All facilities must meet our standards in order to receive coverage for bariatric surgery procedures. On February 21, 2006, we issued our decision memorandum on bariatric surgery procedures. We determined that bariatric surgical procedures are reasonable and necessary for Medicare beneficiaries who have a body-mass index (BMI) greater than or equal to 35, have at least one co-morbidity related to obesity and have been previously unsuccessful with medical treatment for obesity. This decision also stipulated that covered bariatric surgery procedures are reasonable and necessary only when performed at facilities that are: (1) certified by the American College of Surgeons (ACS) as a Level 1 Bariatric Surgery Center (program standards and requirements in effect on February 15, 2006); or (2) certified by the American Society for Bariatric Surgery (ASBS) as a Bariatric Surgery Center of Excellence (BSCOE) (program standards and requirements in effect on February 15, 2006).

There were no additions, deletions, or editorial changes to Medicare-approved facilities that meet CMS' minimum facility standards for bariatric surgery that have been certified by ACS and/or ASMBS in the 3-month period. This information is available at www.cms.gov/MedicareApprovedFacilitie/BSF/list.asp#TopOfPage.

For questions or additional information, contact Sarah Fulton, MHS (410-786-2749).

Addendum XV: FDG-PET for Dementia and Neurodegenerative Diseases Clinical Trials (January through March 2024)

There were no FDG-PET for Dementia and Neurodegenerative Diseases Clinical Trials published in the 3-month period.

This information is available on our website at www.cms.gov/MedicareApprovedFacilitie/PETDT/list.asp#TopOfPage.

For questions or additional information, contact David Dolan, MBA (410-786-3365).

[FR Doc. 2024–09165 Filed 4–26–24; 8:45 am]
BILLING CODE 4120–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0155]

Veterinary Feed Directive Regulation Questions and Answers; Small Entity Compliance Guide; Guidance for Industry (Revised); Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a guidance for industry (GFI) #120 entitled ''Veterinary Feed Directive Regulation Questions and Answers.'' This revised guidance document will aid industry in complying with the requirements of the veterinary feed directive (VFD) regulation.

DATES: The announcement of the guidance is published in the **Federal Register** on April 29, 2024.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2010–N–0155 for ''Veterinary Feed Directive Regulation 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 guidance to the Policy and Regulations Staff (HFV–6), Center for Veterinary Medicine, Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Dragan Momcilovic, Center for Veterinary Medicine (HFV–241), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–402–5944, *Dragan.Momcilovic@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of September 30, 2015 (80 FR 58602), FDA announced the availability of GFI #120 entitled ''Veterinary Feed Directive Regulation Questions and Answers'' to assist industry in complying with the VFD regulation in 21 CFR part 558. This guidance also serves as a Small Entities Compliance Guide (SECG) to aid industry in complying with the requirements of the VFD final rule that published in the **Federal Register** on June 3, 2015 (80 FR 31708). FDA prepared this SECG in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act (Pub. L. 104–121). In the **Federal Register** of March 28, 2019 (84 FR 11804), FDA announced the availability of a draft revised GFI #120 to provide additional information in response to questions that have been submitted by interested parties since 2015. FDA reviewed comments submitted in response to that notice by stakeholders, including animal producer organizations, the animal feed industry, veterinarians, and producers of electronic VFD software.

The Agency is now announcing the availability of revised GFI #120 which refines and clarifies language in the draft guidance based on stakeholder feedback. Specifically, stakeholders asked FDA to clarify and change language related to the amount of VFD drug in feed, the issuance and effective dates of VFDs, definitions of and requirements for individuals who

distribute VFD feeds, and the expiration of medicated feeds. In response to stakeholder comments, FDA clarified language in the respective sections and provided examples to better distinguish roles and responsibilities of involved parties.

This level 1 guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Veterinary Feed Directive Regulation Questions and Answers.'' 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 558.6 have been approved under OMB control number 0910–0363.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at *https://www.fda.gov/animal-veterinary/guidance-regulations/guidance-industry, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.*

Dated: April 24, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–09137 Filed 4–26–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2024–N–1718]

Endocrinologic and Metabolic Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments—Biologics License Application 761326 for NNC0148–0287 Injection (Insulin Icodec)

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Endocrinologic and Metabolic Drugs Advisory Committee (the Committee). The general function of the Committee is to provide advice and recommendations to FDA on regulatory issues. The meeting will be open to the public. FDA is establishing a docket for public comment on this document.

DATES: The meeting will be held on May 24, 2024, from 9 a.m. to 4 p.m. Eastern Time.

ADDRESSES: All meeting participants will be heard, viewed, captioned, and recorded for this advisory committee meeting via an online teleconferencing and/or video conferencing platform.

Answers to commonly asked questions about FDA advisory committee meetings, may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.*

FDA is establishing a docket for public comment on this meeting. The docket number is FDA–2024–N–1718. The docket will close on May 23, 2024. 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 May 23, 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.

Comments received on or before May 16, 2024, will be provided to the Committee. Comments received after that date will be taken into consideration by FDA. In the event that the meeting is cancelled, FDA will continue to evaluate any relevant applications or information, and consider any comments submitted to the docket, as appropriate.

You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2024–N–1718 for ''Endocrinologic and Metabolic Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments.'' 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.'' FDA 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 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 the 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.

FOR FURTHER INFORMATION CONTACT: LaToya Bonner, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–2855, email: *EMDAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last-minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check FDA's website at *https://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: The meeting presentations will be heard, viewed, captioned, and recorded through an online teleconferencing and/or video conferencing platform. The Committee will discuss the safety and efficacy of biologics license application 761326 for NNC0148–0287 injection (insulin icodec), a long-acting insulin analog product, submitted by Novo Nordisk. The proposed indication is to improve glycemic control in adults with diabetes mellitus.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available on FDA's website at the time of the advisory committee meeting. Background material and the link to the online teleconference and/or video conference meeting will be available at *https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

The meeting will include slide presentations with audio and video components to allow the presentation of materials in a manner that most closely resembles an in-person advisory committee meeting.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the Committee. All electronic and written submissions to the Docket (see **ADDRESSES**) on or before May 16, 2024, will be provided to the Committee. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Eastern Time. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before May 10, 2024. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by May 13, 2024.

For press inquiries, please contact the Office of Media Affairs at *fdaoma@fda.hhs.gov* or 301–796–4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact LaToya Bonner (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. 1001 *et seq.*). This meeting notice also serves as notice that, pursuant to 21 CFR 10.19, the requirements in 21 CFR 14.22(b), (f), and (g) relating to the location of advisory committee meetings are hereby waived to allow for this meeting to take place using an online meeting platform. This waiver is in the interest of allowing greater transparency and opportunities for public participation, in addition to convenience for advisory committee members, speakers, and guest speakers. The conditions for issuance of a waiver under 21 CFR 10.19 are met.

Dated: April 24, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–09158 Filed 4–26–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2024–D–1461]

Content and Format of Composition Statement and Corresponding Statement of Ingredients in Labeling in New Drug Applications and Abbreviated New Drug Applications; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''Content and Format of Composition Statements in NDAs and ANDAs and Corresponding Statement of Ingredients in Labeling.'' This guidance is intended to assist new drug application (NDA) and abbreviated new drug application (ANDA) applicants in submitting an accurate and complete composition statement in their applications and corresponding statement of ingredients in the labeling, when applicable. This guidance describes best practices for writing the composition statement and corresponding statement of ingredients in labeling. This guidance recommends how applicants can provide complete information with the goal of minimizing the number of assessment cycles and communications that are necessary for approval, as well as ensuring product labels are written clearly.

DATES: Submit either electronic or written comments on the draft guidance by June 28, 2024 to ensure that the Agency considers your comment on this

draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2024–D–1461 for ''Content and Format of Composition Statements in NDAs and ANDAs and Corresponding Statement of Ingredients in Labeling.'' 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 draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Rachel Erdman, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 1715, 301–348–3984, *Rachel.Erdman@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Content and Format of Composition Statements in NDAs and ANDAs and Corresponding Statement of Ingredients in Labeling.'' Section 505(b)(1)(A) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(b)(1)(A)) requires, among other things, that an NDA includes ''a full list of the articles used as components of such drug'' and ''a full statement of the composition of such drug.'' Further, the regulations at § 314.50(d)(1)(ii)(*a*) (21 CFR 314.50(d)(1)(ii)(*a*)) require NDA holders to provide a ''list of all components used in the manufacture of the drug product (regardless of whether they appear in the drug product) and a statement of the composition of the drug product . . .'' An ANDA applicant is also required to list all components used in the manufacture of the drug product and a statement of the composition of the drug product (§ 314.50(d)(1)(ii)(*a*)) and must also identify and characterize the inactive ingredients (21 CFR 314.94(a)(9)(ii)).

This guidance is intended to assist NDA and ANDA applicants in submitting an accurate and complete composition statement in their applications and corresponding statement of ingredients in labeling when applicable (21 CFR 201.100 requires labeling for certain drug products to include information on inactive ingredients). This guidance describes best practices for writing the composition statement and corresponding statement of ingredients in labeling. This guidance recommends how applicants can provide complete information with the goal of minimizing the number of assessment cycles and communications that are necessary for approval, as well as ensuring product labels are clear. This guidance includes examples of common, recurring problems identified during FDA's preliminary and substantive assessment of NDAs and ANDAs with respect to the content and format of the composition statement in NDAs and ANDAs and the corresponding statement of ingredients in labeling.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Content and Format of Composition Statements in NDAs and ANDAs and Corresponding Statement of Ingredients in Labeling.'' 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 part 314 relating to the submission of NDAs and ANDAs, as well as related postapproval submissions (including annual reports) and drug master files have been approved under OMB control number 0910–0001. The collections of information in 21 CFR 201.56 and 201.57 pertaining to the content and format requirements of labeling for prescription drug products have been approved under OMB control number 0910–0572.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance 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.*

Dated: April 24, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–09156 Filed 4–26–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–P–5450]

Determination That FLUDARABINE PHOSPHATE Injection, 50 Milligrams/2 Milliliter, Was Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) has determined that FLUDARABINE PHOSPHATE Injection, 50 milligrams (mg)/2 milliliter (mL), was not withdrawn from sale for reasons of safety or effectiveness. This determination means that FDA will not begin procedures to withdraw approval of abbreviated new drug applications (ANDAs) that refer to this drug product, and it will allow FDA to continue to approve ANDAs that refer to the product as long as they meet relevant legal and regulatory requirements.

FOR FURTHER INFORMATION CONTACT: Kaetochi Okemgbo, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6224, Silver Spring, MD 20993–0002, 301–796–1546, *Kaetochi.Okemgbo@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Section 505(j) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(j)) allows the submission of an ANDA to market a generic version of a previously approved drug product. To obtain approval, the ANDA applicant must show, among other things, that the generic drug product: (1) has the same active ingredient(s), dosage form, route of administration, strength, conditions of use, and (with certain exceptions) labeling as the listed drug, which is a version of the drug that was previously approved, and (2) is bioequivalent to the listed drug. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA).

Section 505(j)(7) of the FD&C Act requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the ''Approved Drug Products With Therapeutic Equivalence Evaluations,'' which is known generally as the ''Orange Book.'' Under FDA regulations, drugs are removed from the list if the Agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

A person may petition the Agency to determine, or the Agency may determine on its own initiative, whether a listed drug was withdrawn from sale for reasons of safety or effectiveness. This determination may be made at any time after the drug has been withdrawn from sale, but must be made prior to approving an ANDA that refers to the listed drug (§ 314.161 (21 CFR 314.161)). FDA may not approve an ANDA that does not refer to a listed drug.

FLUDARABINE PHOSPHATE Injection, 50 mg/2 mL, is the subject of NDA 022137, held by Sandoz Inc., and initially approved on September 21, 2007. FLUDARABINE PHOSPHATE Injection is indicated for the treatment of adult patients with B-cell chronic lymphocytic leukemia who have not responded to or whose disease has progressed during treatment with at least one standard alkylating-agent containing regimen. The drug product is currently listed in the ''Discontinued Drug Product List'' section of the Orange Book.

Hisun Pharmaceutical (Hangzhou) Co., Ltd. submitted a citizen petition dated December 12, 2023 (Docket No. FDA–2023–P–5450), under 21 CFR 10.30, requesting that the Agency determine whether FLUDARABINE PHOSPHATE Injection, 50 mg/2 mL, was withdrawn from sale for reasons of safety or effectiveness.

After considering the citizen petition and reviewing Agency records and based on the information we have at this time, FDA has determined under § 314.161 that FLUDARABINE PHOSPHATE Injection, 50 mg/2 mL, was not withdrawn for reasons of safety or effectiveness. The petitioner has identified no data or other information suggesting that FLUDARABINE PHOSPHATE Injection, 50 mg/2 mL, was withdrawn for reasons of safety or effectiveness. We have carefully reviewed our files for records concerning the withdrawal of FLUDARABINE PHOSPHATE Injection, 50 mg/2 mL, from sale. We have also independently evaluated relevant literature and data for possible postmarketing adverse events. We have reviewed the available evidence and determined that this drug product was not withdrawn from sale for reasons of safety or effectiveness.

Accordingly, the Agency will continue to list FLUDARABINE PHOSPHATE Injection, 50 mg/2 mL, in the ''Discontinued Drug Product List'' section of the Orange Book. The ''Discontinued Drug Product List'' delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. FDA will not begin procedures to withdraw approval of approved ANDAs that refer to this drug product. Additional ANDAs for this drug product may also be approved by the Agency as long as they meet all other legal and regulatory requirements for the approval of ANDAs.

Dated: April 23, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–09050 Filed 4–26–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2024–D–1613]

Raw Data for Safety and Effectiveness Studies; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry (GFI) #287 entitled ''Raw Data for Safety and Effectiveness Studies.'' This guidance provides information to animal drug sponsors (sponsors) on the use of raw data in the Center for Veterinary Medicine's (CVM's) review of safety and effectiveness studies submitted in support of new animal drug applications. This guidance also describes our recommendations for submitting raw data.

DATES: Submit either electronic or written comments on the draft guidance by June 28, 2024 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2024–D–1613 for ''Raw Data for Safety and Effectiveness Studies.'' 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 guidance to the Policy and Regulations Staff (HFV–6), Center for Veterinary Medicine, Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Steven Fleischer, Center for Veterinary Medicine (HFV–110), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20850, 240–402–0809, *steven.fleischer@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry #287 entitled ''Raw Data for Safety and Effectiveness Studies.'' The purpose of this guidance is to provide recommendations to sponsors on submission of raw data. In addition, this guidance discusses how CVM uses the raw data during review of new animal drug applications and how the raw data allow CVM to have confidence in the information used to make regulatory decisions.

This level 1 draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Raw Data for Safety and Effectiveness Studies.'' 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 (44 U.S.C. 3501–3521). The collections of information in 21 CFR part 514 have been approved under OMB control number 0910–0032.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at *https://www.fda.gov/animal-veterinary/guidance-regulations/guidance-industry, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.*

Dated: April 24, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–09139 Filed 4–26–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Applications (P01 Clinical Trial Not Allowed).

Date: May 24, 2024.

Time: 10:30 a.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G56, Rockville, MD 20852 (Video Assisted Meeting).

Contact Person: Poonam Tewary, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G56, Rockville, MD 20852, (301) 761–7219, *tewaryp@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: April 24, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09107 Filed 4–26–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye Institute; Notice of Partially Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Eye Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend as well as those who need special assistance, such as sign language interpretation or other reasonable accommodation, must notify the Contact Person listed below in advance of the meeting. The open session will be videocast and can be accessed from the NIH Videocasting and Podcasting website (*https://videocast.nih.gov/watch=54718*).

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 intramural programs and projects as well as the grant applications and/or contract proposals 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 and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Eye Council.

Date: June 7, 2024.

Open: 8:00 a.m. to 3:00 p.m.

Agenda: Presentation of the NEI Director's report, discussion of NEI programs, and concept clearances.

Place: National Eye Institute, 1st Floor, Room A/B/C, 6700B Rockledge Drive, Bethesda, MD 20892 (In-Person Meeting).

Closed: 3:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications and/or proposals

Place: National Eye Institute, 1st Floor, Room A/B/C, 6700B Rockledge Drive, Bethesda, MD 20892 (In-Person Meeting).

Contact Person: Kathleen C. Anderson, Ph.D., Director, Division of Extramural Activities, 6700B Rockledge Drive, Room 3440, Bethesda, MD 20892, (301) 451–2020, *kanders1@nei.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the contact person listed above before the meeting or within 15 days after the meeting. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has procedures at *https://www.nih.gov/about-nih/visitor-information/campus-access-security* for entrance into on-campus and off-campus facilities. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors attending a meeting on campus or at an off-campus federal facility will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *https://www.nei.nih.gov/about/advisory-committees/national-advisory-eye-council-naec,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program No. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: April 23, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09111 Filed 4–26–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health and Human Development; 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: Eunice Kennedy Shriver National Institute of Child Health and Human Development Special Emphasis Panel; Multicenter Clinical Trials; Leveraging Network (U01).

Date: June 18, 2024.

Time: 11:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health, 6710B Rockledge Drive, Bethesda, MD 20817 (Virtual Meeting).

Contact Person: Vera A. Cherkasova, Ph.D., Scientific Review Branch, *Eunice Kennedy Shriver* National Institute of Child Health and Human Development, National Institute of Health, 6710B Rockledge Drive, Room 2137B, Bethesda, MD 20892, (240) 478–4580, *vera.cherkasova@nih.gov*.

(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)

Dated: April 24, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09108 Filed 4–26–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Child Health and Human Development Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and 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 open session will also be videocast and can be accessed from the NIH Videocasting and Podcasting website (*http://videocast.nih.gov/*).

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 Advisory Child Health and Human Development Council.

Date: June 3–4, 2024.

Open: June 3, 2024, 10:00 a.m. to 5:00 p.m.

Agenda: Opening Remarks, Administrative Matters, NICHD Director's Report, and other business of the Council.

Place: Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health, 6710B Rockledge Drive, Room 1425 & 142, Bethesda, MD 20817 (Hybrid).

Closed: June 4, 2024, 9:30 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health, 6710B Rockledge Drive, Room 1425 & 1427, Bethesda, MD 20817 (Hybrid).

Contact Person: Rebekah S. Rasooly, Ph.D., Director, Division of Extramural Activities, *Eunice Kennedy Shriver* National Institute of Child Health and Human Development, NIH, 6710B Rockledge Drive, Room 2316, Bethesda, MD 20817.

Information is also available on the Institute's/Center's home page: *https://www.nichd.nih.gov/about/advisory/council,* 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)

Dated: April 23, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09055 Filed 4–26–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health and Human Development; 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: Eunice Kennedy Shriver National Institute of Child Health and Human Development Special Emphasis Panel; Developmental Biology/Member Conflict.

Date: June 7, 2024

Time: 10:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health, 6710B Rockledge Drive, Bethesda, MD 20817 (Virtual Meeting).

Contact Person: Vera A. Cherkasova, Ph.D., Scientific Review Branch, Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institute of Health, 6710B Rockledge Drive, Room 2137B, Bethesda, MD 20892, (240) 478–4580, *vera.cherkasova@nih.gov*.

(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)

Dated: April 24, 2024.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09113 Filed 4–26–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given that the Substance Abuse and Mental Health Services Administration's (SAMHSA) Center for Substance Abuse Prevention's (CSAP) Drug Testing Advisory Board (DTAB) will convene in open session in person and via web conference on June 4th, 2024, from 10:00 a.m. EST to 5:00 p.m. EST and in closed session on June 5th, 2024 from 9:00 a.m. EST to 12:00 p.m. EST.

The board will meet in open-session June 4, 2024, from 10:00 a.m. EST to 5:00 p.m. EST to discuss the Mandatory Guidelines for Federal Workplace Drug Testing Programs, hear updates from the Nuclear Regulatory Commission, and discuss the availability of FDA 510(k) cleared assays and urine verses oral fluid prevalence data and specimen

validity and biomarker testing. Presentations include one by Faye Caldwell on industry moving parts pertaining to Oral Fluid implementation and another by Dr. Edward Cone regarding Johns Hopkins University study updates.

The board will meet in closed session on June 5, 2024, from 9:00 a.m. EST to 12:00 p.m. EST to discuss specimen validity testing data, challenges to Oral Fluid testing and the status of the Hair Mandatory Guidelines. All of these topics require input and discussion from Board Members as to the next steps of Federal Workplace Drug Testing. The DTAB meeting on June 5, 2024, from 9:00 a.m. EST to 12:00 p.m. EST, is closed to the public, as determined by the Assistant Secretary for Mental Health and Substance Use, SAMHSA, in accordance with 5 U.S.C. 552b(c)(9)(B) and 5 U.S.C. App. 2, Section 10(d).

Meeting registration information can be completed at *https://snacregister.samhsa.gov/.* Web conference and call information will be sent after completing registration. Meeting information and a roster of DTAB members may be obtained by accessing the SAMHSA Advisory Committees website, *https://www.samhsa.gov/about-us/advisory-councils/meetings,* or by contacting the Designated Federal Officer, Lisa Davis.

Committee Name: Substance Abuse and Mental Health Services Administration Center for Substance Abuse Prevention Drug Testing Advisory Board.

Dates/Time/Type: June 4, 2024, from 10:00 a.m. EST to 5:00 p.m. EST: OPEN; June 5, 2024, from 9:00 a.m. EST to 12:00 p.m. EST: CLOSED.

Place: Substance Abuse and Mental Health Services Administration, 5600 Fishers Lane, Rockville, MD 20857.

To Submit Comments: Please send comments in writing at least 7 days prior to the meeting to the to the following email: *DFWP@samhsa.hhs.gov.*

Contact: Lisa S. Davis, M.S, Social Science Analyst, Center for Substance Abuse Prevention, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone: (240) 276–1440, Email: *Lisa.Davis@samhsa.hhs.gov.*

Anastasia Flanagan,

Public Health Advisor, Division of Workplace Programs.

[FR Doc. 2024–09047 Filed 4–26–24; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2024–0002; Internal Agency Docket No. FEMA–B–2430]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before July 29, 2024.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2430, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/*

prelimdownload and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Nicholas A. Shufro,

Assistant Administrator (Acting) for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Allen Parish, Louisiana and Incorporated Areas Project: 22–06–0038S Preliminary Date: December 14, 2023	
Unincorporated Areas of Allen Parish	Allen Parish Police Jury Administration Building, 602 Court Street, Oberlin, LA 70655.
Village of Reeves	Village Hall, 18370 Highway 190, Reeves, LA 70658.
Buchanan County, Missouri and Incorporated Areas Project: 19–07–0077S Preliminary Date: February 21, 2024	
City of Rushville	Buchanan County Emergency Management Office, 411 Jules Street, Room 102, St. Joseph, MO 64501.
City of St. Joseph	City Hall, 1100 Frederick Avenue, Room 107, St. Joseph, MO 64501.
Town of Agency	Buchanan County Emergency Management Office, 411 Jules Street, Room 102, St. Joseph, MO 64501.
Unincorporated Areas of Buchanan County	Buchanan County Emergency Management Office, 411 Jules Street, Room 102, St. Joseph, MO 64501.
Village of Lewis and Clark	Lewis and Clark Village Office, 101 Lakeshore Drive, Rushville, MO 64484.

[FR Doc. 2024–09175 Filed 4–26–24; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2024–0002; Internal Agency Docket No. FEMA–B–2432]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before July 29, 2024.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2432, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in

support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Nicholas A. Shufro,

Assistant Administrator (Acting) for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Appomattox County, Virginia and Incorporated Areas Project: 20–03–0035S Preliminary Date: September 01, 2023	
Town of Appomattox	Public Works Department, 1799 Church Street, Appomattox, VA 24522.
Unincorporated Areas of Appomattox County	Appomattox County Administration Building, 153–A Morton Lane, Appomattox, VA 24522.
Charlotte County, Virginia and Incorporated Areas Project: 20–03–0042S Preliminary Date: September 01, 2023	
Town of Charlotte Court House	Town Office, 350 George Washington Highway, Charlotte Court House, VA 23923.
Town of Drakes Branch	Town Office, 4801 Drakes Branch Main Street, Drakes Branch, VA 23937.
Town of Phenix	Town Office, 6860 Phenix Main Street, Phenix, VA 23959.
Unincorporated Areas of Charlotte County	Charlotte County Administration Building, 250 LeGrande Avenue, Suite A, Charlotte Court House, VA 23923.

[FR Doc. 2024–09174 Filed 4–26–24; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2024–0002; Internal Agency Docket No. FEMA–B–2433]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before July 29, 2024.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2433, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact

stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Nicholas A. Shufro,

Assistant Administrator (Acting) for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Jefferson County, Alabama and Incorporated Areas Project: 18–04–0027S Preliminary Date: July 21, 2022	
City of Bessemer	City Hall, 1700 3rd Avenue North, Bessemer, AL 35020.
City of Birmingham	Floodplain Management and Disaster Mitigation Services, 710 20th Street North, Room 500, Birmingham, AL 35203.
City of Hueytown	Building and Zoning Department, 1318 Hueytown Road, Hueytown, AL 35023.
City of Midfield	City Hall, 725 Bessemer Super Highway, Midfield, AL 35228.
Unincorporated Areas of Jefferson County	Jefferson County Department of Development Services, 716 Richard Arrington Jr. Boulevard North, Suite B200, Birmingham, AL 35203.
Tuscaloosa County, Alabama and Incorporated Areas Project: 18–04–0027S Preliminary Date: July 21, 2022	
City of Northport	City Hall, 3500 McFarland Boulevard, Northport, AL 35476.
City of Tuscaloosa	City Hall, 2201 University Boulevard, Tuscaloosa, AL 35401.
Town of Coaling	Town Hall, 11281 Stephens Loop, Coaling, AL 35453.
Unincorporated Areas of Tuscaloosa County	Tuscaloosa County Public Works Department, 2810 35th Street, Tuscaloosa, AL 35401.

[FR Doc. 2024–09166 Filed 4–26–24; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2024–0002]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: New or modified Base (1-percent annual chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or regulatory floodways (hereinafter referred to as flood hazard determinations) as shown on the indicated Letter of Map Revision (LOMR) for each of the communities listed in the table below are finalized. Each LOMR revises the Flood Insurance Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities.

DATES: Each LOMR was finalized as in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address listed in the table below and online through the FEMA Map Service Center at *https://msc.fema.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

The modified flood hazard determinations are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C.

4001 *et seq.,* and with 44 CFR part 65. The currently effective community number is shown and must be used for all new policies and renewals.

The new or modified flood hazard information is the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to remain qualified for participation in the National Flood Insurance Program (NFIP).

This new or modified flood hazard information, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

This new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each community or online through the FEMA Map Service Center at *https://msc.fema.gov.*

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Nicholas A. Shufro,

Assistant Administrator (Acting) for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Alabama: Walker (FEMA Docket No.: B–2418)..	Unincorporated areas of Walker County (23–04–3571P).	Steve Miller, Chair, Walker County Commission, 1801 3rd Avenue South, Suite 113, Jasper, AL 35501.	Walker County Commission, 1801 3rd Avenue South Suite 113, Jasper, AL 35501.	Apr. 19, 2024 ..	010301
Colorado:					
Boulder (FEMA Docket No.: B–2401)..	City of Lafayette (23–08–0459P).	The Honorable J. D. Mangat, Mayor, City of Lafayette, 1290 South Public Road, Lafayette, CO 80026.	Planning Department, 1290 South Public Road, Lafayette, CO 80026.	Apr. 15, 2024 ..	080026
Boulder (FEMA Docket No.: B–2401)..	Unincorporated areas of Boulder County (23–08–0459P).	Claire Levy, Chair, Boulder County Board of Commissioners, P.O. Box 471, Boulder, CO 80306.	Boulder County Transportation Department, 1739 Broadway, Suite 300, Boulder, CO 80306.	Apr. 15, 2024 ..	080023
Broomfield (FEMA Docket No.: B–2401)..	City and County of Broomfield (23–08–0459P).	The Honorable Guyleen Castriotta, Mayor, City and County of Broomfield, 1 DesCombes Drive, Broomfield, CO 80020.	Engineering Department, 1 DesCombes Drive, Broomfield, CO 80020.	Apr. 15, 2024 ..	085073
Florida:					
Charlotte (FEMA Docket No.: B–2407)..	Unincorporated areas of Charlotte County (22–04–3269P).	Bill Truex, Chair, Charlotte County Board of Commissioners, 18500 Murdock Circle, Suite 536, Port Charlotte, FL 33948.	Charlotte County Building Department, 18400 Murdock Circle, Port Charlotte, FL 33948.	Apr. 2, 2024	120061
Charlotte (FEMA Docket No.: B–2411)..	Unincorporated areas of Charlotte County (23–04–6087P).	Bill Truex, Chair, Charlotte County Board of Commissioners, 18500 Murdock Circle, Suite 536, Port Charlotte, FL 33948.	Charlotte County Building Department, 18400 Murdock Circle, Port Charlotte, FL 33948.	Apr. 8, 2024	120061
Lee (FEMA Docket No.: B–2411)..	City of Fort Myers (23–04–3576P).	Marty Lawing, City of Fort Myers Manager, 2200 2nd Street, Fort Myers, FL 33901.	Building Department, 1825 Hendry Street, Fort Myers, FL 33901.	Apr. 15, 2024 ..	125106
Lee (FEMA Docket No.: B–2411)..	Unincorporated areas of Lee County (23–04–3576P).	David Harner, Lee County Manager, P.O. Box 398, Fort Myers, FL 33902.	Lee County Building Department, 1500 Monroe Street, Fort Myers, FL 33901.	Apr. 15, 2024 ..	125124
Sarasota (FEMA Docket No.: B–2401)..	City of Sarasota (23–04–4295P).	The Honorable Kyle Scott Battie, Mayor, City of Sarasota, 1565 1st Street, Room 101, Sarasota, FL 34236.	Development Service Department, 1565 1st Street, Room 101, Sarasota, FL 34236.	Mar. 27, 2024 ..	125150
Georgia:					
Cobb (FEMA Docket No.: B–2407)..	City of Smyrna (23–04–2440P).	The Honorable Derek Norton, Mayor, City of Smyrna, 2800 King Street, Smyrna, GA 30080.	Engineering Department, 2190 Atlanta Road, Smyrna, GA 30080.	Apr. 2, 2024	130057
Fulton (FEMA Docket No.: B–2407)..	City of Atlanta (23–04–2440P).	The Honorable Andre Dickens, Mayor, City of Atlanta, 5563 Trinity Avenue Southwest, Atlanta, GA 30303.	City Hall, 5563 Trinity Avenue Southwest, Atlanta, GA 30303.	Apr. 2, 2024	135157
Maine: Lincoln (FEMA Docket No.: B–2411)..	Town Boothbay Harbor (23–01–0799P).	Julia Latter, Town Boothbay Harbor Manager, 11 Howard Street, Boothbay Harbor, ME 04538.	Code Enforcement Department, 11 Howard Street, Boothbay Harbor, ME 04538.	Apr. 12, 2024 ..	230213
Massachusetts:					
Essex (FEMA Docket No.: B–2407)..	City of Gloucester (23–01–0759P).	The Honorable Greg Varga, Mayor, City of Gloucester, 9 Dale Avenue, Gloucester, MA 01930.	City Hall, 3 Pond Road, 2nd Floor, Gloucester, MA 01930.	Apr. 8, 2024	250082
Massachusetts: Essex (FEMA Docket No.: B–2411)..	City of Gloucester (24–01–0023P).	The Honorable Greg Varga, Mayor, City of Gloucester, 9 Dale Avenue, Gloucester, MA 01930.	City Hall, 3 Pond Road, 2nd Floor, Gloucester, MA 01930.	Mar. 29, 2024 ..	250082
Montana: Lewis and Clark (FEMA Docket No.: B–2401)..	Unincorporated areas of Lewis and Clark County (23–08–0467P).	Tom Rolfe, Chair, Lewis and Clark County Board of Commissioners, 316 North Park Avenue, Room 345, Helena, MT 59623.	Lewis and Clark County Department of Floodplain Development, 316 North Park Avenue, Room 230, Helena, MT 59623.	Apr. 8, 2024	300038
North Carolina:					

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Alamance (FEMA Docket No.: B–2407)..	City of Burlington (24–04–0520P).	The Honorable James B. Butler, Mayor, City of Burlington, P.O. Box 1358, Burlington, NC 27216.	Engineering Department, 425 South Lexington Avenue, Burlington, NC 27215.	Apr. 5, 2024. ...	370002
Madison (FEMA Docket No.: B–2424)..	Unincorporated areas of Madison County (23–04–3517X).	Matthew Wechtel, Chair, Madison County Board of Commissioners, P.O. Box 573, Marshall, NC 28753.	Madison County Development Services Department 5707 U.S. Highway 25/70, Marshall, NC 28753.	Mar. 18, 2024 ..	370152
Orange (FEMA Docket No.: B–2407)..	Town of Chapel Hill (23–04–0988P).	The Honorable Jessica Anderson, Mayor, Town of Chapel Hill, 405 Martin Luther King Jr. Boulevard, Chapel Hill, NC 27514.	Planning Department, 405 Martin Luther King Jr. Boulevard, Chapel Hill, NC 27514.	Apr. 11, 2024 ..	370180
Union (FEMA Docket No.: B–2407)..	Unincorporated areas of Union County (24–04–0519P)	J. R. Rowell, Chair, Union County Board of Commissioners 500 North Main Street, Suite 914, Monroe, NC 28112.	Union County Planning and Development Department, 500 North Main Street, Suite 70, Monroe, NC 28112.	Apr. 8, 2024	370234
Wake (FEMA Docket No.: B–2401)..	Town of Rolesville (24–04–0517P).	The Honorable Ronnie Currin, Mayor, Town of Rolesville, P.O. Box 250, Rolesville, NC 27571.	Planning Department 502 Southtown Circle, Rolesville, NC 27571.	Apr. 11, 2024 ..	370468
Wake (FEMA Docket No.: B–2401)..	Town of Wake Forest (24–04–0517P).	The Honorable Vivian A. Jones, Mayor, Town of Wake Forest, 301 South Brooks Street Wake Forest, NC 27587.	Planning Department 301 South Brooks Street, Lake Forest, NC 27587.	Apr. 11, 2024 ..	370244
Wake (FEMA Docket No.: B–2401)..	Unincorporated areas of Wake County (24–04–0517P).	Shinica Thomas, Chair, Wake County Board of Commissioners, P.O. Box 550, Raleigh, NC 27602.	Wake County Environmental Services Department 337 South Salisbury Street, Raleigh, NC 27601.	Apr. 11, 2024 ..	370368
Texas:					
Bexar (FEMA Docket No.: B–2411)..	City of San Antonio (23–06–1883P).	The Honorable Ron Nirenberg, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	Public Works Department, Storm Water Division, 1901 South Alamo Street, 2nd Floor, San Antonio, TX 78204.	Apr. 8, 2024	480045
Brazos (FEMA Docket No.: B–2407)..	City of Bryan (23–06–2310P).	The Honorable Bobby Gutierrez, Mayor, City of Bryan, P.O. Box 1000, Bryan, TX 77805.	City Hall, 300 South Texas Avenue, Bryan, TX 77805.	Mar. 27, 2024 ..	480082
Collin (FEMA Docket No.: B–2401)..	City of McKinney (23–06–1123P).	The Honorable George Fuller, Mayor, City of McKinney, 222 North Tennessee Street, McKinney, TX 75069.	City Hall, 222 North Tennessee Street, McKinney, TX 75069.	Apr. 1, 2024	480135
Collin (FEMA Docket No.: B–2401)..	City of Murphy (23–06–1486P).	The Honorable Scott Bradley, Mayor, City of Murphy, 206 North Murphy Road, Murphy, TX 75094.	City Hall, 206 North Murphy Road, Murphy, TX 75094.	Mar. 29, 2024 ..	480137
Collin (FEMA Docket No.: B–2407)..	City of Plano (23–06–1831P).	The Honorable John B. Muns, Mayor, City of Plano, 1520 K Avenue, Plano, TX 75074.	Engineering Department, 1520 K Avenue, Plano, TX 75074.	Apr. 15, 2024 ..	480140
Comal (FEMA Docket No.: B–2407)..	Unincorporated areas of Comal County (23–06–1468P).	The Honorable Sherman Krause, Comal County Judge, 150 North Seguin Avenue, New Braunfels, TX 78130.	Comal County Courthouse, 150 North Seguin Avenue, New Braunfels, TX 78130.	Apr. 12, 2024 ..	485463
Dallas (FEMA Docket No.: B–2401)..	City of Mesquite (23–06–1636P).	The Honorable Daniel Alemán, Jr., Mayor, City of Mesquite, P.O. Box 850137, Mesquite, TX 75185.	City Hall, 757 North Galloway Avenue, Mesquite, TX 75149.	Apr. 8, 2024	485490
Denton (FEMA Docket No.: B–2407)..	City of Frisco (23–06–1466P).	The Honorable Jeff Cheney, Mayor, City of Frisco, 6101 Frisco Square Boulevard, Frisco, TX 75034.	George A. Purefoy Municipal Center, 6101 Frisco Square Boulevard, Frisco, TX 75034.	Apr. 15, 2024 ..	480134
Ellis (FEMA Docket No.: B–2411)..	City of Grand Prairie (23–06–2587P).	The Honorable Ron Jensen, Mayor, City of Grand Prairie, P.O. Box 534045, Grand Prairie, TX 75053.	City Hall, 300 West Main Street, Grand Prairie, TX 75050.	Apr. 15, 2024 ..	485472
Harris (FEMA Docket No.: B–2407)..	Unincorporated areas of Harris County (23–06–0151P).	The Honorable Lina Hidalgo, Harris County Judge, 1001 Preston Street, Suite 911, Houston, TX 77002.	Harris County Permit Office, 1111 Fannin Street, 8th Floor, Houston, TX 77002.	Apr. 15, 2024 ..	480287
Hays (FEMA Docket No.: B–2411)..	Unincorporated areas of Hays County (23–06–1564P).	The Honorable Ruben Becerra, Hays County Judge, 111 East San Antonio Street, Suite 300, San Marcos, TX 78666.	Hays County Development Services Department, 2171 Yarrington Road, Suite 100, Kyle, TX 78640.	Apr. 11, 2024 ..	480321
Midland (FEMA Docket No.: B–2401)..	City of Midland (23–06–1759P).	The Honorable Lori Blong, Mayor, City of Midland, 300 North Loraine Street, Midland, TX 79701.	Engineering Department, 300 North Loraine Street, Midland, TX 79701.	Apr. 4, 2024	480477
Tarrant (FEMA Docket No.: B–2411)..	City of Fort Worth (23–06–1421P).	The Honorable Mattie Parker, Mayor, City of Fort Worth, 200 Texas Street, Fort Worth, TX 76102.	Department of Transportation and Public Works, Engineering Vault and Map Repository, 200 Texas Street, Fort Worth, TX 76102.	Apr. 8, 2024	480596
Tarrant (FEMA Docket No.: B–2411)..	City of Mansfield (23–06–0492P).	The Honorable Michael Evans, Mayor, City of Mansfield, 1200 East Broad Street, Mansfield, TX 76063.	City Hall, 1200 East Broad Street, Mansfield, TX 76063.	Apr. 4, 2024	480606
Travis (FEMA Docket No.: B–2407)..	City of Jonestown (23–06–1536P).	The Honorable Paul Johnson, Mayor, City of Jonestown, 18649 F.M. 1431, Suite 4A, Jonestown, TX 78645.	City Hall, 18649 F.M. 1431, Suite 4A, Jonestown, TX 78645.	Apr. 15, 2024 ..	481597
Travis (FEMA Docket No.: B–2407)..	City of Leander (23–06–1536P).	Isaac Turner, City of Leander Interim Manager, P.O. Box 319, Leander, TX 78646.	Engineering Department, 201 North Brushy Street, Leander, TX 78646.	Apr. 15, 2024 ..	481536

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Travis (FEMA Docket No.: B–2401)..	Unincorporated areas of Travis County (23–06–1281P).	The Honorable Andy Brown, Travis County Judge, P.O. Box 1748, Austin, TX 78767.	Travis County Transportation and Natural Resources Department, 700 Lavaca Street, 5th Floor, Austin, TX 78701.	Apr. 1, 2024	481026

[FR Doc. 2024–09169 Filed 4–26–24; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2023–0049]

Establishment of the Artificial Intelligence Safety and Security Board

AGENCY: Office of the Secretary, Department of Homeland Security (DHS).

ACTION: Notice of the establishment of the Artificial Intelligence Safety and Security Board.

SUMMARY: Pursuant to Executive Order (E.O.) 14110, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence,* dated October 30, 2023, the Department of Homeland Security, through the Office of Partnership and Engagement, has established the Artificial Intelligence Safety and Security Board (the Board). The Board will provide the Secretary of Homeland Security (hereinafter referred to as ''the Secretary'') information, advice, and recommendations to advance the security and resilience of our nation's critical infrastructure in its use of artificial intelligence (AI). This Notice is not a solicitation for membership.

FOR FURTHER INFORMATION CONTACT: Matthew F. Ferraro, U.S. Department of Homeland Security at *AIBoard@hq.dhs.gov* or 202–930–0595.

SUPPLEMENTARY INFORMATION: The scope of the Board's activities can include, but need not be limited to, information about emergent risks, threat mitigation guidance, and guardrails for critical infrastructure owners' and operators' use of AI. The Secretary established the Board pursuant to subsection 4.3(a)(v) of Executive Order (E.O.) 14110, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence,* dated October 30, 2023, and section 871(a) of the Homeland Security Act of 2002, 6 United States Code (U.S.C.) 451(a). In recognition of the sensitive nature of the subject matter involved, the Secretary exempted the Board from The Federal Advisory Committee Act (FACA), 5 U.S.C. ch. 10. This notice is being provided in accordance with 6 U.S.C. 451(a).

The primary purpose of the Board shall be to provide the Secretary information, advice, and recommendations to advance the security and resilience of our nation's critical infrastructure in its use of artificial intelligence (AI). The Board's advice and recommendations are to be specific, actionable, timely, and strategic, and targeted to mitigate emerging risks to critical infrastructure from its use.

The duties of the Board are solely advisory in nature and shall extend only to the submission of information, advice, and recommendations to the Secretary. In recognition of the sensitive nature of the subject matter involved, the Secretary exempted the Board from *The Federal Advisory Committee Act* (FACA), 5 U.S.C. ch. 10.

Membership: The Board shall consist of no more than thirty-five (35) Representative Members and the Secretary. The Secretary shall Chair the Board and shall select a Vice Chair. The Secretary shall be a non-voting member of the Board.

The Chair shall lead Board meetings and provide strategic leadership and direction for the Board discussions and activities. The term of office of the Vice Chair shall be two years. The Vice Chair may be reappointed by the Secretary, not to exceed two additional terms. If the Vice Chair is not able to serve for an entire term, the Secretary shall make a new appointment.

The Board Members shall be appointed by and serve at the pleasure of the Secretary. Members shall serve a term of two years, with opportunities to be reappointed for up to two additional terms.

In order for the Secretary to fully leverage broad-ranging experience and education, the Board shall be diverse with regard to professional and technical expertise. DHS is committed to pursuing opportunities, consistent with applicable law, to compose a Board that reflects the diversity of the AI community. In accordance with E.O. 14110, the Board shall include AI experts from the private sector, academia, and government, as appropriate.

Board Members shall be comprised of Representative Members only. Members shall not serve as Special Government Employees as defined in 18 U.S.C. 202(a). The DHS Office of Partnership and Engagement shall ensure that the Board reflects a balanced membership and includes a cross-section of Members having an interest in the duties and authorities of DHS. Appointments shall be made without regard to political affiliation. In the event the Board is terminated, all appointments to the Board shall terminate automatically.

Duration: The Secretary may extend the Board every two years as the Secretary deems appropriate, pursuant to 6 U.S.C. 451.

Michael J. Miron,

Committee Management Officer, Department of Homeland Security.

[FR Doc. 2024–09132 Filed 4–26–24; 8:45 am]

BILLING CODE 9112–FN–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2024–N021; FXES11130100000–245–FF01E00000]

Endangered Species; Receipt of Recovery 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, have received applications for permits to conduct activities intended to enhance the propagation and survival of endangered species under the Endangered Species Act. We invite the public and local, State, Tribal, and Federal agencies to comment on these applications. Before issuing the requested permits, we will take into consideration any information that we receive during the public comment period.

DATES: We must receive your written comments on or before May 29, 2024.

ADDRESSES: *Document availability and comment submission:* Submit a request for a copy of the application and related documents and submit any comments by one of the following methods. All requests and comments should specify the applicant name and application number (*e.g.,* Dana Ross, ES001705):

- *Email: permitsR1ES@fws.gov.*
- *U.S. Mail:* Marilet Zablan, Regional Program Manager, Restoration and Endangered Species Classification, Ecological Services, U.S. Fish and Wildlife Service, Pacific Regional Office, 911 NE 11th Avenue, Portland, OR 97232–4181.

FOR FURTHER INFORMATION CONTACT: Karen Colson, Regional Recovery Permit Coordinator, Ecological Services, (503) 231–6283 (telephone); *permitsR1ES@fws.gov* (email). 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: We, the U.S. Fish and Wildlife Service, invite the public to comment on applications for permits under section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The requested permits would allow the applicants to conduct activities intended to promote recovery of species that are listed as endangered under the ESA.

Background

With some exceptions, the ESA prohibits activities that constitute take of listed species unless a Federal permit is issued that allows such activity. The ESA's definition of ''take'' includes such activities as pursuing, harassing, trapping, capturing, or collecting, in addition to hunting, shooting, harming, wounding, or killing.

A recovery permit issued by us under section 10(a)(1)(A) of the ESA authorizes the permittee to conduct activities with endangered or threatened species for scientific purposes that promote recovery or for enhancement of propagation or survival of the species. These activities often include such prohibited actions as capture and collection. Our regulations implementing section 10(a)(1)(A) for these permits are found in the Code of Federal Regulations (CFR) at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Permit Applications Available for Review and Comment

Proposed activities in the following permit requests are for the recovery and enhancement of propagation or survival of the species in the wild. The ESA requires that we invite public comment before issuing these permits. Accordingly, we invite local, State, Tribal, and Federal agencies and the public to submit written data, views, or arguments with respect to these applications. The comments and recommendations that will be most useful and likely to influence agency decisions are those supported by quantitative information or studies.

Application No.	Applicant, city, state	Species	Location	Take activity	Permit action
ES35731D–2	Lanai Resorts, LLC, HI	'Akēakē or band-rumped storm petrel (*Hydrobates castro;* formerly *Oceanodroma castro*).	Hawai'i	Harass by social attraction	Amend.
		'A'o or Newell's shearwater (*Puffinus newelli*).	Hawai'i	Harass by monitor burrows; acoustic monitoring; social attraction; and salvage.	
PER8355167	Hawaiian Islands Conservation Collective, HI.	Hawaiian common gallinule ('Alae 'ula—*Gallinula galeata sandvicensis*), Hawaiian coot ('Alae ke'o ke';o—*Fulica alai*), and Hawaiian stilt (Ae'o—*Himantopus mexicanus knudseni*).	All Hawaiian Islands.	Harass by survey; capture, handle, measure, weigh, band, attach transmitters, and biosample; monitor nests using cameras; and candling and floating of waterbird eggs.	New.
ES829250–11	Hawaii Wildlife Fund, HI	Hawksbill sea turtle (*Eretmochelys imbricata*); Olive ridley sea turtle (*Lepidochelys olivacea*).	Hawai'i	Harass by survey, monitor nests, capture, handle, tag, biosample, attach transmitters, photograph, place temperature data loggers in nests, excavate hatched nests, relocate nests (hawksbill sea turtles only), and salvage.	Renew.
PER1353215–1	Clare Aslan, Northern Arizona University, AZ.	No common name (NCN) (*Stenogyne angustifolia*), honohono (*Haplostachys haplostachya*), NCN (*Silene lanceolata*), po1e (*Portulaca sclerocarpa*), a1e (*Zanthoxylum hawaiiense*), NCN (*Festuca hawaiiensis*), heau (*Exocarpos menziesii*).	Hawai'i	Remove/reduce to possession by leaf collection.	Amend.
PER9215089	On Sacred Ground, WA	Island marble butterfly (*Euchloe ausonides insulanus*).	Washington	Harass by collection/capture, handle, captively propagate, release, salvage, and emergency relocate.	New.

Public Availability of Comments

Written comments we receive become part of the administrative record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. 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.

Next Steps

If we decide to issue a permit to the applicant listed in this notice, we will publish a notice in the **Federal Register**.

Authority

We publish this notice under section 10(c) of the Endangered Species Act of

1973, as amended (16 U.S.C. 1531 *et seq.*).

Marilet A. Zablan,

Regional Program Manager for Restoration and Endangered Species Classification, Pacific Region.

[FR Doc. 2024–09143 Filed 4–26–24; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R3–ES–2024–N025; FXES11130300000–245–FF03E00000]

Endangered and Threatened Species; Receipt of Recovery 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, have received applications for permits to conduct activities intended to enhance the propagation or survival of endangered or threatened species under the Endangered Species Act. 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.

DATES: We must receive your written comments on or before May 29, 2024.

ADDRESSES:

Document availability and comment submission: Submit requests for copies of the applications and related documents, as well as any comments, by one of the following methods. All requests and comments should specify the applicant name(s) and application number(s) (*e.g.,* ESXXXXXX; see table in **SUPPLEMENTARY INFORMATION**):

- *Email (preferred method): permitsR3ES@fws.gov.* Please refer to the respective application number (*e.g.,* Application No. ESXXXXXX) in the subject line of your email message.
- *U.S. Mail:* Regional Director, Attn: Nathan Rathbun, U.S. Fish and Wildlife Service, Ecological Services, 5600 American Blvd. West, Suite 990, Bloomington, MN 55437–1458.

FOR FURTHER INFORMATION CONTACT: Nathan Rathbun, 612–713–5343 (phone); *permitsR3ES@fws.gov* (email). 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: We, the U.S. Fish and Wildlife Service, invite review and comment from the public and local, State, Tribal, and Federal agencies on applications we have received for permits to conduct certain activities with endangered and threatened species under section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and our regulations in the Code of Federal Regulations (CFR) at 50 CFR part 17. Documents and other information submitted with the applications are available for review, subject to the requirements of the Privacy Act and the Freedom of Information Act.

Background

The ESA prohibits certain activities with endangered and threatened species unless authorized by a Federal permit. The ESA and our implementing regulations in part 17 of title 50 of the Code of Federal Regulations (CFR) provide for the issuance of such permits and require that we invite public comment before issuing permits for activities involving endangered species.

A recovery permit issued by us under section 10(a)(1)(A) of the ESA authorizes the permittee to conduct activities with endangered species for scientific purposes that promote recovery or for enhancement of propagation or survival of the species. Our regulations implementing section 10(a)(1)(A) for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Permit Applications Available for Review and Comment

The ESA requires that we invite public comment before issuing these permits. Accordingly, we invite local, State, Tribal, and Federal agencies and the public to submit written data, views, or arguments with respect to these applications. The comments and recommendations that will be most useful and likely to influence agency decisions are those supported by quantitative information or studies. Proposed activities in the following permit requests are for the recovery and enhancement of propagation or survival of the species in the wild.

Application No.	Applicant	Species	Location	Activity	Type of take	Permit action
ESPER9203951	Michael Thomas, Chesterfield, MI.	White catspaw (*Epioblasma perobliqua*), northern rifffleshell (*Epioblasma rangiana*), snuffbox (*Epioblasma triquetra*), round hickorynut (*Obovaria subrotunda*), rayed bean (*Paetulunio fabalis*), clubshell (*Pleurobema clava*).	MI	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle, relocate.	New.

Application No.	Applicant	Species	Location	Activity	Type of take	Permit action
ES26856C–3	Sean Langley, Tipton, IN.	Add new species—tricolored bat (*Perimyotis subflavus*)—to existing authorized species: Indiana bat (*Myotis sodalis*), northern long-eared bat (*M. septentrionalis*), gray bat (*M. grisescens*).	AL, AR, CO, CT, DE, GA, FL, IA, IL, IN, KS, KY, LA, MA, MD, ME, MI, MN, MS, MO, MT, NC, ND, NE, NH, NJ, NM, NY, OH, OK, PA, RI, SC, SD, TN, TX, VA, VT, WI, WV, WY.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture with mist nets, identify, handle, collect non-intrusive measurements, band, radio-tag, and release.	Amend.
TE81935D	Aaron Prewitt, Cincinnati, OH.	Add new species—round hickorynut (*Obovaria subrotunda*) and longsolid (*Fusconaia subrotunda*)—to existing authorized 25 freshwater mussel species.	AL, AR, IA, IL, IN, KS, KY, LA, MI, MN, MO, MS, NC, NY, OH, OK, PA, TN, VA, WI, WV.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle, release, and relocate under special circumstances.	Amend.
ES71680A	Megan Martin, Indianapolis, IN.	Add new species—tricolored bat (*Perimyotis subflavus*)—to existing authorized species: Indiana bat (*Myotis sodalis*), northern long-eared bat (*M. septentrionalis*), and gray bat (*M. grisescens*).	AL, AR, CT, DE, GA, FL, IA, IL, IN, KS, KY, LA, MA, MD, ME, MI, MN, MS, MO, NC, ND, NE, NH, NJ, NM, NY, OH, OK, PA, RI, SC, SD, TN, TX, VA, VT, WI, WV.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture with mist nets, identify, handle, collect non-intrusive measurements, band, radio-tag, and release.	Amend.
ES62311A	Mary Gilmore, West Lake, OH.	Add new species—tricolored bat (*Perimyotis subflavus*)—to existing authorized species: Indiana bat (*Myotis sodalis*), northern long-eared bat (*M. septentrionalis*), and gray bat (*M. grisescens*).	AL, AR, CO, CT, DC, DE, GA, FL, IA, IL, IN, KS, KY, LA, MA, MD, ME, MI, MN, MS, MO, MT, NC, ND, NE, NH, NJ, NM, NY, OH, OK, PA, RI, SC, SD, TN, TX, VA, VT, WI, WV, WY.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture with mist nets or harp traps, identify, handle, collect non-intrusive measurements, band, radio-tag, collect hair samples, swab and collect wing biopsy punches, enter hibernacula or maternity roost caves, and release.	Amend.
PER9496195	Jesse Weinzinger, Green Bay, WI.	Higgins eye (*Lampsilis higginsii*), sheepnose (*Plethobasus cyphyus*), snuffbox (*Epioblasma triquetra*), spectaclecase (*Cumberlandia monodonta*), winged mapleleaf (*Quadrula fragosa*).	MN, WI	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle, release, collect swab samples, and relocate under special circumstances.	New.

Application No.	Applicant	Species	Location	Activity	Type of take	Permit action
ES31355B	Brooke A. Hines, Littleton, CO.	Add new species—tricolored bat (*Perimyotis subflavus*)—to existing authorized species: Indiana bat (*Myotis sodalis*), northern long-eared bat (*M. septentrionalis*), gray bat (*M. grisescens*), and Virginia big-eared bat (*Corynorhinus townsendii virginianus*).	Add CO, LA, NM, and WY to existing authorized locations: AL, AR, CT, DC, DE, FL, GA, IL, IA, IN, KS, KY, ME, MD, MA, MI, MN, MS, MO, ND, NE, NH, NJ, NY, NC, OH, OK, PA, RI, SC, SD, TN, TX, VT, VA, WI, WV.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture with mist nets or harp traps, identify, handle, collect non-intrusive measurements, band, mark, radio-tag, PIT-tag, enter hibernacula, and release.	Renew and Amend.
PER9544313	Dunn Ecological Services, LLC, Winfield, MO.	20 mussel species	AR, IA, IL, IN, KS, KY, MD, MI, MN, MO, NE, NY, OH, OK, SD, TN, WI, WV.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle, release, and relocate under special circumstances.	New.
ES06130D	Claudio Gratton, Madison, WI.	Rusty patched bumble bee (*Bombus affinis*).	WI	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle, sample and release.	Amend/renew.
ES43605A	Dan Cox, Akron, OH.	Add new species—tricolored bat (*Perimyotis subflavus*)—to existing authorized species: Indiana bat (*Myotis sodalis*), northern long-eared bat (*M. septentrionalis*), and gray bat (*M. grisescens*).	Add CO, DC, LA, and NM to existing authorized locations: AL, AR, CT, DE, FL, GA, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NH, NJ, NY, NC, ND, OH, OK, PA, RI, SC, SD, TN, VT, VA, WV, WI, WY.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture with mist nets or harp traps, handle, collect non-intrusive measurements, release.	Amend.
ES99056B	Marion Wells, Lebanon, OH.	Add new species—round hickorynut (*Obovaria subrotunda*), longsolid (*Fusconaia subrotunda*), western fanshell (*Cyprogenia aberti*), Neosho mucket (*Lampsilis rafinesqueana*)—to existing 16 authorized freshwater mussel species.	Add new State—IN—to existing authorized States: MO, OH.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle, release, and relocate under special circumstances.	Amend.
PER9858817	Nathan Ring, Saint Johns, MI.	Northern riffleshell (*Epioblasma rangiana*), snuffbox (*Epioblasma triquetra*), rayed bean (*Paetulunio fabalis*), clubshell (*Pleurobema clava*).	AL, AR, IL, IN, KY, MI, MN, MS, MO, NY, OH, PA, TN, VA, WV, WI.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle, release, and relocate under special circumstances.	New.

Application No.	Applicant	Species	Location	Activity	Type of take	Permit action
PER9860170	Ieva Roznere, Columbus, OH.	Fanshell (*Cyprogenia stegaria*), purple catspaw (*Epioblasma obliquata*), white catspaw (*Epioblasma perobliqua*), northern riffleshell (*Epioblasma rangiana*), snuffbox (*Epioblasma triquetra*), longsolid (*Fusconaia subrotunda*), pink mucket (*Lampsilis abrupta*), round hickorynut (*Obovaria subrotunda*), rayed bean (*Villosa fabalis*), sheepnose (*Plethobasus cyphyus*), clubshell (*Pleurobema clava*), rabbitsfoot (*Theliderma cylindrica*).	OH	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle, release, headstart, and relocate under special circumstances.	New.
PER9968385	Clarissa Lawlis, Baltimore, OH.	56 freshwater mussel species.	AL, AR, FL, GA, IA, IL, IN, KY, MI, MN, MO, OH, PA, TN, WV, WI.	Conduct presence/absence surveys, document habitat use, conduct population monitoring, and evaluate impacts.	Capture, handle, release, and relocate under special circumstances.	New.

Public Availability of Comments

Written comments we receive become part of the administrative record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, 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.

Next Steps

If we decide to issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register**.

Authority

We publish this notice under section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Lori Nordstrom,

Assistant Regional Director, Ecological Service, Midwest Region.

[FR Doc. 2024–09114 Filed 4–26–24; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2024–N022; FXES11130800000–245–FF08E00000]

Endangered and Threatened Species; Receipt of Recovery 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, have received applications for permits to conduct activities intended to enhance the propagation or survival of endangered or threatened species under the Endangered Species Act. 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.

DATES: We must receive your written comments on or before May 29, 2024.

ADDRESSES:

Document availability and comment submission: Submit requests for copies of the applications and related documents and submit any comments by one of the following methods. All requests and comments should specify the applicant name(s) and application number(s) (*e.g.,* XXXXXX or PER0001234).

- *Email: permitsR8ES@fws.gov.*
- *U.S. Mail:* Susie Tharratt, Regional Recovery Permit Coordinator, U.S. Fish and Wildlife Service, 2800 Cottage Way, Room W–2606, Sacramento, CA 95825.

FOR FURTHER INFORMATION CONTACT: Susie Tharratt, via phone at 916–414–6561, or via email at *permitsR8ES@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: We, the U.S. Fish and Wildlife Service, invite the public to comment on applications for permits under section 10(a)(1)(A) of the Endangered Species Act, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The requested permits would allow the applicants to conduct activities intended to promote recovery of species that are listed as endangered or threatened under the ESA.

Background

With some exceptions, the ESA prohibits activities that constitute take of listed species unless a Federal permit is issued that allows such activity. The ESA's definition of ''take'' includes such activities as pursuing, harassing, trapping, capturing, or collecting, in addition to hunting, shooting, harming, wounding, or killing.

A recovery permit issued by us under section 10(a)(1)(A) of the ESA authorizes the permittee to conduct activities with endangered or threatened species for scientific purposes that promote recovery or for enhancement of propagation or survival of the species. These activities often include such prohibited actions as capture and collection. Our regulations implementing section 10(a)(1)(A) for these permits are found in the Code of Federal Regulations at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Permit Applications Available for Review and Comment

Proposed activities in the following permit requests are for the recovery and enhancement of propagation or survival of species in the wild. The ESA requires that we invite public comment before issuing these permits. Accordingly, we invite local, State, Tribal, and Federal agencies and the public to submit written data, views, or arguments with respect to these applications. The comments and recommendations that will be most useful and likely to influence agency decisions are those supported by quantitative information or studies.

Application No.	Applicant, city, state	Species	Location	Take activity	Permit action
101743	Daniel Edelstein, Novato, California	• California tiger salamander (*Ambystoma californiense*), Santa Barbara County and Sonoma County distinct population segments California Ridgway's rail (*Rallus obsoletus obsoletus*).	CA	Survey using recorded vocalizations, survey, capture, handle, and release.	Renew.
29522A	Kenneth Gilliland, Ventura, California.	• California tiger salamander (*Ambystoma californiense*), Santa Barbara County distinct population segment. • Tidewater goby (*Eucyclogobius newberryi*).	CA	Survey, capture, handle, swab, and release.	Amend.
PER0011950 ...	Brian Nissen, Folsom, California	• California tiger salamander (*Ambystoma californiense*), Santa Barbara County and Sonoma distinct population segments.	CA	Survey, capture, handle, swab, and release.	Amend.
103076	Transcon Environmental, Inc., Mesa, Arizona.	• California tiger salamander (*Ambystoma californiense*), Santa Barbara County and Sonoma distinct population segments.	CA	Survey, capture, handle, swab, and release.	Renew.
98090C	FISHBIO, Oakdale, California	• Tidewater goby (*Eucyclogobius newberryi*).	CA	Survey, capture, handle, and release.	Renew.
31350D	Timothy Salamunovich, Arcata, California.	• Tidewater goby (*Eucyclogobius newberryi*).	CA	Survey, capture, handle, release, and collect voucher specimens.	Renew.
806679	Spring Rivers Ecological Sciences, Cassel, California.	• Shasta crayfish (*Pacifastacus fortis*).	CA	Capture, weigh, mark, sacrifice, collect tissue, release, and translocate/release to restored habitat.	Renew.
02478D	Jennifer Jackson, Imperial Beach, California.	• California least tern (*Sternula antillarum browni*).	CA	Survey, locate and monitor nests, handle/mark eggs, capture, handle, band, and release chicks.	Renew.
93824C	Jill Coumoutso, Fontana, California	• Southwestern willow flycatcher (*Empidonax traillii extimus*).	CA	Survey using recorded vocalizations	Renew.
PER9084448 ...	Oregon Cooperative Fish and Wildlife Research Unit, Corvallis, Oregon.	• Independence Valley speckled dace (*Rhinichthys osculus lethoporus*).	NV	Survey, capture, handle, mark, and release.	New.
67253D	Sequoia Park Zoo, Eureka, California.	• Behren's silverspot butterfly (*Speyeria zerene behrensii*).	CA	Euthanize sick individuals and mark	Amend.
85448A	Conservation Society of California, Oakland, California.	• California condor (*Gymnogyps californianus*).	CA	Receive, hold in captivity, handle, provide veterinarian treatment and care, transport, and transfer.	Renew.
PER0003725 ...	Melanie Madden, San Diego, California.	• Southwestern willow flycatcher (*Empidonax traillii extimus*). • Least Bell's vireo (*Vireo bellii pusillus*).	CA, NV	Survey using recorded vocalizations, locate and monitor nests, capture, handle, measure, weigh, band, color-band, release, collect body feathers and blood, and remove brown-headed cowbird (*Molothrus ater*) eggs and chicks from parasitized nests.	Renew.

Application No.	Applicant, city, state	Species	Location	Take activity	Permit action
095868	David Kisner, Orcutt, California	• Southwestern willow flycatcher (*Empidonax traillii extimus*). • Least Bell's vireo (*Vireo bellii pusillus*).	CA	Survey using recorded vocalizations, locate and monitor nests, and remove brown-headed cowbird (*Molothrus ater*) eggs and chicks from parasitized nests, capture, handle, band and color-band adults, and release.	Renew.
157216	USGS—Western Ecological Research Center, Dixon, California.	• Sierra Nevada yellow-legged frog (*Rana sierrae*). • Mountain yellow-legged frog (*Rana muscosa*) Northern California distinct population segment. • Yosemite toad (*Anaxyrus canorus*). • Foothill yellow-legged frog (*Rana boylii*) South Sierra and South Coast distinct population segments. • San Francisco gartersnake (*Thamnophis sirtalis tetrataenia*).	CA	Survey, capture, handle, measure, swab, collect genetic material, collect individuals, insert PIT tags, insert elastomers, and release.	Amend.
781084	Anita Hayworth, Encinitas, California	• Conservancy fairy shrimp (*Branchinecta conservatio*). • Longhorn fairy shrimp (*Branchinecta longiantenna*). • Vernal pool tadpole shrimp (*Lepidurus packardi*). • Riverside fairy shrimp (*Streptocephalus woottoni*). • San Diego fairy shrimp (*Branchinecta sandiegonensis*). • Quino checkerspot butterfly (*Euphydryas editha quino*). • Southwestern willow flycatcher (*Empidonax traillii extimus*).	CA	Survey, survey by pursuit, survey using recorded vocalizations, capture, handle, release, collect adult vouchers, and collect branchiopod resting eggs.	Renew.
PER0012535 ...	Laura Gorman, Encinitas, California	• Conservancy fairy shrimp (*Branchinecta conservatio*). • Longhorn fairy shrimp (*Branchinecta longiantenna*). • Vernal pool tadpole shrimp (*Lepidurus packardi*). • Riverside fairy shrimp (*Streptocephalus woottoni*). • San Diego fairy shrimp (*Branchinecta sandiegonensis*). • Quino checkerspot butterfly (*Euphydryas editha quino*). • Southwestern willow flycatcher (*Empidonax traillii extimus*).	CA, NV	Survey, survey by pursuit, survey using recorded vocalizations, capture, handle, release, collect adult vouchers, and collect branchiopod resting eggs.	Renew.
PER8784222 ...	William Raitter, Huntington Beach, California.	• Riverside fairy shrimp (*Streptocephalus woottoni*). • San Diego fairy shrimp (*Branchinecta sandiegonensis*).	CA	Survey, survey by pursuit, capture, handle, release, and collect adult vouchers.	New.
PER8964697 ...	Sarah Wood, Meadow Vista, California.	• Conservancy fairy shrimp (*Branchinecta conservatio*). • Longhorn fairy shrimp (*Branchinecta longiantenna*). • Vernal pool tadpole shrimp (*Lepidurus packardi*). • Riverside fairy shrimp (*Streptocephalus woottoni*). • San Diego fairy shrimp (*Branchinecta sandiegonensis*).	CA	Survey, capture, handle, release, and collect adult vouchers.	New.
PER9095125 ...	Emely Romo, Long Beach, California.	• Conservancy fairy shrimp (*Branchinecta conservatio*). • Longhorn fairy shrimp (*Branchinecta longiantenna*). • Vernal pool tadpole shrimp (*Lepidurus packardi*). • Riverside fairy shrimp (*Streptocephalus woottoni*). • San Diego fairy shrimp (*Branchinecta sandiegonensis*).	CA	Survey, capture, handle, release, and collect adult vouchers.	New.
PER9091670 ...	Dustin Brabandt, San Diego, California.	• Conservancy fairy shrimp (*Branchinecta conservatio*). • Longhorn fairy shrimp (*Branchinecta longiantenna*). • Vernal pool tadpole shrimp (*Lepidurus packardi*). • Riverside fairy shrimp (*Streptocephalus woottoni*). • San Diego fairy shrimp (*Branchinecta sandiegonensis*).	CA	Survey, capture, handle, release, and collect adult vouchers.	New.

Application No.	Applicant, city, state	Species	Location	Take activity	Permit action
PER9090570 ...	Samuel Wentworth, Oakland, California.	• Conservancy fairy shrimp (*Branchinecta conservatio*). • Longhorn fairy shrimp (*Branchinecta longiantenna*). • Vernal pool tadpole shrimp (*Lepidurus packardi*). • Riverside fairy shrimp (*Streptocephalus woottoni*). • San Diego fairy shrimp (*Branchinecta sandiegonensis*).	CA	Survey, capture, handle, release, and collect adult vouchers.	New.
069171	National Park Service Santa Monica Mountains National Recreation Area, Thousand Oaks, California.	• Braunton's milk-vetch (*Astragalus brauntonii*). • Lyon's pentachaeta (*Pentachaeta lyonii*).	CA	Remove and reduce to possession from lands under Federal jurisdiction.	Renew and amend.
PER9080785 ...	USDA USFS PSW R5 Six Rivers National Forest, Eureka, California.	• Lassics lupine (*Lupinus constancei*).	CA	Remove and reduce to possession from lands under Federal jurisdiction.	New.
094893	Santa Barbara Botanic Garden, Santa Barbara, California.	• Hoffmann's rock-cress (*Arabis hoffmannii*). • Santa Rosa Island manzanita (*Arctostaphylos confertiflora*). • Marsh Sandwort (*Arenaria paludicola*). • Braunton's milk-vetch (*Astragalus brauntonii*). • Clara Hunt's milk-vetch (*Astragalus claranus*). • Ventura Marsh milk-vetch (*Astragalus pycnostachyus* var. *lanosissimus*). • Coastal dunes milk-vetch (*Astragalus tener* var. *titi*). • Nevin's barberry (*Berberis nevinii*). • Island barberry (*Berberis pinnata* ssp. *insularis*). • Tiburon paintbrush (*Castilleja affinis* ssp. *neglecta*). • Soft-leaved paintbrush (*Castilleja mollis*). • California jewelflower (*Caulanthus californicus*). • Coyote ceanothus (*Ceanothus ferrisiae*). • Catalina Island mountain-mahogany (*Cercocarpus traskiae*). • Chorro Creek bog thistle (*Cirsium fontinale* var. *obispoense*). • La Graciosa thistle (*Cirsium loncholepis*). • Presidio clarkia (*Clarkia franciscana*). • Vine Hill clarkia (*Clarkia imbricata*). • Pismo clarkia (*Clarkia speciosa* ssp. *immaculata*). • Soft bird's-beak (*Cordylanthus mollis* ssp. *mollis*). • Salt marsh bird's-beak (*Cordylanthus maritimus* ssp. *maritimus*). • Gaviota tarplant (*Deinandra increscens* ssp. *villosa*). • Vandenberg monkeyflower (*Diplacus vandenbergensis*). • Santa Clara Valley dudleya (*Dudleya setchellii*). • Santa Barbara Island liveforever (*Dudleya traskiae*). • Kern mallow (*Eremalche kernensis*). • Indian Knob mountainbalm (*Eriodictyon altissimum*). • Lompoc yerba santa (*Eriodictyon capitatum*). • Loch Lomond coyote thistle (*Eryngium constancei*). • San Diego button-celery (*Eryngium aristulatum* var. *parishii*). • Menzies' wallflower (*Erysimum menziesii*). • Monterey gilia (*Gilia tenuiflora* ssp. *arenaria*).	CA	Remove and reduce to possession from lands under Federal jurisdiction.	Renew.

Application No.	Applicant, city, state	Species	Location	Take activity	Permit action
		• Hoffmann's slender-flowered gilia (*Gilia tenuiflora* ssp. *hoffmannii*). • Santa Cruz tarplant (*Holocarpha macradenia*). • Contra Costa goldfields (*Lasthenia conjugens*). • Burke's goldfields (*Lasthenia burkei*). • San Joaquin wooly-threads (*Monolopia* [= *Lembertia*] *congdonii*). • Sebastopol meadowfoam (*Limnanthes vinculans*). • San Clemente Island woodland-star (*Lithophragma maximum*). • Nipomo Mesa lupine (*Lupinus nipomensis*). • Santa Cruz Island bush-mallow (*Malacothamnus fasciculatus* var. *nesioticus*). • Island malacothrix (*Malacothrix squalida*). • Santa Cruz Island malacothrix (*Malacothrix indecora*). • Bakersfield cactus (*Opuntia treleasei*). • California Orcutt grass (*Orcuttia californica*). • Lyon's pentachaeta (*Pentachaeta lyonii*). • Island phacelia (*Phacelia insularis* ssp. *insularis*). • Yadon's piperia (*Piperia yadonii*). • Calistoga allocarya (*Plagiobothrys strictus*). • San Diego mesa-mint (*Pogogyne abramsii*). • Otay mesa-mint (*Pogogyne nudiuscula*). • Gambel's watercress (*Rorippa gambellii*). • Santa Cruz Island rockcress (*Sibara filifolia*). • Keck's checker-mallow (*Sidalcea keckii*). • California seablite (*Suaeda californica*). • Santa Cruz Island fringepod (*Thysanocarpus conchuliferus*).			
PER9001458 ...	Daniel Muratore, Pinole, California ..	• California tiger salamander (*Ambystoma californiense*), Santa Barbara County distinct population segment. • Conservancy fairy shrimp (*Branchinecta conservatio*). • Longhorn fairy shrimp (*Branchinecta longiantenna*). • Vernal pool tadpole shrimp (*Lepidurus packardi*). • Riverside fairy shrimp (*Streptocephalus woottoni*). • San Diego fairy shrimp (*Branchinecta sandiegonensis*).	CA	Survey, capture, handle, swab, release, and collect adult vouchers.	New.
PER9012426 ...	Endangered Species Recovery Program, California State University, Stanislaus, Turlock, California.	• Tipton kangaroo rat (*Dipodomys nitratoides nitratoides*). • San Joaquin kit fox (*Vulpes macrotis mutica*). • Blunt-nose leopard lizard (*Gambelia silus*). • Fresno kangaroo rat (*Dipodomys nitratoides exilis*). • Buena Vista Lake ornate shrew (*Sorex ornatus relictus*). • Giant kangaroo rat (*Dipodomys ingens*). • Bakersfield cactus (*Opuntia treleasei*). • Riparian brush rabbit (*Sylvilagus bachmani riparius*). • Riparian woodrat (*Neotoma fuscipes riparia*).	CA	Survey, capture, handle, mark, insert PIT (passive integrated transponder) tag, attach/remove radio transmitters, take biological samples, hold in captivity, release, provide treatment for sarcoptic mange, and remove and reduce to possession from lands under Federal jurisdiction.	New.
21700B	Diana Grosso, Paso Robles, California.	• Tipton kangaroo rat (*Dipodomys nitratoides nitratoides*).	CA	Survey, capture, handle, and release.	Renew.

Application No.	Applicant, city, state	Species	Location	Take activity	Permit action
		• San Joaquin kit fox (*Vulpes macrotis mutica*). • Giant kangaroo rat (*Dipodomys ingens*)..			
028223	Jonathan Stead, Oakland, California	• Conservancy fairy shrimp (*Branchinecta conservatio*). • Longhorn fairy shrimp (*Branchinecta longiantenna*). • Vernal pool tadpole shrimp (*Lepidurus packardi*). • Riverside fairy shrimp (*Streptocephalus woottoni*). • San Diego fairy shrimp (*Branchinecta sandiegonensis*).	CA	Survey, capture, handle, release, collect adult vouchers, collect branchiopod resting eggs, and process soil samples for resting egg identification.	Renew.
PER0036394 ...	West Kern Environmental Consulting, Buttonwillow, California.	• Tipton kangaroo rat (*Dipodomys nitratoides nitratoides*). • Giant kangaroo rat (*Dipodomys ingens*).	CA	Survey, capture, handle, and release.	New.
037806	Bureau of Land Management, Bakersfield Field Office, Bakersfield, California.	• Conservancy fairy shrimp (*Branchinecta conservatio*). • Longhorn fairy shrimp (*Branchinecta longiantenna*). • Vernal pool tadpole shrimp (*Lepidurus packardi*). • Tipton kangaroo rat (*Dipodomys nitratoides nitratoides*). • Giant kangaroo rat (*Dipodomys ingens*).	CA	Survey, capture, handle, mark, release, collect adult vouchers, and collect branchiopod resting eggs.	Renew.
PER0057271 ...	William Webb Jr., Larkspur, California.	• Conservancy fairy shrimp (*Branchinecta conservatio*). • Longhorn fairy shrimp (*Branchinecta longiantenna*). • Vernal pool tadpole shrimp (*Lepidurus packardi*). • Riverside fairy shrimp (*Streptocephalus woottoni*). • San Diego fairy shrimp (*Branchinecta sandiegonensis*).	CA	Survey, capture, handle, release, and collect adult vouchers.	Amend.
110382	Ava Edens, Mission Viejo, California	• Conservancy fairy shrimp (*Branchinecta conservatio*). • Longhorn fairy shrimp (*Branchinecta longiantenna*). • Vernal pool tadpole shrimp (*Lepidurus packardi*). • Riverside fairy shrimp (*Streptocephalus woottoni*). • San Diego fairy shrimp (*Branchinecta sandiegonensis*).	CA	Survey, capture, handle, release, collect adult vouchers, and collect branchiopod resting eggs.	Renew.
181714	Pieter Johnson, Boulder, Colorado ..	• California tiger salamander (*Ambystoma, californiense*) Sonoma County distinct population segment. • Santa Cruz long-toed salamander (*Ambystoma macrodactylum croceum*).	CA	Survey, capture, handle, examine, swab, and release.	Renew.
107075	Steven Powell, Orinda, California	• California tiger salamander (*Ambystoma californiense*), Santa Barbara County and Sonoma County distinct population segments. • Salt marsh harvest mice (*Reithrodontomys raviventris*). • San Francisco garter snake (*Thamnophis sirtalis tetrataenia*).	CA	Survey, capture, handle, swab, and release.	Renew.
PER0121458 ...	Donald Hardeman Jr., Cedar Hills, Texas.	• Giant kangaroo rat (*Dipodomys ingens*). • Morro Bay kangaroo rat (*Dipodomys heermanni morroensis*). • Tipton kangaroo rat (*Dipodomys nitratoides nitratoides*). • Fresno kangaroo rat (*Dipodomys nitratoides exilis*).	CA	Survey, capture, handle, and release.	Amend.
96514A	Jonathan Aguayo, Buena Park, California.	• Foothill yellow-legged frog (*Rana boylii*) South Sierra and South Coast distinct population segments.	CA	Survey, capture, handle, swab, and release.	Amend.
29658A	Cindy Dunn, San Diego, California ..	• Quino checkerspot butterfly (*Euphydryas editha quino*).	CA	Pursue	Renew.
98083C	Sarah Willbrand, San Francisco, California.	• California tiger salamander (*Ambystoma californiense*), Santa Barbara County distinct population segments.	CA	Survey, capture, handle, swab, and release.	Renew.

Application No.	Applicant, city, state	Species	Location	Take activity	Permit action
48170A	Lisa Herrera, Santa Maria, California.	• California tiger salamander (*Ambystoma californiense*), Santa Barbara County distinct population segments.	CA	Survey, capture, handle, swab, and release.	Amend.
769304	Jeffrey Halstead, Clovis, California ..	• Tipton kangaroo rat (*Dipodomys nitratoides nitratoides*). • Fresno kangaroo rat (*Dipodomys nitratoides exilis*). • California tiger salamander (*Ambystoma californiense*), Santa Barbara County distinct population segments.	CA	Survey, capture, handle, swab, and release.	Renew.
02481D	Anna Touchstone, San Diego, California.	• Tipton kangaroo rat (*Dipodomys nitratoides nitratoides*). • Fresno kangaroo rat (*Dipodomys nitratoides exilis*). • Conservancy fairy shrimp (*Branchinecta conservatio*). • Longhorn fairy shrimp (*Branchinecta longiantenna*). • Vernal pool tadpole shrimp (*Lepidurus packardi*). • Riverside fairy shrimp (*Streptocephalus woottoni*). • San Diego fairy shrimp (*Branchinecta sandiegonensis*).	CA	Survey, capture, handle, release, collect adult vouchers, and collect branchiopod resting eggs.	Renew.
207873	Carol Thompson, Claremont, California.	• Riverside fairy shrimp (*Streptocephalus woottoni*). • San Diego fairy shrimp (*Branchinecta sandiegonensis*). • San Bernardino Merriam's kangaroo rat (*Dipodomys merriami parvus*).	CA	Survey, capture, handle, release, collect adult vouchers, and collect branchiopod resting eggs.	Renew.
831207	Natural Resources Assessment, Inc., Riverside, California.	• San Bernardino Merriam's kangaroo rat (*Dipodomys merriami parvus*). • Pacific pocket mouse (*Perognathus longimembris pacificus*).	CA	Survey, capture, handle, and release.	Renew.
139628	Kleinfelder, San Francisco, California.	• Foothill yellow-legged frog (*Rana boylii*), South Sierra and South Coast distinct population segments.	CA	Survey, capture, handle, swab, and release.	Amend.
PER9631931 ...	Karissa Denney, Bakersfield, California.	• Foothill yellow-legged frog (*Rana boylii*), South Sierra and South Coast distinct population segments.	CA	Survey, capture, handle, swab, and release.	New.
85084C	Dustin Brown, Orangevale, California.	• Conservancy fairy shrimp (*Branchinecta conservatio*). • Longhorn fairy shrimp (*Branchinecta longiantenna*). • Vernal pool tadpole shrimp (*Lepidurus packardi*). • Riverside fairy shrimp (*Streptocephalus woottoni*). • San Diego fairy shrimp (*Branchinecta sandiegonensis*). • California tiger salamander (*Ambystoma californiense*), Santa Barbara County distinct population segments.	CA	Survey, capture, handle, swab, release, collect adult vouchers, and collect branchiopod resting eggs.	Renew.

Public Availability of Comments

Written comments we receive become part of the administrative record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of be made available for public disclosure in their entirety.

Next Steps

If we decide to issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register**.

Authority

We publish this notice under section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Rachel Henry,

Acting Regional Ecological Services Program Manager, Pacific Southwest Region, Sacramento, California.

[FR Doc. 2024–09129 Filed 4–26–24; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R3–ES–2023–0249; FXES11140300000–245–FF03E00000]

Receipt of Incidental Take Permit Application and Proposed Habitat Conservation Plan for the Prosperity Wind Project, Piatt County, IL; Categorical Exclusion

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of documents; request for comment and information.

SUMMARY: We, the U.S. Fish and Wildlife Service, have received an application from Prosperity Wind LLC (applicant), for an incidental take permit (ITP) under the Endangered Species Act, for its Prosperity Wind Project (project). If approved, the ITP would be for a 6-year period and would authorize the incidental take of two endangered species, the Indiana bat and the northern long-eared bat, and one species proposed as endangered, the tricolored bat. The applicant has prepared a proposed habitat conservation plan (HCP) in support of the application. We request public comment on the application, which includes the applicant's HCP, and on the Service's preliminary determination that the proposed permitting action may be eligible for a categorical exclusion pursuant to the Council on Environmental Quality's National Environmental Policy Act (NEPA) regulations, the Department of the Interior's (DOI) NEPA regulations, and the DOI Departmental Manual. To make this preliminary determination, we prepared a draft environmental action statement and low-effect screening form, both of which are also available for public review. We invite comment from the public and local, State, Tribal, and Federal agencies.

DATES: We must receive your written comments on or before May 29, 2024.

ADDRESSES:

Obtaining Documents: The documents this notice announces, as well as any comments and other materials that we receive, will be available for public inspection online in Docket No. FWS–R3–ES–2023–0249 at *https://www.regulations.gov.*

Submitting Comments: If you wish to submit comments on any of the documents, you may do so in writing by one of the following methods:

- *Online: https://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–R3–ES–2023–0249.
- *U.S. mail:* Public Comments Processing, Attn: Docket No. FWS–R3–ES–2023–0249; U.S. Fish and Wildlife Service; 5275 Leesburg Pike, MS: PRB/3W; Falls Church, VA 22041–3803.

FOR FURTHER INFORMATION CONTACT: Kraig McPeek, Field Supervisor, Illinois-Iowa Ecological Services Field Office, by email at *kraig_mcpeek@fws.gov* or by telephone at 309–757–5800, extension 202; or Andrew Horton, Regional HCP Coordinator, by email at *andrew_horton@fws.gov* or by telephone at 612–713–5337. 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: We, the U.S. Fish and Wildlife Service (Service), have received an application from Prosperity Wind LLC (applicant) for a 6-year incidental take permit (ITP) under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The applicant requests the ITP to take the Indiana bat (*Myotis sodalis*) and northern long-eared bat (*Myotis septentrionalis*), both federally listed as endangered, and the tricolored bat (*Perimyotis subflavus*), which has been proposed for listing as endangered. Take would be incidental to the operation of 50 wind turbines with a total generating capacity of 300 megawatts (MW) at the Prosperity Wind Project in Piatt County, Illinois. While the ITP would be for 6 years, the operational life of most new wind energy facilities is 30 years; therefore, intensive monitoring conducted during the 6-year permit term would inform the need for future avoidance or a future new or revised long-term ITP for the remaining life of the project that would comply with a new NEPA analysis and habitat conservation plan (HCP). The applicant has prepared an HCP that describes the actions and measures that the applicant would implement to avoid, minimize, and mitigate incidental take of the covered species for the first 6 years.

We request public comment on the application, which includes the applicant's proposed HCP, and on the Service's preliminary determination that this HCP qualifies as ''low effect,'' and may qualify for a categorical exclusion pursuant to the Council on Environmental Quality's National Environmental Policy Act (NEPA) regulations (40 CFR 1501.4), the Department of the Interior's (DOI) NEPA regulations (43 CFR 46), and the DOI's Departmental Manual (516 DM 8.5(C)(2)). To make this preliminary determination, we prepared a draft environmental action statement and low-effect screening form, both of which are also available for public review.

Background

Section 9 of the ESA and its implementing regulations prohibit the ''take'' of animal species listed as endangered or threatened. Take is defined under the ESA as to ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect [listed animal species], or to attempt to engage in any such conduct'' (16 U.S.C. 1532). However, under section 10(a) of the ESA, we may issue permits to authorize incidental take of listed species. ''Incidental take'' is defined by the ESA as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity (16 U.S.C. 1539). Regulations governing incidental take permits for endangered and threatened species, respectively, are found in the Code of Federal Regulations (CFR) at 50 CFR 17.22 and 50 CFR 17.32.

Applicant's Proposed Project

The applicant requests a 6-year ITP to take the federally endangered Indiana bat (*Myotis sodalis*), federally endangered northern long-eared bat (*Myotis septentrionalis*), and the proposed endangered tricolored bat (*Perimyotis subflavus*). The applicant determined that take is reasonably certain to occur incidental to operation of 50 previously constructed wind turbines in Piatt County, Illinois, covering approximately 9,623 hectares (23,779 acres) of private land. The proposed conservation strategy in the applicant's proposed HCP is designed to avoid, minimize, and mitigate the impacts of the covered activity on the covered species. The biological goals and objectives are to minimize potential take of the three covered bat species through on-site minimization measures and to provide habitat conservation measures to offset any impacts from project operations. The HCP provides on-site avoidance and minimization measures, which include turbine operational adjustments. The authorized level of take from the project is 18 Indiana bats, 2 northern long-eared bats and 18 tricolored bats over the 6-year permit duration. To offset the impacts of the taking of the species, the applicant will implement one or more of the following mitigation options:

- Purchase credits from an approved conservation bank;
- Contribute to an in-lieu fee mitigation fund;
- Implement a permittee-responsible mitigation project; or
- Contribute to a white-nose syndrome treatment fund.

National Environmental Policy Act

The issuance of an ITP is a Federal action that triggers the need for compliance with NEPA. The Service has made a preliminary determination that the applicant's proposed project, and the proposed mitigation measures, would individually and cumulatively have a minor effect on the covered species and the human environment. Therefore, we have preliminarily determined that the proposed ESA section 10(a)(1)(B) permit would be a low-effect ITP that individually or cumulatively would have a minor effect on the species and may qualify for application of a categorical exclusion pursuant to the Council on Environmental Quality's NEPA regulations, DOI's NEPA regulations, and the DOI Departmental Manual. A low-effect ITP is one that would result in (1) minor or nonsignificant effects on species covered in the HCP; (2) nonsignificant effects on the human environment; and (3) impacts that, when added together with the impacts of other past, present, and reasonably foreseeable actions, would not result in significant cumulative effects to the human environment.

Next Steps

The Service will evaluate the application and the comments received to determine whether to issue the requested ITP. We will also conduct an intra-Service consultation pursuant to section 7 of the ESA to evaluate the effects of the proposed take. After considering the preceding and other matters, we will determine whether the permit issuance criteria of section 10(a)(1)(B) of the ESA have been met. If met, the Service will issue the requested ITP to the applicant.

Request for Public Comments

The Service invites comments and suggestions from all interested parties on the proposed HCP and screening form during a 30-day public comment period (see **DATES**). In particular, information and comments regarding the following topics are requested:

1. Whether the adaptive management, monitoring, and mitigation provisions in the proposed HCP are sufficient;
2. The requested 6-year ITP term;
3. Any threats to the Indiana bat, northern long-eared bat, and tricolored bat that may influence their populations over the life of the ITP that are not addressed in the proposed HCP or screening form;
4. Any new information on white-nose syndrome effects on the covered bat species;
5. Whether or not the significance of the impact on various aspects of the human environment has been adequately analyzed; and
6. Any other information pertinent to evaluating the effects of the proposed action on the human environment.

Availability of Public Comments

You may submit comments by one of the methods shown under **ADDRESSES**. We will post on *https://regulations.gov* all public comments and information received electronically or via hardcopy. All comments received, including names and addresses, will become part of the administrative record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. 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.

Authority

We provide this notice under section 10(c) of the ESA (16 U.S.C. 1539(c)) and its implementing regulations (50 CFR 17.22) and NEPA (42 U.S.C. 4321 *et seq.*) and its implementing regulations (40 CFR 1500–1508; 43 CFR part 46).

Karen Herrington,

Acting Assistant Regional Director, Ecological Services.

[FR Doc. 2024–09123 Filed 4–26–24; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_AK_FRN_MO4500179332]

Filing of Plats of Survey: Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of official filing.

SUMMARY: The plats of survey of lands described in this notice are scheduled to be officially filed in the Bureau of Land Management (BLM), Alaska State Office, Anchorage, Alaska. The surveys, which were executed at the request of the Bureau of Indian Affairs and the BLM, are necessary for the management of these lands.

DATES: The BLM must receive protests by May 29, 2024.

ADDRESSES: You may buy a copy of the plats from the BLM Alaska Public Information Center, 222 W 7th Avenue, Mailstop 13, Anchorage, AK 99513. Please use this address when filing written protests. You may also view the plats at the BLM Alaska Public Information Center, Fitzgerald Federal Building, 222 W 7th Avenue, Anchorage, Alaska, at no cost.

FOR FURTHER INFORMATION CONTACT: Thomas B. O'Toole, Chief, Branch of Cadastral Survey, Alaska State Office, Bureau of Land Management, 222 W 7th Avenue, Anchorage, AK 99513; 907–271–4231; *totoole@blm.gov*. People who use a telecommunications device for the deaf may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the BLM during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The lands surveyed are:

Copper River Meridian, Alaska

T. 4 N., R. 1 W., accepted April 5, 2024.
T. 9 S., R. 1 W., accepted March 12, 2024.
T. 74 S., R. 90 E, April 15, 2024
U.S. Survey No. 14622, accepted April 16, 2024, situated in T. 9 S., R. 8 W.
U.S. Survey No. 14635, accepted April 16, 2024, situated in T. 9 S., R. 8 W.
U.S. Survey No. 14636, accepted April 16, 2024, situated in T. 9 S., R. 8 W.

Seward Meridian, Alaska

T. 24 N., R. 4 W., accepted April 22, 2024.
T. 10 S., R. 71 W., April 22, 2024.
U.S. Survey No. 9516, accepted April 19, 2024, situated in T. 21 N., R. 46 W.

A person or party who wishes to protest one or more plats of survey identified above must file a written notice of protest with the State Director for the BLM in Alaska. The protest may be filed by mailing to BLM State Director, Alaska State Office, Bureau of Land Management, 222 W. 7th Avenue, Anchorage, AK 99513 or by delivering it in person to BLM Alaska Public Information Center, Fitzgerald Federal Building, 222 W 7th Avenue, Anchorage, Alaska. The notice of protest

must identify the plat(s) of survey that the person or party wishes to protest. You must file the notice of protest before the scheduled date of official filing for the plat(s) of survey being protested. The BLM will not consider any notice of protest filed after the scheduled date of official filing. A notice of protest is considered filed on the date it is received by the State Director for the BLM in Alaska during regular business hours; if received after regular business hours, a notice of protest will be considered filed the next business day. A written statement of reasons in support of a protest, if not filed with the notice of protest, must be filed with the State Director for the BLM in Alaska within 30 calendar days after the notice of protest is filed.

If a notice of protest against a plat of survey is received prior to the scheduled date of official filing, the official filing of the plat of survey identified in the notice of protest will be stayed pending consideration of the protest. A plat of survey will not be officially filed until the dismissal or resolution of all protests of the plat.

Before including your address, phone number, email address, or other personally identifiable information in a notice of protest or statement of reasons, you should be aware that the documents you submit, including your personally identifiable information, may be made publicly available in their entirety at any time. While you can ask the BLM to withhold your personally identifiable information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 U.S.C. ch. 3.

Thomas O'Toole,

Chief Cadastral Surveyor, Alaska.

[FR Doc. 2024–09130 Filed 4–26–24; 8:45 am]

BILLING CODE 4331–10–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_NV_FRN_MO4500177430]

Notice of Realty Action: Change of Authorized Use for Recreation and Public Purposes Lease/Conveyance in Clark County, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The Bureau of Land Management (BLM), Las Vegas Field Office, proposes a change of authorized use of 7.20 acres of public land in Clark County, Nevada, from use as a portion of the Hollywood Regional Park and an undeveloped Clark County Family Services building, to use for a Las Vegas Metropolitan Police substation. The land is currently classified under the Recreation and Public Purposes Act, as amended (R&PP).

DATES: Interested parties may submit written comments regarding the proposed change of authorized use until June 13, 2024.

ADDRESSES: Mail written comments to the Bureau of Land Management (BLM) Las Vegas Field Office, Assistant Field Manager, Division of Lands, 4701 North Torrey Pines Drive, Las Vegas, NV 89130, or fax to (702) 515–5010.

FOR FURTHER INFORMATION CONTACT: Joseph Varner, Supervisory Realty Specialist, Las Vegas Field Office, at the above address, by telephone at (702) 515–5488, or by email at *jvarner@blm.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. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The parcel is located at the northeast corner of Hollywood Boulevard and Sahara Avenue in Clark County, Nevada, and is legally described as:

Mount Diablo Meridian, Nevada

T. 21 S., R. 62 E.,
sec. 2, lots 28, 30, 33, and 41 thru 46.

The area described contains 7.20 acres, according to the official plat of the survey of said land, on file with the BLM.

In accordance with the R&PP Act (43 U.S.C. 869 *et seq.*), Clark County Real Property Management has filed an application to develop a Las Vegas Metropolitan Police substation that would directly support a proposed adjacent public park, fire station, high school, housing communities, and businesses. The new substation is needed to house police equipment and personnel necessary to perform all job duties and maintain all aspects of the substation, which will support the surrounding areas of northeast Las Vegas. Clark County has requested that the BLM change the authorized use of 7.20 acres of public land in Clark County, Nevada, from use as a portion of the Hollywood Regional Park and the undeveloped Clark County Family Services building to use for a Las Vegas Metropolitan Police substation. The above-described land was previously classified by a notice published in the **Federal Register** (62 FR 59789) on November 3, 1999, for Recreation and Public Purposes, and the current use for a fire station, regional park, and a Clark County Family Services building was established by a notice (70 FR 4144) published on January 28, 2005.

The proposed facility consists of administrative offices; cubicles; conference rooms; briefing rooms; interview rooms; locker rooms with showers and restroom stalls; janitorial closets with common household cleaning supplies; break rooms; a kitchen with refrigerator, microwave, gas stove, vending machines, water fountains, sinks, flat screen televisions, tables, and chairs; an armory room containing handguns, rifles, shotguns, tazers, body cameras, radios, and multiple types of ammunition stored in a fire proof safe; an I.D.F. room that contains communication servers/data; and an evidence room.

The exterior of the main facility would be landscaped with standard desert landscaping materials. Plans include an unsecured paved parking lot, a secured employee parking lot, a storage shed, and a backup diesel fuel generator. The generator would be maintained regularly and checked for any leaks or spills. If there is such a leak or spill, it will be contained within a concrete secondary containment enclosure and cleaned per appropriate standards.

There will be an additional 360 square foot locked storage shed in the secured employee parking lot housing handheld fuel tanks, damaged vehicle parts, air compressor, road flares, car jacks, traffic cones, battery jumper, hand tools, water jugs, additional location lighting, and power cords. There will be trash enclosures picked up by Republic Services on a schedule, 24-hour video monitoring, lighting, and typical local utilities for direct support of the proposed substation.

Additional detailed information pertaining to the BLM's proposed change of authorized use or the county's plan of development and site plan is available in case file N–97410, which will be available for review at the BLM Las Vegas Field Office at the above address. Clark County Real Property Management is a political subdivision of the State of Nevada and is, therefore, a qualified applicant under the R&PP Act.

Subject to limitations prescribed by law and regulation, prior to patent issuance, the holder of any right-of-way grant from the BLM within the lease area would be given the opportunity to amend the right-of-way grant for

conversion to a new term, including perpetuity, if applicable.

The land identified is not needed for any Federal purpose. The proposed change of authorized use for lease and/or conveyance is consistent with the BLM Las Vegas Resource Management Plan dated October 5, 1998, and would be in the public interest. Clark County Real Property Management has not applied for more than the 640-acre annual limitation for public purpose uses and has submitted a statement that their application is for a definite project as required by regulations at 43 CFR 2741.4(b).

The change of authorized use for lease and/or conveyance, when issued, will be subject to the provisions of the R&PP Act and applicable regulations of the Secretary of the Interior, and any patent issued will contain the following reservations to the United States:

1. A right-of-way thereon for ditches or canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945); and

2. All minerals shall be reserved to the United States, together with the right to prospect for, mine, and remove such deposits for the same under applicable law and such regulations as the Secretary of the Interior may prescribe; and

3. Any lease and conveyance will also be subject to valid existing rights, will contain any terms or conditions required by law (including, but not limited to, any terms or conditions required by 43 CFR 2741.4), and will contain an appropriate indemnification clause protecting the United States from claims arising out of the lessee's/patentee's use, occupancy, or operations on the leased/patented lands. It will also contain any other terms and conditions deemed necessary and appropriate by the Authorized Officer; and

4. Any other reservations that the authorized officer determines appropriate to ensure public access and proper management of Federal lands and interests therein.

The subject public lands described above were previously withdrawn from location and entry under the U.S. mining laws and from operation of the mineral and geothermal leasing laws by the Southern Nevada Public Land Management Act of 1998 (Pub. L. 105–263), as amended. Upon publication of this notice in the **Federal Register**, the land described above will be further segregated from all other forms of appropriation under the public land laws, except for lease and conveyance under the R&PP Act.

Interested parties may also submit written comments regarding the specific use proposed in the application and plan of development, and whether the BLM followed proper administrative procedures in reaching the decision to lease and convey under the R&PP Act. Comments on the change of authorized use are restricted to whether the land is physically suited for the proposal, whether the use will maximize the future use or uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with state and Federal programs.

Before including your address, phone number, email, address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. Only written comments submitted to the Assistant Field Manager, BLM Las Vegas Field Office, will be considered properly filed. Any adverse comments on the change of authorized use will be reviewed as protests by the BLM Nevada State Director, who may sustain, vacate, or modify this realty action. In the absence of any adverse comments, the decision will become effective on June 28, 2024.

Authority: 43 CFR 2741.5.

Bruce Sillitoe,

Field Manager, Las Vegas Field Office.

[FR Doc. 2024–09151 Filed 4–26–24; 8:45 am]

BILLING CODE 4331–21–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0037674; PPWOCRADN0–PCU00RP14.R50000]

Notice of Intended Repatriation: Memphis Museum of Science and History, Memphis, TN

Correction

In notice document 2024- 07360, appearing on pages 24495–24496 in the issue of April 8, February 28, 2024, make the following correction:

On page 24496, in the first column, on the 8th line from the top, ''*733arilyn.masler@memphistn.gov*'' is corrected to read ''*marilyn.masler@memphistn.gov.*''

[FR Doc. C1–2024–07360 Filed 4–26–24; 8:45 am]

BILLING CODE 0099–10–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1607 (Final)]

Boltless Steel Shelving Units Prepackaged for Sale From India; Termination of Investigation

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: On April 19, 2024, the Department of Commerce published notice in the **Federal Register** of a negative final determination of sales at less than fair value (LTFV) in connection with the subject investigation concerning India. Accordingly, the antidumping duty investigation concerning boltless steel shelving units prepackaged for sale from India (Investigation No. 731–TA–1607 (Final)) is terminated.

DATES: April 19, 2024.

FOR FURTHER INFORMATION CONTACT: Jordan Harriman (202–205–2610), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. 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 (*https://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

Authority: This investigation is being terminated under authority of title VII of the Tariff Act of 1930 and pursuant to section 207.40(a) of the Commission's Rules of Practice and Procedure (19 CFR 207.40(a)). This notice is published pursuant to section 201.10 of the Commission's rules (19 CFR 201.10).

By order of the Commission.

Issued: April 24, 2024.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2024–09121 Filed 4–26–24; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint *Certain Surface Cleaning Devices and Components Thereof,* DN 3741; the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.*

General information concerning the Commission may also be obtained by accessing its internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of SharkNinja Operating LLC, Omachron Alpha Inc., and Omachron Intellectual Property Inc. on April 23, 2024. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain surface cleaning devices and components thereof. The complaint names as respondents: Dyson, Inc. of Chicago, IL; Dyson Technology Limited of United Kingdom; and Dyson Canada Limited of Canada. The complainant requests that the Commission issue a limited exclusion order, cease and desist orders, and impose a bond upon respondent alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due, notwithstanding § 201.14(a) of the Commission's Rules of Practice and Procedure. No other submissions will be accepted, unless requested by the Commission. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. Submissions should refer to the docket number (''Docket No. 3741'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures [1]).

Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov.*) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding filing should contact the Secretary at *EDIS3Help@usitc.gov.*

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

Issued: April 23, 2024.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2024–09078 Filed 4–26–24; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1125–0018]

Agency Information Collection Activities; Proposed eCollection eComments Requested; FOIAXpress/FOIA Public Access Link

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: 30-day notice.

SUMMARY: The Executive Office for Immigration Review (EOIR), Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register** on February 9, 2024, allowing a 60-day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until May 29, 2024.

FOR FURTHER INFORMATION CONTACT: If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Raechel Horowitz, Chief, Immigration Law Division, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2500, Falls Church, VA 22041, telephone: (703) 305–0473, *Raechel.Horowitz@usdoj.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and/or

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/*PRAMain. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 1125–0018. This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view Department of Justice, information collections currently under review by OMB.

DOJ seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOJ notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Overview of This Information Collection

1. Type of Information Collection: Revision and Extension of a previously approved collection.

2. Title of the Form/Collection: FOIAXpress/FOIA Public Access Link.

3. Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: EOIR does not maintain an agency-specific form number for this collection.

4. Affected public who will be asked or required to respond, as well as a brief abstract: Affected Public: Individuals and households.

Abstract: This information collection is optional and voluntary. FOIAXpress is a software program that provides the EOIR Freedom of Information Act (FOIA) Program with a single, unified application for managing the entire lifecycle of FOIA requests and appeals. The Public Access Link (PAL) is a secure web-based application that provides an online platform for the public to file a FOIA request with EOIR. The PAL is integrated directly with FOIAXpress and offers a centralized location for EOIR to receive online FOIA requests, deliver responsive records, communicate with requesters, collect fees, if applicable, and provide access to released documents in a public reading room in accordance with agency proactive disclosure guidelines.

EOIR has developed several changes to the PAL platform to improve the Agency's FOIA request and response process and to reduce the burden on members of the public that submit FOIA requests to EOIR. These developments include the following substantive changes: modifying the request form to display only those data fields relevant to the type of FOIA request selected by the requestor; changing the date range field from voluntary to mandatory; prompting an individual that requests a Record of Proceeding (ROP) to provide on a voluntary basis the charging document date and a record subject's alias, parents' names, port and date of entry, and place and date of proceeding; and removing data fields that EOIR determined were no longer necessary for the Agency to fulfill a FOIA request. In addition, EOIR has identified the following non-substantive changes: modifying the appearance and formatting of the PAL request form; updating links to web pages and resources embedded throughout the form; revising existing form instructions for clarity; and reorganizing some data fields under different sections of the PAL form. EOIR intends these developments to reduce the public's burden in completing the PAL form and to improve the Agency's FOIA request and response process, and the public's experience with that process. These enhancements include: assisting requestors in making the most appropriate selection for the type of FOIA request; enhancing the logical direction with which a requestor completes the form; and tailoring the information solicited from the requestor to generate more precise requests, thereby reducing processing time.

5. Obligation to Respond: Voluntary.

6. Total Estimated Number of Respondents: 24,804.

7. Estimated Time per Respondent: 3 minutes.

8. Frequency: Once annually.

9. Total Estimated Annual Time Burden: 1,240 hours.

10. Total Estimated Annual Other Costs Burden: $0.

If additional information is required, contact: Darwin Arceo, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice,

Two Constitution Square, 145 N Street NE, 4W–218 Washington, DC 20530.

Dated: April 24, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024–09127 Filed 4–26–24; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF JUSTICE

[OMB Number 1110–0074]

Agency Information Collection Activities; Proposed eCollection eComments Requested; [Extension of a Previously Approved Collection]; FBI Hazardous Devices School Course Application

AGENCY: Federal Bureau of Investigation, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Federal Bureau of Investigation (FBI), Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until June 28, 2024.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Mark Wall, *mhwall@fbi.gov,* 703–906–2317.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Abstract: Collect participant information to be entered in the CIRG CIMS database for course enrollment and tracking of individual training and certification expiration dates.

Overview of This Information Collection

1. Type of Information Collection: Extension of a previously approved collection.

2. The Title of the Form/Collection: FBI Hazardous Devices School (HDS) Course Application.

3. The agency form number, if any, and the applicable component of the Department sponsoring the collection: FD–731, FD–731a; FBI Hazardous Devices School.

4. Affected public who will be asked or required to respond, as well as the obligation to respond: Affected Public State: state, local and tribal governments. The obligation to respond is voluntary.

5. An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated number of respondents is 1,000.

The time per response is 45 minutes.

6. An estimate of the total annual burden (in hours) associated with the collection: Ex: The total annual burden hours for this collection 750 hours ($1{,}000 \times 45$ min/60 = 750).

7. An estimate of the total annual cost burden associated with the collection, if applicable: $0.

TOTAL BURDEN HOURS

Activity	Number of respondents	Frequency	Total annual responses	Time per response (min)	Total annual burden (hours)
FD–731	1,000	1/annually	1,000	45	750
Unduplicated Totals	*1,000*		*1,000*		*750*

If additional information is required contact: Darwin Arceo, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC.

Dated: April 24, 2024.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2024–09126 Filed 4–26–24; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

[OMB 1140–0030]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Records and Supporting Data: Importation, Receipt, Storage, and Disposition by Explosives Importers, Manufacturers, Dealers, and Users Licensed Under Title 18 U.S.C. Chapter 40 Explosives

Correction

Notice document 2024–08472, appearing on pages 29365–29366, in the Issue of Monday, April 22, 2024, inadvertently published in error and is hereby withdrawn.

[FR Doc. C1–2024–08472 Filed 4–26–24; 8:45 am]

BILLING CODE 0099–10–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2022–0011]

Maritime Advisory Committee on Occupational Safety and Health (MACOSH): Notice of Meeting

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice of MACOSH meeting.

SUMMARY: The Maritime Advisory Committee on Occupational Safety and Health (MACOSH) will meet June 4, 2024. Committee members and the public will meet virtually via WebEx.

DATES: *MACOSH full Committee meeting:* MACOSH will meet from 10:00 a.m. to 12:00 p.m., ET, June 4, 2024.

MACOSH Workgroup meetings: The MACOSH Shipyard and Longshoring Workgroups will meet from 1:00 p.m. to 3:00 p.m., ET, June 4, 2024.

ADDRESSES:

Submission of comments and requests to speak: Comments and requests to speak at the MACOSH meeting, including attachments, must be submitted electronically at *www.regulations.gov,* the eRulemaking Portal by May 21, 2024. Comments must be identified by the docket number for this **Federal Register** notice (Docket No. OSHA–2022–0011). Follow the online instructions for submitting comments.

Registration: All persons wishing to attend this virtual meeting must register via the registration link on the MACOSH web page at *https://www.osha.gov/advisorycommittee/macosh.* Upon registration, virtual attendees will receive a WebEx link for remote access to the meeting.

Requests for special accommodations: Submit requests for special accommodations, including translation services, for this MACOSH meeting by May 21, 2024, to Ms. Carla Marcellus, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone: (202) 693–1865; email: *marcellus.carla@dol.gov.*

Instructions: All submissions must include the agency name and the OSHA docket number for this **Federal Register** notice (Docket No. OSHA–2022–0011). OSHA will place comments, including personal information, in the public docket, which may be made available online. Therefore, OSHA cautions interested parties about submitting personal information such as Social Security numbers and birthdates.

Docket: To read or download documents in the public docket for this MACOSH meeting, go to *www.regulations.gov.* All documents in the public docket are listed in the index; however, some documents (*e.g.,* copyrighted material) are not publicly available to read or download through *www.regulations.gov.* All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor; telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

For general information about MACOSH: Ms. Amy Wangdahl, Director, Office of Maritime and Agriculture, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone: (202) 693–2066; email: *wangdahl.amy@dol.gov.*

Telecommunication requirements: For additional information about the telecommunication requirements for the meeting, please contact Ms. Carla Marcellus, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone: (202) 693–1865; email: *marcellus.carla@dol.gov.*

For copies of this **Federal Register** *Notice:* Electronic copies of this **Federal Register** notice are available at *www.regulations.gov.* This notice, as well as news releases and other relevant information, are also available at OSHA's web page at *www.osha.gov.*

SUPPLEMENTARY INFORMATION:

I. Meeting Information

MACOSH Meeting

MACOSH will meet from 10:00 a.m. to 12:00 p.m., ET, Tuesday, June 4, 2024. Public attendance will be virtual via WebEx. Meeting information will be posted in the docket (Docket No. OSHA–2022–0011) and on the MACOSH web page, *https://www.osha.gov/advisorycommittee/macosh,* prior to the meeting.

The tentative agenda for the full Committee meeting will include reports from the Shipyard and Longshoring workgroups, presentations from the Office of Communications and the Directorate of Whistleblower Protection Programs, and a discussion on wind turbine safety.

MACOSH Workgroup Meetings

The MACOSH Shipyard and Longshoring Workgroups will meet from 1:00 p.m. to 3:00 p.m., ET, Tuesday, June 4, 2024.

Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice under the authority granted by 29 U.S.C. 655(b)(1) and 656(d), 5 U.S.C. 10, Secretary of Labor's Order No. 8–2020 (85 FR 58393), and 29 CFR part 1912.

Signed at Washington, DC, on April 22, 2024.

James S. Frederick,

Deputy Assistant Secretary for Occupational Safety and Health.

[FR Doc. 2024–09112 Filed 4–26–24; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2017–0013]

Safe and Sound Campaign; Revision of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to revise the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Safe and Sound Campaign.

DATES: Comments must be submitted (postmarked, sent, or received) by June 28, 2024.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Docket: To read or download comments or other material in the docket, go to *https://www.regulations.gov.* Documents in the docket are listed in the *https://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the websites. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

Instructions: All submissions must include the agency name and OSHA docket number (OSHA–2017–0013) for the Information Collection Request (ICR). OSHA will place all comments, including any personal information, in the public docket, which may be made available online. Therefore, OSHA cautions interested parties about

submitting personal information such as social security numbers and birthdates.

For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Seleda Perryman, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of the continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, the collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of effort in obtaining information (29 U.S.C. 657).

The following sections describe who uses the information collected under each requirement, as well as how they use it. In 2016, OSHA established the Safe and Sound Campaign, a voluntary effort to support the implementation of safety and health programs in businesses throughout the Unites States. Outside stakeholders, including safety health professional organizations, trade and industry associations, academic institutions, and state and federal government agencies, collaborate with the agency on the Campaign. The Campaign includes periodic activities and events, ranging from regular email updates to quarterly national webinars to local meetings to an annual national stand down (*i.e.,* Safe and Sound Week), designed to increase overall employer and employee awareness and understanding of safety and health programs and promote employer adoption of these programs. OSHA believes widespread implementation of such programs will substantially improve overall workplace safety and health conditions.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions to protect workers, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information, and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB approve the information collection requirements contained in the Safe and Sound Campaign. The agency is requesting a revision increase of total burden hours from 2,535 to 20,088 hours, a difference of 17,553 hours. This increase is due to the anticipated increase in the number of respondents registering by 22,000.

OSHA will summarize the comments submitted in response to this notice and will include this summary in the request to OMB to extend the approval of the information collection requirements.

Type of Review: Revision of a currently approved collection.

Title: Safe and Sound Campaign.

OMB Control Number: 1218–0269.

Affected Public: Business or other for-profits.

Number of Respondents: 190,155.

Number of Responses: 190,155.

Frequency of Responses: Once.

Average Time per Response: Varies.

Estimated Total Burden Hours: 20,088.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal; or (2) by facsimile (fax), if your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at 202–693–1648. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR (OSHA–2017–0013). You may supplement electronic submission by uploading document files electronically.

Comments and submissions are posted without change at *https://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *https://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website. All submission, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *https://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627) for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 8–2020 (85 FR 58393).

Signed at Washington, DC, on April 22, 2024.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2024–09070 Filed 4–26–24; 8:45 am]

BILLING CODE 4510–26–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–461; NRC–2024–0046]

Notice of Intent To Conduct Scoping Process and Prepare Environmental Impact Statement; Constellation Energy Generation, LLC; Clinton Power Station, Unit 1

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice; public scoping meeting and request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) will conduct a scoping process to gather information necessary to prepare an environmental impact statement (EIS) to evaluate the environmental impacts for the license renewal of the Facility Operating License No. NPF–62 for Clinton Power Station, Unit 1 (CPS). The NRC is seeking public comment on this action and has scheduled two public scoping meetings that will take place as online webinars.

DATES: The NRC will hold two public scoping meetings as online webinars on May 7, 2024, at 6 p.m. eastern time (ET) and May 9, 2024, at 1 p.m. (ET). Details on both meetings can be found on the NRC's Public Meeting Schedule at *https://www.nrc.gov/pmns/mtg.* Submit comments on the scope of the EIS by May 29, 2024. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website.

- *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2024–0046. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the ''For Further Information Contact'' section of this document.
- *Email comments to: ClintonEnvironmental@nrc.gov.*
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Ashley Waldron, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–7317; email: *Ashley.Waldron@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2024–0046 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2024–0046.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if it is available in ADAMS) is provided the first time that it is referenced.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. ET, Monday through Friday, except Federal holidays.
- *Public Library:* A copy of the license renewal application for CPS, including the environmental report, is available for public review at the following public library location: Vespasian Warner Public Library, 310 N Quincy St., Clinton, IL 61727.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2024–0046 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Discussion

By letter dated February 14, 2024 (ADAMS Package Accession No. ML24045A023), Constellation Energy Generation, LLC (CEG) submitted to the NRC an application for license renewal of Facility Operating License No. NPF–62 for Clinton Power Station, Unit 1 (CPS), for an additional 20 years of operation. This submission initiated the NRC's proposed action of determining whether to grant the license renewal application. CPS is located in DeWitt County, approximately 7 miles east of the city of Clinton in east-central Illinois. The current facility operating license for Unit 1 will expire at midnight on April 17, 2027. The license renewal application was submitted pursuant to part 54 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Requirements for Renewal of Operating Licenses for Nuclear Power Plants,'' and seeks to extend the facility operating license for Unit 1 to midnight on April 17, 2047. A notice of receipt and availability of the application was published in the **Federal Register** on March 7, 2024 (89 FR 16591). A notice of acceptance for docketing of the application and of opportunity to request a hearing was published in the **Federal Register** on April 18, 2024 (89 FR 27805) and is available on the Federal rulemaking website (*https://www.regulations.gov*) by searching for Docket ID NRC–2024–0046

III. Request for Comment

This notice informs the public of the NRC's intention to conduct environmental scoping and prepare an EIS related to the license renewal application for CPS, and to provide the public an opportunity to participate in the environmental scoping process, as defined in 10 CFR 51.29 ''Scoping-environmental impact statement and supplement to environmental impact statement,'' and 10 CFR 51.116, ''Notice of intent.''

The regulations in 36 CFR 800.8, ''Coordination with the National Environmental Policy Act,'' allow agencies to use their National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321, *et seq.*) (NEPA), process to fulfill the

requirements of Section 106 of the National Historic Preservation Act of 1966 (54 U.S.C. 300101, *et seq.*) (NHPA). Therefore, pursuant to 36 CFR 800.8(c), the NRC intends to use its process and documentation required for the preparation of the EIS on the proposed action to comply with Section 106 of the NHPA in lieu of the procedures set forth at 36 CFR 800.3 through 800.6.

In accordance with 10 CFR 51.53(c) and 10 CFR 54.23, CEG submitted an environmental report (ER) as part of the license renewal application. The ER was prepared pursuant to 10 CFR part 51 and is publicly available at ADAMS Accession No. ML24045A279. The ER will also be available for viewing at *https://www.nrc.gov/reactors/operating/licensing/renewal/applications/clinton.html.*

The NRC intends to gather the information necessary to prepare a plant-specific supplement to NUREG–1437, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants'' (GEIS) (ADAMS Package Accession No. ML13107A023), related to the license renewal application for CPS. The NRC is required by 10 CFR 51.95 to prepare a plant-specific supplement to the GEIS in connection with the renewal of an operating license. This notice is being published in accordance with NEPA and the NRC's regulations at 10 CFR part 51.

The supplemental to the GEIS will evaluate the environmental impacts of the license renewal for CPS, and reasonable alternatives thereto. Possible alternatives to the proposed action include the no action alternative and reasonable alternative energy sources.

As part of its environmental review, the NRC will first conduct a scoping process for the EIS and, as soon as practicable thereafter, will prepare a draft EIS for public comment. Participation in this scoping process by members of the public and local, State, Tribal, and Federal government agencies is encouraged. The scoping process for the EIS will be used to accomplish the following:

a. Define the proposed action that is to be the subject of the EIS;

b. Determine the scope of the EIS and identify the significant issues to be analyzed in depth;

c. Identify and eliminate from detailed study those issues that are peripheral or are not significant or that have been covered by prior environmental review;

d. Identify any environmental assessments and other ElSs that are being or will be prepared that are related to, but are not part of, the scope of the EIS under consideration;

e. Identify other environmental review and consultation requirements related to the proposed action;

f. Indicate the relationship between the timing of the preparation of the environmental analyses and the NRC's tentative planning and decision-making schedule;

g. Identify any cooperating agencies and, as appropriate, allocate assignments for preparation and schedules for completing the EIS to the NRC and any cooperating agencies; and

h. Describe how the EIS will be prepared, including any contractor assistance to be used.

The NRC invites the following entities to participate in scoping:

a. The applicant, Constellation Energy Generation, LLC;

b. Any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved or that is authorized to develop and enforce relevant environmental standards;

c. Affected State and local government agencies, including those authorized to develop and enforce relevant environmental standards;

d. Any affected Indian Tribe;

e. Any person who requests or has requested an opportunity to participate in the scoping process; and

f. Any person who has petitioned or intends to petition for leave to intervene under 10 CFR 2.309.

IV. Public Scoping Meeting

In accordance with 10 CFR 51.26(b), the scoping process for an EIS may include a public scoping meeting to help identify significant issues related to the proposed action and to determine the scope of issues to be addressed in the EIS.

The NRC is announcing that it will hold two public scoping meetings as online webinars for the CPS license renewal application. The webinar will include a telephone line for members of the public to provide comments. A court reporter will transcribe all comments received during the webinars. To be considered, comments must be provided either at the transcribed public meeting or in writing, as discussed in the **ADDRESSES** section of this document. The public scoping webinars will be held on May 7, 2024, at 6 p.m. ET and May 9, 2024, at 1 p.m. ET. Persons interested in attending this online webinar should monitor the NRC's Public Meeting Schedule website at *https://www.nrc.gov/pmns/mtg* for additional information, agendas for the meeting, and access information for the webinar. Please contact Ashley Waldron no later than May 2, 2024, if accommodations or special equipment is needed to attend or to provide comments, so that the NRC staff can determine whether the request can be accommodated.

The public scoping meeting will include: (1) an overview by the NRC staff of the environmental and safety review processes, the proposed scope of the EIS, and the proposed review schedule; and (2) the opportunity for interested government agencies, organizations, and individuals to submit comments or suggestions on environmental issues or the proposed scope of the CPS license renewal EIS.

Participation in the scoping process for the CPS license renewal EIS does not entitle participants to become parties to the proceeding to which the EIS relates. Matters related to participation in any hearing are outside the scope of matters to be discussed at this public meeting.

Dated: April 23, 2024.

For the Nuclear Regulatory Commission.

Stephen S. Koenick,

Chief, Environmental Project Management Branch 1, Division of Rulemaking, Environment, and Financial Support, Office of Nuclear Material Safety, and Safeguards.

[FR Doc. 2024–09063 Filed 4–26–24; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2024–0026]

Information Collection: Planned Power Uprate-Related Licensing Submittals for All Power Reactor Licensees

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed information collection; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on this proposed information collection. The information collection is entitled, ''Planned Power Uprate-Related Licensing Submittals for All Power Reactor Licensees.''

DATES: Submit comments by June 28, 2024. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

• *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2024–0026. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *Mail comments to:* David Cullison, Office of the Chief Information Officer, Mail Stop: T–6 A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2024–0026 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

• *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2024–0026. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2024–0026 on this website.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The supporting statement, Regulatory Issue Summary, and burden table are available in ADAMS under Accession Nos. ML24009A269, ML23353A201, and ML24018A171.

• *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

• *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2024–0026, in your comment submission.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collection:* Planned Power Uprate-Related Licensing Submittals for All Power Reactor Licensees.

2. *OMB approval number:* An OMB control number has not yet been assigned to this proposed information collection.

3. *Type of submission:* New.

4. *The form number, if applicable:* Not applicable.

5. *How often the collection is required or requested:* Annually, with the addition of voluntary updates as available.

6. *Who will be required or asked to respond:* All holders of operating licenses or combined licenses for nuclear power reactors, except those that have permanently ceased operations and have certified that fuel has been permanently removed from the reactor vessel or combined license holders that have not received authorization to load nuclear fuel and begin operation.

7. *The estimated number of annual responses:* 5.33.

8. *The estimated number of annual respondents:* 5.33.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 107.

10. *Abstract:* This voluntary information collection assists the NRC in determining resource and budget needs as well as aligning the proper allocation and utilization of resources to support power uprate related licensing activities. In addition, information provided to the NRC staff is intended to promote early communications between the NRC and the respective addressees about potential power uprate licensing actions and related activities, submission dates, and plans for alternate source term amendments or accident tolerant fuels amendments activities. The overarching goal of this information collection is to assist the NRC staff more effectively and efficiently plan, schedule, and implement activities and reviews in a timely manner.

III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility? Please explain your answer.

2. Is the estimate of the burden of the information collection accurate? Please explain your answer.

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

Dated: April 24, 2024.

For the Nuclear Regulatory Commission.

David Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2024–09096 Filed 4–26–24; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–7033; NRC–2024–0062]

Global Laser Enrichment, LLC; New Headquarters; Environmental Assessment and Finding of No Significant Impact

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) staff is considering approval of a Standard Practice Procedures Plan (SPPP) and Transportation Security Plan (TSP) for the protection of classified matter at the new Global Laser Enrichment, LLC (GLE) headquarters facility. The NRC staff is issuing an environmental assessment (EA) and finding of no significant impact (FONSI) associated with the proposed plans.

DATES: The EA and FONSI referenced in this document are available on April 29, 2024.

ADDRESSES: Please refer to Docket ID NRC–2024–0062 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2024–0062. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section. Individuals seeking access to Official Use Only information should contact Matthew Bartlett, using the contact information listed in the **FOR FURTHER INFORMATION CONTACT** section.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Matthew Bartlett, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–7154; email: *Matthew.Bartlett@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC staff is considering issuance of approval of GLE's SPPP and TSP for GLE's new headquarters, located in Wilmington, NC, approximately 6.2 miles from GLE's existing test loop facility. Approval of the SPPP and TSP fulfill the appropriate requirements for the NRC to issue a facility clearance to allow for the use, processing, storage, reproduction, transmittal, transportation, or handling of NRC classified matter at GLE's new headquarters building. Therefore, as required by section 51.21 of title 10 of the Code of Federal Regulations (10 CFR), ''Criteria for and identification of licensing and regulatory actions requiring environmental assessments,'' the NRC staff has prepared an EA that analyzes the environmental effects of the proposed action. Based on the results of the EA and in accordance with 10 CFR 51.31(a), the NRC staff has prepared a FONSI for the proposed action.

The NRC staff received a request from GLE for approval of the SPPP dated August 25, 2023, supplemented by letter dated March 12, 2024, and for approval of the TSP dated August 25, 2023, supplemented by later dated October 2, 2023. The NRC staff is also considering the approval of a separate but related request for a revised Program Cyber Security Plan to extend GLE's classified network to the new headquarters building. That **Federal Register** notice is anticipated to be published in the near future and will be available on the Federal rulemaking website (*https://www.regulations.gov*) by searching for Docket ID NRC–2024–0061.

II. Environmental Assessment

Description of the Proposed Action

The proposed action would allow GLE to expand use of classified matter to a new headquarters location approximately 6.2 miles from the test loop facility. As proposed, GLE would continue to possess, use, and store classified matter at its test loop facility. GLE would also possess, use, and store classified matter at the new headquarters location and would be authorized to transport classified matter between the two sites. Global Laser Enrichment, LLC operates a test loop for industrialization of the uranium enrichment process that uses separation of isotopes by laser excitation. Although GLE has an NRC-issued facility security clearance for the test loop facility under 10 CFR part 95 for protection of classified information, the facility's operations, safety, and safeguards programs are authorized under the Global Nuclear Fuel—America license SNM–1097.

Need for the Proposed Action

The proposed action would allow GLE to expand use of classified matter to a new headquarters building to facilitate further research and development potentially leading to the industrialization of the laser enrichment process. The proposed NRC staff approval of the SPPP and TSP will support the possession, use, and storage of classified matter at the new headquarters as well as transportation of classified matter between the GLE test loop facility and the GLE headquarters facility.

Environmental Impacts of the Proposed Action

The NRC staff has assessed the potential environmental impacts from approval of GLE's SPPP and TSP.

The TSP provides the security procedures for the transportation of classified matter from the test loop facility to the headquarters facility. The new GLE headquarters facility is located in Wilmington, NC. The facility is approximately 0.5 km (0.3 mi) from Interstate 140 via Castle Hayne Road and approximately 1.9 km (1.2 mi) from Interstate 140 via U.S. Highway 421. The NRC staff evaluated the potential for impacts from the proposed action and concluded that there would be no effluent releases and that the proposed action would have no significant radiological or non-radiological impacts to environmental resources. The NRC staff determined that there would be no significant impacts from the proposed action associated with the transportation of classified matter. There would be no construction of new roads or other improvements to facilitate the transportation of the classified matter. With fewer than ten trips, of three or fewer vehicles per trip, between the facilities per week, the proposed action is not expected to

significantly increase traffic levels. Therefore, activities associated with transportation of classified material would not result in significant environmental impacts. The NRC staff evaluated the potential for environmental impacts at the GLE headquarters facility from the proposed approval of the SPPP, which involves modifications to systems used for security, and concluded that the proposed action would not involve any significant construction impacts.

The NRC staff assessed the impacts of the proposed action on land use; historical and cultural resources; visual and scenic resources; climatology, meteorology and air quality; geology, minerals, and soils; water resources; ecological resources; socioeconomics; noise; traffic and transportation; public and occupational health and safety; and waste management and concluded that the proposed action would have no significant environmental impacts on these resource areas. The NRC staff determined that there are no cumulative impacts associated with the proposed action.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (*i.e.,* the ''no-action'' alternative). Under this alternative, GLE would not be granted approval of the SPPP and TSP for the new location. Denial of the proposed action would result in GLE being unable to conduct operations related to classified matter at its headquarters location. The NRC staff concluded that environmental impacts from the no-action alternative would not be significant.

Agencies and Persons Consulted

The Endangered Species Act (ESA) was enacted to prevent further decline of endangered and threatened species and restore those species and their critical habitat. Section 7 of the ESA requires Federal agencies to consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate, regarding actions that may affect listed species or designated critical habitats. The NRC staff has determined that the proposed action would have no effect on threatened or endangered species or critical habitat. Therefore, consultation under section 7 of the ESA is not required.

Section 106 of the National Historic Preservation Act (NHPA) requires Federal agencies to consider the effects of their undertakings on historic properties. As stated in the NHPA, historic properties are any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places. The NRC staff has determined that the undertaking is a type of activity that does not have the potential to cause effects on any historic properties that may be present. Therefore, in accordance with 36 CFR 800.3(a)(1), the NRC has no further obligations under section 106 of the NHPA.

III. Finding of No Significant Impact

GLE has requested approval of its SPPP and TSP for the new headquarters facility. The NRC staff has prepared an EA as part of its review of the proposed action. The proposed action would have no significant radiological or non-radiological impacts to environmental resources. This FONSI incorporates by reference the EA in Section II of this notice. On the basis of this EA, the NRC staff concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement.

IV. Availability of Documents

The documents identified in the following table are available to interested persons through one or more of the following methods, as indicated.

Document description	ADAMS accession No.
Submission for Approval of the Standard Practice and Procedures Plan (SPPP) and Transportation Plan for Global Laser Enrichment Headquarters, dated August 25, 2023.	ML23243A847
RE-Submission of the GLE Standard Practice and Procedures Plan (SPPP) for Headquarters Facility (HQ), dated March 12, 2024.	ML24081A017
RE-Submission for Approval of the Transportation Plan for Global Laser Enrichment Headquarters, dated October 2, 2023.	ML23284A062

Dated: April 23, 2024.

For the Nuclear Regulatory Commission.

Samantha Lav,

Branch Chief, Fuel Facilities Licensing Branch, Division of Fuel Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2024–09097 Filed 4–26–24; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2024–0001]

Sunshine Act Meetings

TIME AND DATE: Weeks of April 29, May 6, 13, 20, 27, and June 3, 2024. The schedule for Commission meetings is subject to change on short notice. The NRC Commission Meeting Schedule can be found on the internet at: *https://www.nrc.gov/public-involve/public-meetings/schedule.html.*

PLACE: The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.,* braille, large print), please notify Anne Silk, NRC Disability Program Specialist, at 301–287–0745, by videophone at 240–428–3217, or by email at *Anne.Silk@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

STATUS: Public.

Members of the public may request to receive the information in these notices electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555, at 301–415–1969, or by email at *Betty.Thweatt@nrc.gov* or *Samantha.Miklaszewski@nrc.gov.*

MATTERS TO BE CONSIDERED:

Week of April 29, 2024

There are no meetings scheduled for the week of April 29, 2024.

Week of May 6, 2024—Tentative

There are no meetings scheduled for the week of May 6, 2024.

Week of May 13, 2024—Tentative

There are no meetings scheduled for the week of May 13, 2024.

Week of May 20, 2024—Tentative

There are no meetings scheduled for the week of May 20, 2024.

Week of May 27, 2024—Tentative

There are no meetings scheduled for the week of May 27, 2024.

Week of June 3, 2024—Tentative

Tuesday, June 4, 2024

10:00 a.m. Briefing on Human Capital and Equal Employment Opportunity (Public Meeting) (Contact: Angie Randall: 301–415–6806)

Additional Information: The meeting will be held in the Commissioners' Hearing Room, 11555 Rockville Pike, Rockville, Maryland. The public is invited to attend the Commission's meeting in person or watch live via webcast at the Web address—*https://video.nrc.gov/.*

Friday, June 7, 2024

10:00 a.m. Meeting with Advisory Committee on Reactor Safeguards (Public Meeting) (Contact: Robert Krsek: 301–415–1766)

Additional Information: The meeting will be held in the Commissioners' Hearing Room, 11555 Rockville Pike, Rockville, Maryland. The public is invited to attend the Commission's meeting in person or watch live via webcast at the Web address—*https://video.nrc.gov/.*

CONTACT PERSON FOR MORE INFORMATION: For more information or to verify the status of meetings, contact Wesley Held at 301–287–3591 or via email at *Wesley.Held@nrc.gov.*

The NRC is holding the meetings under the authority of the Government in the Sunshine Act, 5 U.S.C. 552b.

Dated: April 24, 2024.

For the Nuclear Regulatory Commission.

Wesley W. Held,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2024–09204 Filed 4–25–24; 11:15 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee Virtual Public Meeting

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: According to the provisions of section 10 of the Federal Advisory Committee Act, notice is hereby given that a virtual meeting of the Federal Prevailing Rate Advisory Committee will be held on Thursday, May 16, 2024. There will be no in-person gathering for this meeting.

DATES: The virtual meeting will be held on May 16, 2024, beginning at 10:00 a.m. (ET).

ADDRESSES: The meeting will convene virtually.

FOR FURTHER INFORMATION CONTACT: Ana Paunoiu, 202–606–2858, or email *paypolicy@opm.gov*.

SUPPLEMENTARY INFORMATION: The Federal Prevailing Rate Advisory Committee is composed of a Chair, five representatives from labor unions holding exclusive bargaining rights for Federal prevailing rate employees, and five representatives from Federal agencies. Entitlement to membership on the Committee is provided for in 5 U.S.C. 5347.

The Committee's primary responsibility is to review the Prevailing Rate System and other matters pertinent to establishing prevailing rates under subchapter IV, chapter 53, 5 U.S.C., as amended, and from time to time advise the Office of Personnel Management.

Annually, the Chair compiles a report of pay issues discussed and concluded recommendations. These reports are available to the public. Reports for calendar years 2008 to 2023 are posted at *http://www.opm.gov/fprac.* Previous reports are also available, upon written request to the Committee.

The public is invited to submit material in writing to the Chair on Federal Wage System pay matters felt to be deserving of the Committee's attention. Additional information on these meetings may be obtained by contacting the Committee at Office of Personnel Management, Federal Prevailing Rate Advisory Committee, Room 7H31, 1900 E Street NW, Washington, DC 20415, (202) 606–2858.

This meeting is open to the public, with an audio option for listening. This notice sets forth the participation guidelines for the meeting.

Meeting Agenda. The committee meets to discuss various agenda items related to the determination of prevailing wage rates for the Federal Wage System. The committee's agenda is approved one week prior to the public meeting and will be available upon request at that time.

Public Participation: The May 16, 2024, meeting of the Federal Prevailing Rate Advisory Committee is open to the public through advance registration. Public participation is available for the meeting. All individuals who plan to attend the virtual public meeting to listen must register by sending an email to *paypolicy@opm.gov* with the subject line ''May 16, 2024'' no later than Tuesday, May 14, 2024.

The following information must be provided when registering:

- Name.
- Agency and duty station.
- Email address.
- Your topic of interest.

Members of the press, in addition to registering for this event, must also RSVP to *media@opm.gov* by May 14, 2024.

A confirmation email will be sent upon receipt of the registration. Audio teleconference information for participation will be sent to registrants the morning of the virtual meeting.

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

[FR Doc. 2024–09162 Filed 4–26–24; 8:45 am]

BILLING CODE 6325–39–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2022–110; MC2024–244 and CP2024–250; MC2024–245 and CP2024–251; MC2024–246 and CP2024–252; MC2024–247 and CP2024–253]

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:* April 30, 2024.

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

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service

agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2022–110; *Filing Title:* USPS Notice of Amendment to Priority Mail Express, Priority Mail, First-Class Package Service & Parcel Select Contract 20, Filed Under Seal; *Filing Acceptance Date:* April 22, 2024; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* April 30, 2024.

2. *Docket No(s).:* MC2024–244 and CP2024–250; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 55 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* April 22, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Alain Brou; *Comments Due:* April 30, 2024.

3. *Docket No(s).:* MC2024–245 and CP2024–251; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 225 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* April 22, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Alain Brou; *Comments Due:* April 30, 2024.

4. *Docket No(s).:* MC2024–246 and CP2024–252; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 60 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* April 22, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Arif Hafiz; *Comments Due:* April 30, 2024.

5. *Docket No(s).:* MC2024–247 and CP2024–253; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 226 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* April 22, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Arif Hafiz; *Comments Due:* April 30, 2024

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2024–09128 Filed 4–26–24; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

POSTAL SERVICE

Sunshine Act Meetings

TIME AND DATE: Thursday, May 9, 2024, at 9:00 a.m.; Thursday, May 9, 2024, at 3:00 p.m.

PLACE: Washington, DC, at U.S. Postal Service Headquarters, 475 L'Enfant Plaza, SW, in the Benjamin Franklin Room.

STATUS: Thursday, May 9, 2024, at 9:00 a.m.—Closed. Thursday, May 9, 2024, at 3:00 p.m.—Open.

MATTERS TO BE CONSIDERED:

Meeting of the Board of Governors

Thursday, May 9, 2024, at 9:00 a.m. (Closed)

1. Strategic Issues.
2. Financial and Operational Matters.
3. Executive Session.
4. Administrative Items.

Thursday, May 9, 2024, at 3:00 p.m. (Open)

1. Remarks of the Chairman of the Board of Governors.
2. Remarks of the Postmaster General and CEO.
3. Approval of the Minutes.
4. Committee Reports.
5. Quarterly Financial Report.
6. Quarterly Service Performance Report.
7. Approval of Tentative Agenda for August 8 Open Meeting.

CONTACT PERSON FOR MORE INFORMATION: Michael J. Elston, Secretary of the Board of Governors, U.S. Postal Service, 475 L'Enfant Plaza, SW, Washington, DC 20260–1000. Telephone: (202) 268–4800.

Michael J. Elston,

Secretary.

[FR Doc. 2024–09262 Filed 4–25–24; 4:15 pm]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100012; File No. SR–C2–2024–005]

Self-Regulatory Organizations; Cboe C2 Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

April 23, 2024.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 9, 2024, Cboe C2 Exchange, Inc. (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe C2 Exchange, Inc. (the ''Exchange'' or ''C2 Options'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

website (*http://markets.cboe.com/us/options/regulation/rule_filings/ctwo/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Trading Permit Holders (''TPHs'') and non-TPHs on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gbps'') circuit and $7,500 per physical port for a 10 Gbps circuit. The Exchange proposes to increase the monthly fee for 10 Gbps physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: Cboe BZX Exchange, Inc. (options and equities platforms), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., and Cboe EDGA Exchange, Inc., (''Affiliate Exchanges'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its TPHs and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gbps physical ports. Further, the current 10 Gbps physical port fee has remained unchanged since June 2018.[10] Since its last increase over 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gbps physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%. The Exchange is also unaware of any standard that suggests any fee proposal that exceeds a certain yearly or cumulative inflation rate is unreasonable, and in any event, in this instance the increase is well below the cumulative rate.

Additionally, the Exchange believes the proposed fee increase is reasonable in light of recent and anticipated connectivity-related upgrades and changes. The Exchange and its affiliated exchanges recently launched a multi-year initiative to improve Cboe Exchange Platform performance and capacity requirements to increase competitiveness, support growth and advance a consistent world class platform. The goal of the project, among other things, is to provide faster and more consistent order handling and matching performance for options, while ensuring quicker processing time and supporting increasing volumes and capacity needs. For example, the Exchange recently performed switch hardware upgrades. Particularly, the Exchange replaced existing customer access switches with newer models, which the Exchange believes resulted in increased determinism. The recent switch upgrades also increased the Exchange's capacity to accommodate more physical ports by nearly 50%. Network bandwidth was also increased nearly two-fold as a result of the upgrades, which among other things, can lead to reduce message queuing. The Exchange also believes these newer models result in less natural variance in

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–C2–2023–014). On September 1, 2023, the Exchange withdrew that filing and submitted SR–C2–2023–020. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On September 29, 2023, the Exchange filed the proposed fee change (SR–C2–2023–021). On October 13, 2023, the Exchange withdrew that filing and submitted SR–C2–2023–022. On December 12, 2023, the Exchange withdrew that filing and submitted SR–C2–2023–025. On February 9, 2024, the Exchange withdrew that filing and submitted SR–C2–2024–004. On April 9, 2024, the Exchange withdrew that filing and submitted this filing.

[4] *See e.g.*, The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83455 (June 15, 2018), 83 FR 28892 (June 21, 2018) (SR–C2–2018–014).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

the processing of messages. The Exchange notes that it incurred costs associated with purchasing and upgrading to these newer models, of which the Exchange has not otherwise passed through or offset.

As of April 1, 2024, market participants also having the option of connecting to a new data center (*i.e.,* Secaucus NY6 Data Center (''NY6'')), in addition to the current data centers at NY4 and NY5. The Exchange made NY6 available in response to customer requests in connection with their need for additional space and capacity. In order to make this space available, the Exchange expended significant resources to prepare this space, and will also incur ongoing costs with respect to maintaining this offering, including costs related to power, space, fiber, cabinets, panels, labor and maintenance of racks. The Exchange also incurred a large cost with respect to ensuring NY6 would be latency equalized, as it is for NY4 and NY5.

The Exchange also has made various other improvements since the current physical port rates were adopted in 2018. For example, the Exchange has updated its customer portal to provide more transparency with respect to firms' respective connectivity subscriptions, enabling them to better monitor, evaluate and adjust their connections based on their evolving business needs. The Exchange also performs proactive audits on a weekly basis to ensure that all customer cross connects continue to fall within allowable tolerances for Latency Equalized connections. Accordingly, the Exchange expended, and will continue to expend, resources to innovate and modernize technology so that it may benefit its Members and continue to compete among other options markets. The ability to continue to innovate with technology and offer new products to market participants allows the Exchange to remain competitive in the options space which currently has 17 options markets and potential new entrants.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, TPHs are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gbps physical ports and charging a higher fee as compared to the 1 Gbps physical port is equitable as the 1 Gbps physical port is 1/10th the size of the 10 Gbps physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gbps alternative is lower than the value of the 10 Gbps alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gbps physical ports utilize the most bandwidth and therefore consume the most resources from the network. The Exchange also anticipates that firms that utilize 10 Gb ports will benefit the most from the Exchange's investment in offering NY6 as the Exchange anticipates there will be much higher quantities of 10 Gb physical ports connecting from NY6 as compared to 1 Gb ports. Indeed, the Exchange notes that 10 Gb physical ports account for approximately 90% of physical ports across the NY4, NY5, and NY6 data centers, and to date, 80% of new port connections in NY6 are 10 Gb ports. As such, the Exchange believes the proposed fee change for 10 Gbps physical ports is reasonably and appropriately allocated.

The Exchange also notes TPHs and non-TPHs will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a TPH of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Market participants may voluntarily choose to become a member of one or more of a number of different exchanges, of which, the Exchange is but one choice. Additionally, any Exchange member that is dissatisfied with the proposal is free to choose not to be a member of the Exchange and send order flow to another exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other options exchanges that a market participant may connect to in lieu of the Exchange and/or trading of any options product, such as within the Over-the-Counter (OTC) markets which do not require connectivity to the Exchange. Indeed, there are currently 17 registered options exchanges that trade options (13 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single options exchange has more than approximately 19% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, there are 4 exchanges that have been added in the U.S. options markets in the last 5 years (*i.e.,* Nasdaq MRX, LLC, MIAX Pearl, LLC, MIAX Emerald LLC, and most recently, MEMX LLC).

As noted above, there is no regulatory requirement that any market participant connect to any one options exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one options exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 52

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[13] *Id.*

[14] *See* Cboe Global Markets U.S. Options Market Volume Summary (April 8, 2024), available at *https://markets.cboe.com/us/options/market_statistics/.*

TPHs, Cboe BZX has 61 members that trade options, and Cboe EDGX has 51 members that trade options. There is also no firm that is a Member of C2 Options only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE American Options has 71 members, [15] and NYSE Arca Options has 69 members,[16] MIAX Options has 46 members [17] and MIAX Pearl Options has 40 members.[18]

Vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 13 non-Cboe affiliated options markets. Indeed, market participants are free to choose which exchange to use to satisfy their business needs. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

The Exchange lastly notes that it is not required by the Exchange Act, nor any other rule or regulation, to undertake a cost-of-service or rate-making approach with respect to fee proposals. Moreover, Congress's intent in enacting the 1975 Amendments to the Act was to enable competition—rather than government order—to determine prices. The principal purpose of the amendments was to facilitate the creation of a national market system for the trading of securities. Congress intended that this ''national market system evolve through the interplay of *competitive forces* as unnecessary regulatory restrictions are removed.'' [19] Other provisions of the Act confirm that intent. For example, the Act provides that an exchange must design its rules ''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.'' [20] Likewise, the Act grants the Commission authority to amend or repeal ''[t]he rules of [an] exchange [that] impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.'' [21] In short, the promotion of free and open competition was a core congressional objective in creating the national market system.[22] Indeed, the Commission has historically interpreted that mandate to promote competitive forces to determine prices whenever compatible with a national market system. Accordingly, the Exchange believes it has met its burden to demonstrate that its proposed fee change is reasonable and consistent with the immediate filing process chosen by Congress, which created a system whereby market forces determine access fees in the vast majority of cases, subject to oversight only in particular cases of abuse or market failure. Lastly, and importantly, the Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for the proposed fee would be so complicated that it could not be done practically.

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. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated TPHs equally (i.e., all market participants that choose to purchase the 10 Gbps physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gbps physical port (which cost is not changing). While pricing may be increased for the larger capacity physical porfts, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gbps physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so. Indeed, market participants have numerous alternative venues that they may participate on and direct their order flow, including 13 non-Cboe affiliated options markets, as well as off-exchange venues, where competitive products are available for trading. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has

[15] *See https://www.nyse.com/markets/american-options/membership#directory.*

[16] *See https://www.nyse.com/markets/arca-options/membership#directory.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Options_Exchange_Members_April_2023_04282023.pdf.*

[18] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Pearl_Exchange_Members_01172023_0.pdf.*

[19] *See* H.R. Rep. No. 94–229, at 92 (1975) (Conf. Rep.) (emphasis added)

[20] 15 U.S.C. 78f(b)(5).

[21] 15 U.S.C. 78f(8).

[22] *See* also 15 U.S.C. 78k–l(a)(1)(C)(ii) (purposes of Exchange Act include to promote ''fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets''); Order, 73 FR at 74781 (''The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'').

been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [23] The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[24] Accordingly, the Exchange does not believe its proposed change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act [25] and paragraph (f) of Rule 19b–4 [26] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–C2–2024–005 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–C2–2024–005. 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–C2–2024–005 and should be submitted on or before May 20, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–09069 Filed 4–26–24; 8:45 am]

BILLING CODE 8011–01–P

[23] See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[24] *NetCoalition* v. *SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[25] 15 U.S.C. 78s(b)(3)(A).

[26] 17 CFR 240.19b–4(f).

[27] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 1:30 p.m. on Thursday, May 2, 2024.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street, NE, Washington, DC 20549.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.sec.gov.*

The General Counsel of the Commission, or her designee, has certified that, in her opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

The subject matter of the closed meeting will consist of the following topics:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Resolution of litigation claims; and

Other matters relating to examinations and enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

CONTACT PERSON FOR MORE INFORMATION: For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Authority: 5 U.S.C. 552b.

Dated: April 25, 2024.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2024–09247 Filed 4–25–24; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100017; File No. 4–757]

Joint Industry Plan; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a National Market System Plan Regarding Consolidated Equity Market Data

April 23, 2024.

I. Introduction

On October 23, 2023, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., Investors Exchange LLC, Long Term Stock Exchange, Inc., MEMX LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq PHLX LLC, Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., NYSE National, Inc., and Financial Industry Regulatory Authority, Inc. (collectively, the ''SROs'' or ''Participants'') filed with the Securities and Exchange Commission (''Commission'') a proposed new single national market system plan governing the public dissemination of real-time consolidated equity market data for national market system (''NMS'') stocks (the ''CT Plan''). The proposed CT Plan was published for comment in the **Federal Register** on January 25, 2024.[1]

This order institutes proceedings, under Rule 608(b)(2)(i) of Regulation NMS,[2] to determine whether to approve or disapprove the proposed CT Plan or to approve it with any changes or subject to any conditions the Commission deems necessary or appropriate after considering public comment.[3]

II. Background

On September 1, 2023, the Commission issued an amended order directing the SROs to submit a new national market system plan (''NMS plan'') regarding consolidated equity market data to replace the three NMS plans (''Equity Data Plans'')[4] that govern the public dissemination of real-time consolidated market data for NMS stocks,[5] and to include specified provisions in the proposed NMS plan.[6] The SROs filed the proposed CT Plan pursuant to the Amended Governance Order.[7]

III. Proceedings To Determine Whether To Approve or Disapprove the Proposed CT Plan

The Commission is instituting proceedings pursuant to Rule 608(b)(2)(i) of Regulation NMS,[8] and Rules 700 and 701 of the Commission's Rules of Practice,[9] to determine whether to approve or disapprove the proposed CT Plan or to approve it with any changes or subject to any conditions the Commission deems necessary or appropriate after considering public comment. The Commission is instituting proceedings to have sufficient time to consider the issues raised by the proposed CT Plan, including comments received. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed CT Plan to inform the Commission's analysis.

Rule 608(b)(2) of Regulation NMS provides that the Commission ''shall approve a national market system plan . . ., with such changes or subject to such conditions as the Commission may deem necessary or appropriate, if it finds that such plan . . . is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of'' the Securities Exchange Act of 1934 (''Exchange Act'').[10] Rule 608(b)(2) of Regulation NMS further provides that the Commission shall disapprove a national market system plan or proposed amendment if it does not make such a finding.[11] In this order, pursuant to Rule 608(b)(2)(i) of Regulation NMS,[12] the Commission is providing notice of the grounds for disapproval under consideration:

1. Whether the proposed CT Plan is consistent with the Amended Governance Order;

2. Whether, consistent with Rule 608(b)(2) of Regulation NMS,[13] the terms of the proposed CT Plan are necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Exchange Act;

3. Whether modifications to the proposed CT Plan, or conditions to its approval, would be necessary to make the proposed plan necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Exchange Act;

4. Whether the proposed CT Plan is consistent with Congress's finding, in section 11A(a)(1)(C)(iii) of the Exchange Act, that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to ensure ''the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities'';[14]

5. Whether, consistent with the purposes of section 11A(c)(1)(B) of the Exchange Act, the proposed CT Plan is appropriately structured, and whether its provisions are appropriately drafted, to support the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in NMS stocks, and the fairness and usefulness of the form and content of such information;[15] and

6. Whether, consistent with Rule 608(b)(2) of Regulation NMS,[16] the proposed timeline for implementation in Exhibit F[17] of the proposed CT Plan is necessary or appropriate in the public interest, for the protection of investors

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[1] *See* Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 99403 (Jan. 19, 2024), 89 FR 5002 (Jan. 25, 2024) (''Notice'').

[2] 17 CFR 242.608(b)(2)(i).

[3] Comments received in response to the Notice can be found on the Commission's website at *https://www.sec.gov/comments/4-757/4-757.htm*.

[4] The three Equity Data Plans that currently govern the collection, consolidation, processing, and dissemination of consolidated equity market data via the exclusive securities information processors (''SIPs'') are: (1) the Consolidated Tape Association Plan (''CTA Plan''); (2) the Consolidated Quotation Plan (''CQ Plan''); and (3) the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis (''UTP Plan'').

[5] Amended Order Directing the Exchanges and the Financial Industry Regulatory Authority, Inc., to File a National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 98271 (Sept. 1, 2023), 88 FR 61630, 61631 (Sept. 7, 2023) (File No. 4–757) (''Amended Governance Order'').

[6] *See id.* at 61639–41.

[7] *See* Notice, *supra* note 1, 89 FR at 5003.

[8] 17 CFR 242.608.

[9] 17 CFR 201.700; 17 CFR 201.701.

[10] *See* 17 CFR 242.608(b)(2).

[11] *See id.*

[12] 17 CFR 242.608(b)(2)(i).

[13] *See* 17 CFR 242.608(b)(2).

[14] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[15] *See* 15 U.S.C. 78k–1(c)(1)(B).

[16] *See* 17 CFR 242.608(b)(2).

[17] *See* Notice, *supra* note 1, 89 FR at 5027–29.

and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Exchange Act.

Under the Commission's Rules of Practice, the ''burden to demonstrate that a NMS plan filing is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the plan participants that filed the NMS plan filing.'' [18] The description of the NMS plan filing, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding.[19] Any failure by the Participants to provide such detail and specificity may result in the Commission not having a sufficient basis to make an affirmative finding that the NMS plan filing is consistent with the Exchange Act and the applicable rules and regulations thereunder.[20]

IV. Commission's Solicitation of Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposed CT Plan. The Commission asks that commenters address the sufficiency and merit of the Participants' statements in support of the proposed CT Plan, in addition to any other comments they may wish to submit about the proposed CT Plan. In particular, the Commission seeks comment on the following:

1. What are commenters' views on whether the proposed CT Plan is consistent with Section 11A or any other provisions of the Exchange Act, or the rules and regulations thereunder?

2. Should any elements of the proposed timeline in Exhibit F [21] of the proposed CT Plan be shortened to ensure that implementation of the proposed CT Plan can be achieved within a reasonable time? If so, which ones and why? Should any elements of the proposed timeline be extended? If so, which ones and why? If the Commission should modify any elements of the proposed timeline, how specifically should it change them? Should the Commission modify the proposed CT Plan to include a specific required end date for implementation? Why or why not? And if so, what should that date be and why?

3. Should the Commission modify the sequence of implementation steps identified in Exhibit F of the proposed CT Plan [22] to provide for greater efficiencies, such as through increased parallel performance of workstream tasks? [23] If so, what changes should be made? Do commenters believe that the proposed implementation schedule's dependencies—the steps that need to be completed before other steps can begin—are justified or otherwise reasonable? Are there dependencies that could be removed or modified to accelerate implementation of the proposed CT Plan? If so, which ones and why? What advantages or disadvantages, including risks or complications, would be associated with such modifications to the implementation timeline?

4. What are commenters' views of Section 14.1 of the proposed CT Plan,[24] which would allow the Operating Committee to lengthen the implementation timelines in Exhibit F by an affirmative vote of the Operating Committee? [25] Should the proposed CT Plan include specific standards to be met before the implementation timelines are lengthened? Should any such changes be subject to Commission approval? Why or why not?

5. Should the Commission modify the proposed CT Plan to allow the Operating Committee to appoint one or more of the current Equity Data Plan administrators to serve as interim Administrator(s) for the proposed CT Plan pending the selection and onboarding of a permanent independent Administrator that meets the Amended Governance Order's requirement that the independent plan Administrator shall not ''be owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own proprietary market data product for NMS stocks''? [26] How might an interim Administrator affect the implementation schedule for the proposed CT Plan? If the Commission modified the proposed CT Plan to permit interim Administrator(s), should it modify the implementation schedule accordingly? If so, how? What would be the advantages and disadvantages associated with the appointment of such an interim Administrator(s)?

6. Are there additional actions of the proposed CT Plan Operating Committee that should not be subject to the two-thirds-vote requirement in Section 4.3(b) of the proposed CT Plan? [27] If so, which actions and why?

Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 608(b)(2)(i) of Regulation NMS,[28] any request for an opportunity to make an oral presentation.[29]

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number 4–757 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 4–757. 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 (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed CT Plan that are filed with the Commission, and all written communications relating to the proposed CT Plan between the Commission and any person, other than those that may be withheld from the public in accordance with the

[18] 17 CFR 201.701(b)(3)(ii).

[19] *Id.*

[20] *Id.*

[21] *See* Notice, *supra* note 1, 89 FR at 5027–29.

[22] *See id.*

[23] Generally, the SROs believe there are six workstreams associated with the implementation of the proposed CT Plan: (1) Setting up the proposed CT Plan's governance; (2) Developing the proposed CT Plan's fees, policies, and data subscriber agreements; (3) Selecting the new Administrator; (4) Contract negotiations with the new Administrator; (5) Administrator setup; and (6) Retirement of the CTA Plan, CQ Plan, and UTP Plan. *See* Notice, *supra* note 1, 89 FR at 5003.

[24] *See* Notice, *supra* note 1, 89 FR at 5021.

[25] Section 14.1 of the proposed CT Plan provides that the Operating Committee must make a reasonable determination that the timeline needs to be extended and provide written progress reports to the Commission noting the adjustments. *See id.*

[26] Amended Governance Order, *supra* note 5, 88 FR at 61640.

[27] For example, Section 4.3(c) of the proposed CT Plan lists actions that may be taken by simple majority vote. *See* Notice, *supra* note 1, 89 FR at 5011.

[28] 17 CFR 242.608(b)(2)(i).

[29] Rule 700(c)(ii) of the Commission's Rules of Practice provides that ''[t]he Commission, in its sole discretion, may determine whether any issues relevant to approval or disapproval would be facilitated by the opportunity for an oral presentation of views.'' 17 CFR 201.700(c)(ii).

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 Participants' principal offices. 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 4–757 and should be submitted on or before May 20, 2024. Rebuttal comments should be submitted by June 3, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–09067 Filed 4–26–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100014; File No. SR–NYSEArca–2023–70]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Designation of a Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of the Grayscale Ethereum Trust Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares)

April 23, 2024.

On October 10, 2023, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the Grayscale Ethereum Trust (''Trust'') under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares). The proposed rule change was published for comment in the **Federal Register** on October 27, 2023.[3]

On December 5, 2023, pursuant to section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On January 25, 2024, the Commission instituted proceedings under section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change.[7] On March 15, 2024, the Exchange filed Amendment No. 1, which replaced and superseded the proposed rule change in its entirety. On April 2, 2024, the Commission published notice of Amendment No. 1 to the proposed rule change.[8]

Section 19(b)(2) of the Act[9] 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 comment in the **Federal Register** on October 27, 2023.[10] The 180th day after publication of the proposed rule change is April 24, 2024. The Commission is extending the time period for approving or disapproving the proposed rule change for an additional 60 days.

The Commission finds that it is 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, as modified by Amendment No. 1, and the issues raised therein. Accordingly, the Commission, pursuant to section 19(b)(2) of the Act,[11] designates June 23, 2024, as the date by which the Commission shall either approve or disapprove the proposed rule change, as modified by Amendment No. 1 (File No. SR–NYSEArca–2023–70).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–09079 Filed 4–26–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100016; File No. SR–NASDAQ–2023–045]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 1 to a Proposed Rule Change To List and Trade Shares of the iShares Ethereum Trust Under Nasdaq Rule 5711(d), Commodity-Based Trust Shares

April 23, 2024.

On November 21, 2023, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the iShares Ethereum Trust (''Trust'') under Nasdaq Rule 5711(d), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on December 11, 2023.[3]

On January 24, 2024, pursuant to section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On March 4, 2024, the Commission instituted proceedings under section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change.[7] On April 19, 2024, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced

[30] 17 CFR 200.30–3(a)(85).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 98780 (Oct. 23, 2023), 88 FR 73892. Comments on the proposed rule change are available at: *https://www.sec.gov/comments/sr-nysearca-2023-70/srnysearca202370.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 99082, 88 FR 85962 (Dec. 11, 2023). The Commission designated January 25, 2024, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 99428, 89 FR 6155 (Jan. 31, 2024).

[8] *See* Securities Exchange Act Release No. 99887, 89 FR 24534 (Apr. 8, 2024).

[9] 15 U.S.C. 78s(b)(2).

[10] *See supra* note 3 and accompanying text.

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(57).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 99081 (Dec. 5, 2023), 88 FR 85945. Comments on the proposed rule change are available at: *https://www.sec.gov/comments/sr-nasdaq-2023-045/srnasdaq2023045.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 99419, 89 FR 5970 (Jan. 30, 2024).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 99665, 89 FR 16811 (Mar. 8, 2024).

and superseded the proposed rule change in its entirety. Amendment No. 1 is 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, as modified by Amendment No. 1, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to a proposed rule change to list and trade shares of the iShares Ethereum Trust (the ''Trust'') under Nasdaq Rule 5711(d) (''Commodity-Based Trust Shares''). The shares of the Trust are referred to herein as the ''Shares.'' This Amendment No. 1 supersedes the original filing in its entirety.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 Exchange proposes to list and trade the Shares under Nasdaq Rule 5711(d),[8] which governs the listing and trading of Commodity-Based Trust Shares on the Exchange. iShares Delaware Trust Sponsor LLC, a Delaware limited liability company and an indirect subsidiary of BlackRock, Inc. (''BlackRock''), is the sponsor of the Trust (the ''Sponsor''). The Shares will be registered with the SEC by means of the Trust's registration statement on Form S–1 (the ''Registration Statement'').[9]

Description of the Trust

The Shares will be issued by the Trust, a Delaware statutory trust. The Trust will operate pursuant to a trust agreement (the ''Trust Agreement'') between the Sponsor, BlackRock Fund Advisors (the ''Trustee'') as the trustee of the Trust and will appoint a Delaware Trustee of the Trust (the ''Delaware Trustee'') by such time that the Registration Statement is effective. The Trust issues Shares representing fractional undivided beneficial interests in its net assets. The assets of the Trust will consist only of ether held by a custodian on behalf of the Trust, except under limited circumstances when transferred through the Trust's prime broker temporarily (described below), and cash. Coinbase Custody Trust Company, LLC (the ''Ether Custodian''), is the custodian for the Trust's ether holdings, and maintains a custody account for the Trust (''Custody Account''); Coinbase, Inc. (the ''Prime Execution Agent''), an affiliate of the Ether Custodian, is the prime broker for the Trust and maintains a trading account for the Trust (''Trading Account''); and another entity will be the custodian for the Trust's cash holdings (the ''Cash Custodian'' and together with the Ether Custodian, the ''Custodians'') and the administrator of the Trust (the ''Trust Administrator''). Under the Trust Agreement, the Trustee may delegate all or a portion of its duties to any agent, and has delegated the bulk of the day-to-day responsibilities to the Trust Administrator and certain other administrative and record-keeping functions to its affiliates and other agents. The Trust is not an investment company registered under the Investment Company Act of 1940, as amended (the ''1940 Act'').

The investment objective of the Trust is to reflect generally the performance of the price of ether. The Trust seeks to reflect such performance before payment of the Trust's expenses and liabilities. The Shares are intended to constitute a simple means of making an investment similar to an investment in ether through the public securities market rather than by acquiring, holding and trading ether directly on a peer-to-peer or other basis or via a digital asset platforms. The Shares have been designed to remove the obstacles represented by the complexities and operational burdens involved in a direct investment in ether, while at the same time having an intrinsic value that reflects, at any given time, the investment exposure to the ether owned by the Trust at such time, less the Trust's expenses and liabilities. Although the Shares are not the exact equivalent of a direct investment in ether, they provide investors with an alternative method of achieving investment exposure to ether through the public securities market, which may be more familiar to them.

Custody of the Trust's Ether and Creation and Redemption

An investment in the Shares is backed by ether held by the Ether Custodian on behalf of the Trust. All of the Trust's ether will be held in the Custody Account, other than the Trust's ether which is temporarily maintained in the Trading Account under limited circumstances, *i.e.,* in connection with creation and redemption Basket[10] activity or sales of ether deducted from the Trust's holdings in payment of Trust expenses or the Sponsor's fee (or, in extraordinary circumstances, upon liquidation of the Trust). The Custody Account includes all of the Trust's ether held at the Ether Custodian, but does not include the Trust's ether temporarily maintained at the Prime Execution Agent in the Trading Account from time to time. The Ether Custodian will keep all of the private keys associated with the Trust's ether held in the Custody Account in ''cold storage''.[11] The hardware, software, systems, and procedures of the Ether Custodian may not be available or cost-effective for many investors to access directly.

The Trust's ether holdings and cash holdings from time to time may temporarily be maintained in the Trading Account held with the Prime Execution Agent, an affiliate of the Ether Custodian. Coinbase Inc. serves as the Trust's Prime Execution Agent pursuant to the Trust's agreement with the Prime Execution Agent (''Prime Execution Agent Agreement''). In this capacity, the Prime Execution Agent facilitates the

[8] The Commission approved Nasdaq Rule 5711 in Securities Exchange Act Release No. 66648 (March 23, 2012), 77 FR 19428 (March 30, 2012) (SR–NASDAQ–2012–013).

[9] The descriptions of the Trust contained herein are based, in part, on information in the Registration Statement. The Registration Statement in not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

[10] The Trust issues and redeems Shares only in blocks of 40,000 or integral multiples thereof. A block of 40,000 Shares is called a ''Basket.'' These transactions take place in exchange for ether.

[11] The term ''cold storage'' refers to a safeguarding method by which the private keys corresponding to the Trust's ether are generated and stored in an offline manner, subject to layers of procedures designed to enhance security. Private keys are generated by the Ether Custodian in offline computers that are not connected to the internet so that they are more resistant to being hacked.

buying and selling of ether by the Trust in response to cash creations and redemptions between the Trust and registered broker-dealers that are Depositary Trust Company (''DTC'') participants that enter into an authorized participant agreement with the Sponsor and the Trustee (''Authorized Participants''), and the sale of ether to pay the Sponsor's fee, any other Trust expenses not assumed by the Sponsor, to the extent applicable, and in extraordinary circumstances, in connection with the liquidation of the Trust's ether.

The Authorized Participants will deliver only cash to create shares and will receive only cash when redeeming shares. Further, Authorized Participants will not directly or indirectly purchase, hold, deliver, or receive ether as part of the creation or redemption process or otherwise direct the Trust or a third party with respect to purchasing, holding, delivering, or receiving ether as part of the creation or redemption process.

The Trust will create shares by receiving ether from a third party that is not the Authorized Participant and the Trust—not the Authorized Participant—is responsible for selecting the third party to deliver the ether. Further, the third party will not be acting as an agent of the Authorized Participant with respect to the delivery of the ether to the Trust or acting at the direction of the Authorized Participant with respect to the delivery of the ether to the Trust. The Trust will redeem shares by delivering ether to a third party that is not the Authorized Participant and the Trust—not the Authorized Participant—is responsible for selecting the third party to receive the ether. Further, the third party will not be acting as an agent of the Authorized Participant with respect to the receipt of the ether from the Trust or acting at the direction of the Authorized Participant with respect to the receipt of the ether from the Trust. The third party will be unaffiliated with the Trust and the Sponsor.

In connection with cash creations and cash redemptions, the Authorized Participants will submit orders to create or redeem Baskets of Shares exclusively in exchange for cash. The Trust will engage in ether transactions to convert cash into ether (in association with creation orders) and ether into cash (in association with redemption orders). The Trust will conduct its ether purchase and sale transactions by, in its sole discretion, choosing to trade directly with designated third parties (each, an ''Ether Trading Counterparty''), who are not registered broker-dealers pursuant to written agreements between each such Ether Trading Counterparty and the Trust, or choosing to trade through the Prime Execution Agent acting in an agency capacity with third parties through its Coinbase Prime service [12] pursuant to the Prime Execution Agent Agreement. Ether Trading Counterparties settle trades with the Trust using their own accounts at the Prime Execution Agent when trading with the Trust.

For a creation of a Basket of Shares, the Authorized Participant will be required to submit the creation order by an early order cutoff (''Creation Early Cutoff Time''). The Creation Early Cutoff Time will initially be 6:00 p.m. ET on the business day prior to trade date.

On the date of the Creation Early Cutoff Time for a creation order, the Trust will choose, in its sole discretion, to enter into a transaction with an Ether Trading Counterparty or the Prime Execution Agent to buy ether in exchange for the cash proceeds from such creation order. On settlement date for a creation, the Trust delivers Shares to the Authorized Participant in exchange for cash received from the Authorized Participant. Also, on or around the settlement date, the Ether Trading Counterparty or Prime Execution Agent, as applicable, deposits the required ether pursuant to its trade with the Trust into the Trust's Trading Account in exchange for cash. In the event the Trust has not been able to successfully execute and complete settlement of an ether transaction by the settlement date of the creation order, the Authorized Participant will be given the option to (1) cancel the creation order, or (2) accept that the Trust will continue to attempt to complete the execution, which will delay the settlement date of the creation order. With respect to a creation order, as between the Trust and the Authorized Participant, the Authorized Participant is responsible for the dollar cost of the difference between the ether price utilized in calculating NAV per Share on trade date and the price at which the Trust acquires the ether to the extent the price realized in buying the ether is higher than the ether price utilized in the NAV. To the extent the price realized in buying the ether is lower than the price utilized in the NAV, the Authorized Participant shall get to keep the dollar impact of any such difference.

Because the Trust's Trading Account may not be funded with cash on trade date for the purchase of ether associated with a cash creation order, the Trust may borrow trade credits (''Trade Credits'') in the form of cash from Coinbase Credit, Inc. (the ''Trade Credit Lender''), an affiliate of the Prime Execution Agent, under the trade financing agreement (''Trade Financing Agreement'') or may require the Authorized Participant to deliver the required cash for the creation order on trade date. The extension of Trade Credits on trade date allows the Trust to purchase ether through the Prime Execution Agent on trade date, with such ether being deposited in the Trust's Trading Account. On settlement date for a creation order, the Trust delivers Shares to the Authorized Participant in exchange for cash received from the Authorized Participant. To the extent Trade Credits were utilized, the Trust uses the cash to repay the Trade Credits borrowed from the Trade Credit Lender. On settlement date for a creation order, the ether purchased is swept from the Trust's Trading Account to the Trust's Custody Account pursuant to a regular end-of-day sweep process.

For a redemption of a Basket of Shares, the Authorized Participant will be required to submit a redemption order by an early order cutoff (the ''Redemption Early Cutoff Time''). The Redemption Early Cutoff Time will initially be 6:00 p.m. ET on the business day prior to trade date. On the date of the Redemption Early Cutoff Time for a redemption order, the Trust may choose, in its sole discretion, to enter into a transaction with an Ether Trading Counterparty or the Prime Execution Agent, to sell ether in exchange for cash. After the Redemption Early Cutoff Time, the Trust instructs the Ether Custodian to prepare to move the associated ether from the Trust's Custody Account to the Trust's Trading Account. On settlement date for a redemption order, the Authorized Participant delivers the necessary Shares to the Trust, and on or around settlement date, an Ether Trading Counterparty or Prime Execution Agent, as applicable, delivers the cash associated with the Trust's sale of ether to the Trust in exchange for the Trust's ether, and the Trust delivers cash to the Authorized Participant. In the event the Trust has not been able to successfully execute and complete settlement of an ether transaction by the settlement date, the Authorized Participant will be given the option to

[12] The Coinbase Prime service is an execution service pursuant to which Coinbase will execute ether orders for the Trust by accessing liquidity from sources such as ether trading platforms, which can include Coinbase's own platform, and other liquidity providers. Trades can be executed according to an algorithm or on the basis of firm quotes sought by requests-for-quote (''RFQ'') for a two-way price sent to liquidity providers. Algorithmic trades can be self-directed or executed by Coinbase's high touch execution desk, Coinbase Execution Services.

(1) cancel the redemption order, or (2) accept that the Trust will continue to attempt to complete the execution, which will delay the settlement date. With respect to a redemption order, between the Trust and the Authorized Participant, the Authorized Participant will be responsible for the dollar cost of the difference between the ether price utilized in calculating the NAV per Share on trade date and the price realized in selling the ether to raise the cash needed for the cash redemption order to the extent the price realized in selling the ether is lower than the ether price utilized in the NAV. To the extent the price realized in selling the bitcoin is higher than the price utilized in the NAV, the Authorized Participant will get to keep the dollar impact of any such difference.

The Trust may use financing in connection with a redemption order when ether remains in the Trust's Custody Account at the point of intended execution of a sale of ether. In those circumstances, the Trust may borrow Trade Credits in the form of ether from the Trade Credit Lender, which allows the Trust to sell ether through the Prime Execution Agent on trade date, and the cash proceeds are deposited in the Trust's Trading Account. On settlement date for a redemption order, the Trust delivers cash to the Authorized Participant in exchange for Shares received from the Authorized Participant. In the event financing was used, the Trust will use the ether moved from the Trust's Custody Account to the Trading Account to repay the Trade Credits borrowed from the Trade Credit Lender.

Net Asset Value

The net asset value (''NAV'') of the Trust is used by the Trust in its day-to-day operations to measure the net value of the Trust's assets. The NAV of the Trust will be equal to the total assets of the Trust, which will consist of ether and cash, less total liabilities of the Trust, each determined by the Trustee pursuant to policies established from time to time by the Trustee or its affiliates as described herein.

The Sponsor has the exclusive authority to determine the Trust's NAV, which it has delegated to the Trustee under the Trust Agreement. The Trustee has delegated to the Trust Administrator the responsibility to calculate the NAV and the NAV per Share for the Trust, based on a pricing source selected by the Trustee. In determining the Trust's NAV per Share, the Trust Administrator will value the ether held by the Trust based on the index price, unless the Sponsor in its sole discretion determines that the index is unreliable. The CME CF Ether-Dollar Reference Rate—New York Variant for the Ether-U.S. Dollar trading pair (the ''CF Benchmarks Index'') shall constitute the index (''the ''Index''), unless the CF Benchmarks Index is not available or the Sponsor in its sole discretion determines that the CF Benchmarks Index is unreliable and therefore determines not to use the CF Benchmarks Index as the Index. If the CF Benchmarks Index is not available or the Sponsor determines, in its sole discretion, that the CF Benchmarks Index is unreliable, (together a ''Fair Value Event''), the Trust's holdings may be fair valued on a temporary basis in accordance with the fair value policies approved by the Trustee. If the CF Benchmarks Index is not used as the Index price, owners of the beneficial interests of Shares (the ''Shareholders'') will be notified in a prospectus supplement or on the Trust's website and, if this index change is on a permanent basis, a filing with the SEC under Rule 19b–4 of the Act will be required.

A Fair Value Event value determination will be based upon all available factors that the Sponsor or Trustee deems relevant at the time of the determination, and may be based on analytical values determined by the Sponsor or Trustee using third-party valuation models.

Fair value policies approved by the Trustee will seek to determine the fair value price that the Trust might reasonably expect to receive from the current sale of that asset or liability in an arm's-length transaction on the date on which the asset or liability is being valued consistent with ''Relevant Transactions''.[13] In the instance of a Fair Value Event and pursuant the Sponsor's fair valuation policies and procedures Volume Weighted Average Prices (''VWAP'') or Volume Weighted Median Prices (''VWMP'') from another index administrator (''Secondary Index'') would be utilized. If a Secondary Index is not available or the Sponsor in its sole discretion determines the Secondary Index is unreliable the price set by the Trust's principal market as of 4:00 p.m. ET, on the valuation date would be utilized.

In the event the principal market price is not available or the Sponsor in its sole discretion determines the principal market valuation is unreliable the Sponsor will use its best judgment to determine a good faith estimate of fair value. The Trustee identifies and determines the Trust's principal market (or in the absence of a principal market, the most advantageous market) for ether consistent with the application of fair value measurement framework in FASB ASC 820–10.[14] The principal market is the market where the reporting entity would normally enter into a transaction to sell the asset or transfer the liability. The principal market must be available to and be accessible by the reporting entity. The reporting entity is the Trust.

Net Asset Value Calculation and Index

On each Business Day (as defined below), as soon as practicable after 4:00 p.m. ET, the Trust Administrator evaluates the ether held by the Trust as reflected by the CF Benchmarks Index and determines the NAV per Share. For purposes of making these calculations, a Business Day means any day other than a day when Nasdaq is closed for regular trading (''Business Day'').

The CF Benchmarks Index employed by the Trust is calculated on each Business Day by aggregating the notional value of ether trading activity across major ether spot platforms. The CF Benchmarks Index is designed based on the IOSCO Principles for Financial Benchmarks. The administrator of the CF Benchmarks Index is CF Benchmarks Ltd. (the ''Index Administrator''). The CF Benchmarks Index serves as a once-a-day benchmark rate of the U.S. dollar price of ether (USD/ETH), calculated as of 4:00 p.m. ET. The CF Benchmarks Index aggregates the trade flow of several ether platforms, during an observation window between 3:00 p.m. and 4:00 p.m. ET into the U.S. dollar price of one ether at 4:00 p.m. ET. Specifically, the CF Benchmarks Index is calculated based on the ''Relevant Transactions'' of all of its constituent ether platforms, which are currently: Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital (the ''Constituent Platforms''), and which may change from time to time.

If the CF Benchmarks Index is not available or the Sponsor determines, in

[13] A ''Relevant Transaction'' is any cryptocurrency versus U.S. dollar spot trade that occurs during the observation window between 3:00 p.m. and 4:00 p.m. ET on a ''Constituent Platform'' in the ETH/USD pair that is reported and disseminated by a Constituent Platform through its publicly available application programming interface and observed by the ''Index Administrator'', as such terms are defined below.

[14] *See* FASB (Financial Accounting Standards Board) Accounting standards codification (ASC) 820–10. For financial reporting purposes only, the Trustee has adopted a valuation policy that outlines the methodology for valuing the Trust's assets. The policy also outlines the methodology for determining the principal market (or in the absence of a principal market, the most advantageous market) in accordance with FASB ASC 820–10.

its sole discretion, that the CF Benchmarks Index is unreliable and so should not be used, the Trust's holdings may be fair valued in accordance with the policy approved by the Trustee.

The Trust is intended to provide a way for Shareholders to obtain exposure to ether by investing in the Shares rather than by acquiring, holding and trading ether directly on a peer-to-peer or other basis or via a digital asset platform. An investment in Shares of the Trust is not the same as an investment directly in ether on a peer-to-peer or other basis or via a digital asset platform.

Intraday Indicative Value

In order to provide updated information relating to the Trust for use by Shareholders, the Trust intends to publish an intraday indicative value per Share (''IIV'') using the CME CF Ether-Dollar Real Time Index. One or more major market data vendors will provide an IIV updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's regular market session of 9:30 a.m. to 4:00 p.m. ET (the ''Regular Market Session''). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during the Exchange's Regular Market Session to reflect changes in the value of the Trust's NAV per Share during the trading day.

The IIV is disseminated during the Exchange's Regular Market Session should not be viewed as an actual real time update of the NAV per Share, which will be calculated only once at the end of each trading day.

The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Market Session by one or more major market data vendors. In addition, the IIV will be available through online information services. All aspects of the Index Methodology are publicly available at the website of Index Provider, CF Benchmarks (*https://www.cfbenchmarks.com*).

Creation and Redemption of Shares

The Trust issues and redeems Baskets [15] on a continuous basis. Baskets are only issued or redeemed in exchange for an amount of cash determined by the Trustee on each day that Nasdaq is open for regular trading. No Shares are issued unless the Cash Custodian has allocated to the Trust's account the corresponding amount of cash. The amount of cash necessary for the creation of a Basket, or to be received upon redemption of a Basket, will decrease over the life of the Trust, due to the payment or accrual of fees and other expenses or liabilities payable by the Trust. Baskets may be created or redeemed only by Authorized Participants, who pay BlackRock Investments, LLC (''BRIL''), an affiliate of the Trustee and a wholly owned subsidiary of BlackRock, Inc., that has been retained by the Trust to perform certain order processing, Authorized Participant communications, and related services in connection with the issuance and redemption of Baskets, a transaction fee for each order to create or redeem Baskets.

The Sponsor will maintain ownership and control of the ether in a manner consistent with good delivery requirements for spot commodity transactions.

Overview of the Ethereum Industry

Ethereum is free software that is hosted on computers distributed throughout the globe. It employs an array of computer code-based logic, called a protocol, to create a unified understanding of ownership, commercial activity, and economic logic. This allows users to engage in commerce without the need to trust any of its participants or counterparties. Ethereum code creates verifiable and unambiguous rules that assign clear, strong property rights to create a platform for unrestrained business formation and free exchange. No single intermediary or entity operates or controls the Ethereum network (referred to as ''decentralization''), the transaction validation and recordkeeping infrastructure of which is collectively maintained by a disparate user base. The Ethereum network allows people to exchange tokens of value, or ether (''ETH''), which are recorded on a distributed public recordkeeping system or ledger known as a blockchain (the ''Ethereum Blockchain''), and which can be used to pay for goods and services, including computational power on the Ethereum network, or converted to fiat currencies, such as the U.S. dollar, at rates determined on digital asset platforms or in individual peer-to-peer transactions. Furthermore, by combining the recordkeeping system of the Ethereum Blockchain with a flexible scripting language that is programmable and can be used to implement sophisticated logic and execute a wide variety of instructions, the Ethereum network is intended to act as a foundational infrastructure layer on top of which users can build their own custom software programs, as an alternative to centralized web servers. In theory, anyone can build their own custom software programs on the Ethereum network. In this way, the Ethereum network represents a project to expand blockchain deployment beyond a peer-to-peer private money system into a flexible, distributed alternative computing infrastructure that is available to all. On the Ethereum network, ETH is the unit of account that users pay for the computational resources consumed by running their programs.

Up to now, U.S. retail investors have lacked a U.S. regulated, U.S. exchange-traded vehicle to gain exposure to ETH. Instead, current options include: (i) facing the counter-party risk, legal uncertainty, technical risk, and complexity associated with accessing spot ether or (ii) over-the-counter ether funds (''OTC ETH Funds'') with high management fees and potentially volatile premiums and discounts. Meanwhile, investors in other countries, including Germany, Switzerland and France, are able to use more traditional exchange listed and traded products (including exchange-traded funds holding physical ETH) to gain exposure to ETH. Investors across Europe have access to products which trade on regulated exchanges and provide exposure to a broad array of spot crypto assets. U.S. investors, by contrast, are left with fewer and more risky means of getting ether exposure.[16]

To this point, the lack of an ETP that holds spot ETH (a ''Spot ETH ETP'') exposes U.S. investor assets to significant risk because investors that would otherwise seek cryptoasset exposure through a Spot ETH ETP are forced to find alternative exposure through generally riskier means. For example, investors in OTC ETH Funds are not afforded the benefits and protections of regulated Spot ETH ETPs, resulting in retail investors suffering losses due to drastic movements in the premium/discount of OTC ETH Funds. An investor who purchased the largest

[15] Baskets will be offered continuously at the NAV per Share for 40,000 Shares. Therefore, a Basket of Shares would be valued at NAV per Share multiplied by the Basket size and the ether required to be delivered in exchange for a creation of a Basket would equal the dollar value of the NAV per Share multiplied by the Basket size for such creations. The Trust may change the number of Shares in a Basket. Only Authorized Participants may purchase or redeem Baskets. Shares will be offered to the public from time to time at varying prices that will reflect the price of ether and the trading price of the Shares on Nasdaq at the time of the offer.

[16] The Exchange notes that the list of countries above is not exhaustive and that securities regulators in a number of additional countries have either approved or otherwise allowed the listing and trading of Spot ETH ETPs.

OTC ETH Fund in January 2021 and held the position at the end of 2022 would have suffered a 30% loss due to the change in the premium/discount, even if the price of ETH did not change. Many retail investors likely suffered losses due to this premium/discount in OTC ETH Fund trading; all such losses could have been avoided if a Spot ETH ETP had been available. Additionally, many U.S. investors that held their digital assets in accounts at FTX,[17] Celsius Network LLC,[18] BlockFi Inc.[19] and Voyager Digital Holdings, Inc.[20] have become unsecured creditors in the insolvencies of those entities. If a Spot ETH ETP was available, it is likely that at least a portion of the billions of dollars tied up in those proceedings would still reside in the brokerage accounts of U.S. investors, having instead been invested in a transparent, regulated, and well-understood structure—a Spot ETH ETP. To this point, approval of a Spot ETH ETP would represent a major win for the protection of U.S. investors in the cryptoasset space. The Trust, like all other series of Commodity-Based Trust Shares, is designed to protect investors against the risk of losses through fraud and insolvency that arise by holding digital assets, including ETH, on centralized platforms.

Applicable Standard

The Commission has historically approved or disapproved exchange filings to list and trade series of Trust Issued Receipts, including spot based Commodity-Based Trust Shares, on the basis of whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size related to the underlying commodity to be held.[21] Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission (''CFTC'') regulated futures market.[22] Further to

[17] *See* FTX Trading Ltd., et al., Case No. 22–11068.

[18] *See* Celsius Network LLC, et al., Case No. 22–10964.

[19] *See* BlockFi Inc., Case No. 22–19361.

[20] *See* Voyager Digital Holdings, Inc., et al., Case No. 22–10943.

[21] *See* Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018). This proposal was subsequently disapproved by the Commission. *See* Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the ''Winklevoss Order''). Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission (the ''CFTC'') regulated futures market. Further to this point, the Commission's prior orders have noted that the spot commodities and currency markets for which it has previously approved spot ETPs are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of Currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the approval order issued related to the first spot gold ETP ''was based on an assumption that the currency market and the spot gold market were largely unregulated.'' *See* Winklevoss Order at 37592. As such, the regulated market of significant size test does not require that the spot ether market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission's oversight, but the Commission has consistently looked to surveillance sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act.

[22] *See* streetTRACKS Gold Shares, Exchange Act Release No. 50603 (Oct. 28, 2004), 69 FR 64614, 64618–19 (Nov. 5, 2004) (SR–NYSE–2004–22) (the ''First Gold Approval Order''); iShares COMEX Gold Trust, Exchange Act Release No. 51058 (Jan. 19, 2005), 70 FR 3749, 3751, 3754–55 (Jan. 26, 2005) (SR–Amex–2004–38); iShares Silver Trust, Exchange Act Release No. 53521 (Mar. 20, 2006), 71 FR 14967, 14968, 14973–74 (Mar. 24, 2006) (SR–Amex–2005–072); ETFS Gold Trust, Exchange Act Release No. 59895 (May 8, 2009), 74 FR 22993, 22994–95, 22998, 23000 (May 15, 2009) (SR–NYSEArca–2009–40); ETFS Silver Trust, Exchange Act Release No. 59781 (Apr. 17, 2009), 74 FR 18771, 18772, 18775–77 (Apr. 24, 2009) (SR–NYSEArca–2009–28); ETFS Palladium Trust, Exchange Act Release No. 61220 (Dec. 22, 2009), 74 FR 68895, 68896 (Dec. 29, 2009) (SR–NYSEArca–2009–94) (notice of proposed rule change included NYSE Arca's representation that ''[t]he most significant palladium futures exchanges are the NYMEX and the Tokyo Commodity Exchange,'' that ''NYMEX is the largest exchange in the world for trading precious metals futures and options,'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which NYMEX is a member, Exchange Act Release No. 60971 (Nov. 9, 2009), 74 FR 59283, 59285–86, 59291 (Nov. 17, 2009)); ETFS Platinum Trust, Exchange Act Release No. 61219 (Dec. 22, 2009), 74 FR 68886, 68887–88 (Dec. 29, 2009) (SR–NYSEArca–2009–95) (notice of proposed rule change included NYSE Arca's representation that ''[t]he most significant platinum futures exchanges are the NYMEX and the Tokyo Commodity Exchange,'' that ''NYMEX is the largest exchange in the world for trading precious metals futures and options,'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which NYMEX is a member, Exchange Act Release No. 60970 (Nov. 9, 2009), 74 FR 59319, 59321, 59327 (Nov. 17, 2009)); Sprott Physical Gold Trust, Exchange Act Release No. 61496 (Feb. 4, 2010), 75 FR 6758, 6760 (Feb. 10, 2010) (SR–NYSEArca–2009–113) (notice of proposed rule change included NYSE Arca's representation that the COMEX is one of the ''major world gold markets,'' that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' and that NYMEX, of which COMEX is a division, is a member of the Intermarket Surveillance Group, Exchange Act Release No. 61236 (Dec. 23, 2009), 75 FR 170, 171, 174 (Jan. 4, 2010)); Sprott Physical Silver Trust, Exchange Act Release No. 63043 (Oct. 5, 2010), 75 FR 62615, 62616, 62619, 62621 (Oct. 12, 2010) (SR–NYSEArca–2010–84); ETFS Precious Metals Basket Trust, Exchange Act Release No. 62692 (Aug. 11, 2010), 75 FR 50789, 50790 (Aug. 17, 2010) (SR–NYSEArca–2010–56) (notice of proposed rule change included NYSE Arca's representation that ''the most significant gold, silver, platinum and palladium futures exchanges are the COMEX and the TOCOM'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which COMEX is a member, Exchange Act Release No. 62402 (Jun. 29, 2010), 75 FR 39292, 39295, 39298 (July 8, 2010)); ETFS White Metals Basket Trust, Exchange Act Release No. 62875 (Sept. 9, 2010), 75 FR 56156, 56158 (Sept. 15, 2010) (SR–NYSEArca–2010–71) (notice of proposed rule change included NYSE Arca's representation that ''the most significant silver, platinum and palladium futures exchanges are the COMEX and the TOCOM'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which COMEX is a member, Exchange Act Release No. 62620 (July 30, 2010), 75 FR 47655, 47657, 47660 (Aug. 6, 2010)); ETFS Asian Gold Trust, Exchange Act Release No. 63464 (Dec. 8, 2010), 75 FR 77926, 77928 (Dec. 14, 2010) (SR–NYSEArca–2010–95) (notice of proposed rule change included NYSE Arca's representation that ''the most significant gold futures exchanges are the COMEX and the Tokyo Commodity Exchange,'' that ''COMEX is the largest exchange in the world for trading precious metals futures and options,'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which COMEX is a member, Exchange Act Release No. 63267 (Nov. 8, 2010), 75 FR 69494, 69496, 69500–01 (Nov. 12, 2010)); Sprott Physical Platinum and Palladium Trust, Exchange Act Release No. 68430 (Dec. 13, 2012), 77 FR 75239, 75240–41 (Dec. 19, 2012) (SR–NYSEArca–2012–111) (notice of proposed rule change included NYSE Arca's representation that ''[f]utures on platinum and palladium are traded on two major exchanges: The New York Mercantile Exchange . . . and Tokyo Commodities Exchange'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which COMEX is a member, Exchange Act Release No. 68101 (Oct. 24, 2012), 77 FR 65732, 65733, 65739 (Oct. 30, 2012)); APMEX Physical—1 oz. Gold Redeemable Trust, Exchange Act Release No. 66930 (May 7, 2012), 77 FR 27817, 27818 (May 11, 2012) (SR–NYSEArca–2012–18) (notice of proposed rule change included NYSE Arca's representation that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' of which COMEX is a member, and that gold futures are traded on COMEX and the Tokyo Commodity Exchange, with a cross- reference to the proposed rule change to list and trade shares of the ETFS Gold Trust, in which NYSE Arca represented that COMEX is one of the ''major world gold markets,'' Exchange Act Release No. 66627 (Mar. 20, 2012), 77 FR 17539, 17542–43, 17547 (Mar. 26, 2012)); JPM XF Physical Copper Trust, Exchange Act Release No. 68440 (Dec. 14, 2012), 77 FR 75468, 75469–70, 75472, 75485–86 (Dec. 20, 2012) (SR–NYSEArca–2012–28); iShares Copper Trust, Exchange Act Release No. 68973 (Feb. 22, 2013), 78 FR 13726, 13727, 13729–30, 13739–40 (Feb. 28, 2013) (SR–NYSEArca–2012–66); First Trust Gold Trust, Exchange Act Release No. 70195 (Aug. 14, 2013), 78 FR 51239, 51240 (Aug. 20, 2013) (SR–NYSEArca–2013–61) (notice of proposed rule change included NYSE Arca's representation that FINRA, on behalf of the exchange, may obtain trading information regarding gold futures and options on gold futures from members of the Intermarket Surveillance Group, including COMEX, or from markets ''with which [NYSE Arca] has in

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this point, the Commission's prior orders have noted that the spot commodities and currency markets for which it has previously approved spot exchange traded products (''ETPs'') are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the First Gold Approval Order ''was based on an assumption that the currency market and the spot gold market were largely unregulated.'' [23]

As such, the regulated market of significant size test does not require that the spot ether market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission's oversight, but the Commission has consistently looked to surveillance sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act. With this in mind, the CME ether futures (''Ether Futures'') market, as described below, is the proper market to consider in determining whether there is a related regulated market of significant size.

Recently, the Commission issued an order granting approval for proposals to list bitcoin-based commodity trust and bitcoin-based trust issued receipts (these proposed funds are nearly identical to the Trust, but proposed to hold bitcoin instead of ether) (''Spot Bitcoin ETPs''). [24] In considering the Spot Bitcoin ETPs, the Commission determined in the Spot Bitcoin ETP Approval Order that the CME Bitcoin Futures market is a regulated market of significant size.

Specifically, the Commission stated:

> [B]ased on the record before the Commission and the improved quality of the correlation analysis in the record . . . the Commission is able to conclude that fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME's surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges' comprehensive surveillance-sharing agreement with the CME–a U.S. regulated market whose bitcoin futures market is consistently highly correlated to spot bitcoin, albeit not of ''significant size'' related to spot bitcoin–can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals. [25]

The Exchange and Sponsor applaud the Commission for allowing the launch of ETFs registered under the Investment Company Act of 1940, as amended (the ''1940 Act'') that provide exposure to ether primarily through CME Ether Futures. Allowing such products to list and trade is a productive first step in providing U.S. investors and traders with transparent, exchange-listed tools for expressing a view on ether.

On October 2, 2023 the SEC approved nine ETH-based ETFs for trading. [26] The ETFs hold ETH futures contracts that trade on the CME and settle using the CME CF Ethereum Reference Rate (''ERR''), which is priced based on the spot ETH markets Coinbase, Kraken, LMAX, Bitstamp, Gemini, and itBit, essentially the same spot markets that are included in the Index that the Trust uses to value its ETH holdings. Given that the Commission has approved ETFs that offer exposure to ETH futures, which themselves are priced based on the underlying spot ETH market, the Sponsor believes that the Commission must also approve ETPs that offer exposure to spot ETH, like the Trust.

Based on the foregoing, the Exchange and Sponsor believe that any objective review of the proposals to list spot ether ETPs, like the Trust, compared to the Ether Futures ETFs would lead to the conclusion that any concerns related to preventing fraudulent and manipulative acts and practices related to spot ether ETPs would apply equally to the spot markets underlying the futures contracts held by an Ether Futures ETF. Both the Exchange and Sponsor believe that the CME Ether Futures market is a regulated market of significant size and that such manipulation concerns are mitigated, as described extensively below. After allowing the listing and trading of Ether Futures ETFs that hold primarily CME Ether Futures, however, the only consistent outcome would be approving spot ether ETPs on the basis that the CME Ether Futures market is a regulated market of significant size.

The Sponsor believes that because the CME ETH futures market is priced based on the underlying spot ETH market, any fraud or manipulation in the spot market would necessarily affect the price of ETH futures, thereby affecting the net asset value of an ETP holding spot ETH or an ETF holding ETH futures, as well as the price investors pay for such product's shares. Accordingly, either CME surveillance can detect spot-market fraud that affects both futures ETFs and spot ETPs, or that surveillance cannot do so for either type of product. Having approved ETH futures ETFs in part on the basis of such surveillance, the Commission has clearly determined that CME surveillance can detect spot-market fraud that would affect spot ETPs, and the Sponsor thus believes that it must also approve spot ETH ETPs on that basis.

In summary, both the Exchange and the Sponsor believe that this proposal and the included analysis are sufficient to establish that the CME ETH Futures market represents a regulated market of significant size as it relates both to the CME ETH Futures market and to the spot ETH market and that this proposal should be approved.

CME ETH Futures

CME began offering trading in Ether Futures in February 2021. Each contract represents 50 ETH and is based on the

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place a comprehensive surveillance sharing agreement,'' and that gold futures are traded on COMEX and the Tokyo Commodity Exchange, with a cross-reference to the proposed rule change to list and trade shares of the ETFS Gold Trust, in which NYSE Arca represented that COMEX is one of the ''major world gold markets,'' Exchange Act Release No. 69847 (June 25, 2013), 78 FR 39399, 39400, 39405 (July 1, 2013)); Merk Gold Trust, Exchange Act Release No. 71378 (Jan. 23, 2014), 79 FR 4786, 4786–87 (Jan. 29, 2014) (SR–NYSEArca–2013–137) (notice of proposed rule change included NYSE Arca's representation that ''COMEX is the largest gold futures and options exchange'' and that NYSE Arca ''may obtain trading information via the Intermarket Surveillance Group,'' including with respect to transactions occurring on COMEX pursuant to CME and NYMEX's membership, or from exchanges ''with which [NYSE Arca] has in place a comprehensive surveillance sharing agreement,'' Exchange Act Release No. 71038 (Dec. 11, 2013), 78 FR 76367, 76369, 76374 (Dec. 17, 2013)); Long Dollar Gold Trust, Exchange Act Release No. 79518 (Dec. 9, 2016), 81 FR 90876, 90881, 90886, 90888 (Dec. 15, 2016) (SR–NYSEArca–2016–84).

[23] *See* Winklevoss Order at 37592.

[24] *See* Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008 (January 17, 2024) (Self-Regulatory Organizations; NYSE Arca, Inc.; The Nasdaq Stock Market LLC; Cboe BZX Exchange, Inc.; Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, To List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) (the ''Spot Bitcoin ETP Approval Order'').

[25] *See* the Spot Bitcoin ETP Approval Order at 3011–3012.

[26] These ETFs included the Bitwise Ethereum Strategy ETF, Bitwise Bitcoin & Ether Equal Weight Strategy ETF, Hashdex Ether Strategy ETF, ProShares Ether Strategy ETF, ProShares Bitcoin & Ether Strategy ETF, ProShares Bitcoin & Ether Equal Weight Strategy ETF, Valkyrie Bitcoin & Ethereum Strategy ETF, VanEck Ethereum Strategy ETF, and Volatility Shares Ethereum Strategy ETF (collectively, the ''ETH Futures ETFs'').

CME CF Ether-Dollar Reference Rate.[27] The contracts trade and settle like other cash-settled commodity futures contracts. Most measurable metrics related to CME ETH Futures have generally trended up since launch, although some metrics have slowed recently. For example, there were 78,571 CME ETH Futures contracts traded in September 2023 (approximately $6.3 billion) compared to 163,114 ($11.9 billion) and 130,546 ($21.2 billion) contracts traded in September 2022, and September 2022 respectively.[28] The daily correlation between the spot ETH and the CME ETH Futures is 0.9993 from the period of 10/13/22 through 10/13/23.[29] The number of large open interest holders [30] and unique accounts trading CME ETH Futures have both increased, even in the face of heightened Ether price volatility.

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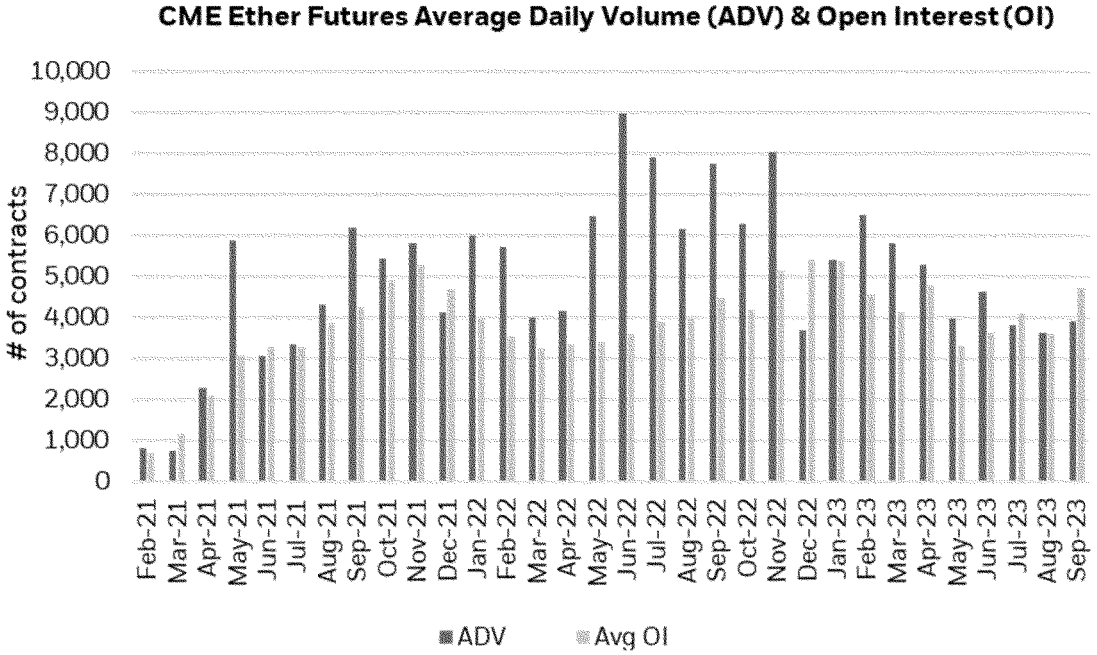

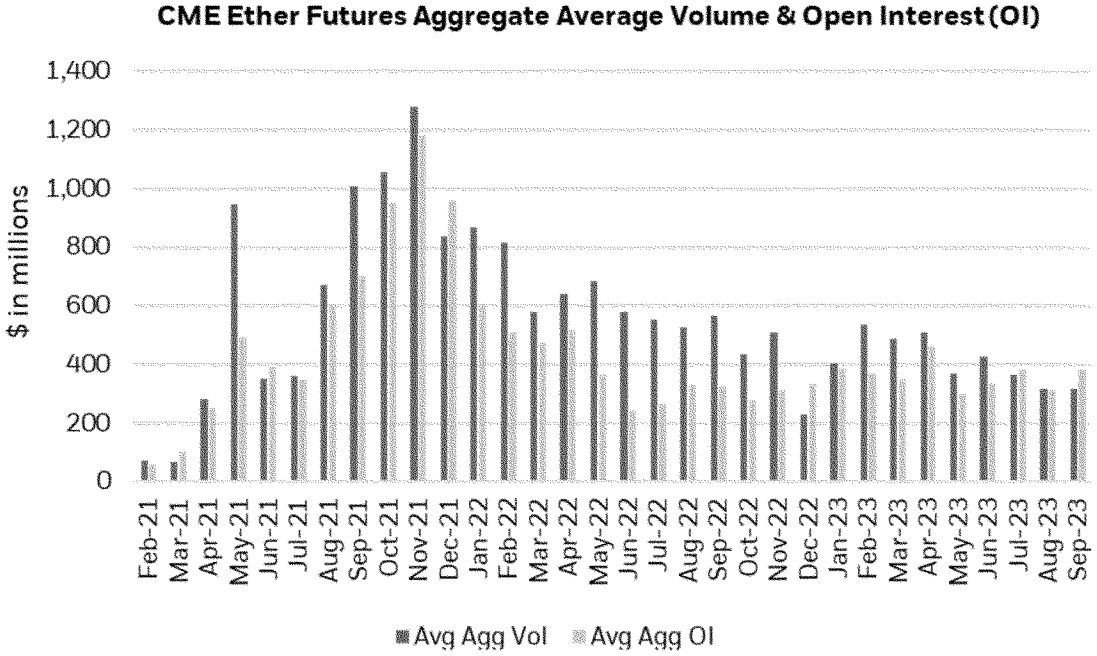

[27] The CME CF Ether-Dollar Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto exchanges and trading platforms, including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

[28] Source: Bloomberg, BlackRock calculations. Data as of 10/18/2023 for period shown (2/8/2021 to 9/30/2023).

[29] Source: S&P Ethereum Index, S&P CME Ether Futures Index (Spot).

[30] A large open interest holder in CME ETH Futures is an entity that holds at least 25 contracts, which is the equivalent of 1250 ether. At a price of approximately $1,867 per ether on 7/31/2023, more than 59 firms had outstanding positions of greater than $2.3 million in CME ETH Futures.

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Preventing Fraudulent and Manipulative Practices

In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices; [31] and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of section 6(b)(5) of the Act and that this filing sufficiently demonstrates that the CME ETH Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

(i) Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance sharing agreement in place [32] with a regulated market of significant size. Both the Exchange and CME are members of ISG.[33] The only remaining issue to be addressed is whether the ETH Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms ''significant market'' and ''market of significant size'' include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[34]

The Commission has also recognized that the ''regulated market of significant size'' standard is not the only means for satisfying section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that ''other means to prevent fraudulent and manipulative acts and practices'' are sufficient to justify dispensing with the requisite surveillance sharing agreement.[35]

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same rationale that the Commission applied to a Spot Bitcoin ETP in the Spot Bitcoin ETP Approval Order [36] also indicates that this test is satisfied for this proposal. As noted above, in the Spot Bitcoin ETP Approval Order, the SEC concluded that: . . . fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME's surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges' comprehensive surveillance-sharing agreement with the CME . . . can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.[37] The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Spot Bitcoin ETP Approval Order that the surveillance-sharing agreement with the CME ''can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals'' makes clear that the Commission believes that CME's surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This same logic would extend to CME Ether Futures markets where CME's surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures.

(A) Predominant Influence on Prices in Spot and ETH Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME ETH Futures market or spot market for a number of reasons. First,

[31] The Exchange believes that ETH is resistant to price manipulation and that ''other means to prevent fraudulent and manipulative acts and practices'' exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ETH trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ETH platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ETH prices through continuous trading activity challenging. To the extent that there are ETH platforms engaged in or allowing wash trading or other activity intended to manipulate the price of ETH on other markets, such pricing does not normally impact prices on other exchange because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ETH markets and the presence of arbitrageurs in those markets means that the manipulation of the price of ETH price on any single venue would require manipulation of the global ETH price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ETH platform or Over-the Counter platform (''OTC platform''). As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

[32] As previously articulated by the Commission, ''The standard requires such surveillance-sharing agreements since ''they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.'' The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance- sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.'' The Commission has historically held that joint membership in the ISG constitutes such a surveillance sharing agreement. *See* Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR–NYSEArca–2019–39) (the ''Wilshire Phoenix Disapproval'').

[33] For a list of the current members and affiliate members of ISG, *see https://www.isgportal.com/.*

[34] *See* Wilshire Phoenix Disapproval.

[35] *See* Winklevoss Order at 37580. The Commission has also specifically noted that it ''is not applying a 'cannot be manipulated' standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.'' *Id.* at 37582.

[36] *See* Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008 (January 17, 2024) (Self-Regulatory Organizations; NYSE Arca, Inc.; The Nasdaq Stock Market LLC; Cboe BZX Exchange, Inc.; Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, To List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) (the ''Spot Bitcoin ETP Approval Order'').

[37] *See* the Spot Bitcoin ETP Approval Order at 3011–3012.

because the Trust would not hold CME ETH Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME ETH Futures contracts use for pricing.[38] The Sponsor notes that ETH total 24-hour spot trading volume has averaged $9.1B over the year ending October 16, 2023,[39] with approximately $1.7B occurring on venues whose trades are included in the sponsor's benchmark.[40] The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ETH market even in its most aggressive projections for the Trust's assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME ETH Futures market. Second, much like the CME Bitcoin Futures market, the CME ETH Futures market has progressed and matured significantly. As the court found in the Grayscale Order ''Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less.'' The Exchange and sponsor agree with this sentiment and believe it applies equally to the spot ETH and CME ETH Futures markets.

(B) Other Means To Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that ''other means to prevent fraudulent and manipulative acts and practices'' are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

As noted in the Surveillance section, the surveillance program includes real-time patterns for price and volume movements and post-trade surveillance patterns (*e.g.,* spoofing, marking the close, pinging, phishing). In addition to the Exchange's existing surveillance, a new pattern will be added to surveil for significant deviation in the Commodity-Based Trust Shares' price from the underlying asset's price. The Exchange will use the trade data from an external vendor that consolidates the real-time data from multiple ether platforms.

Trading of Shares on the Exchange will be subject to the Exchange's surveillance program for derivative products, as well as cross-market surveillances administered by Financial Industry Regulatory Authority (''FINRA''), on behalf of the Exchange pursuant to a regulatory services agreement, which are also designed to detect violations of Exchange rules and applicable federal securities laws. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

The Exchange will require the Trust to represent to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

The Exchange will communicate as needed regarding trading in the Shares with other markets and other entities that are members of the ISG, and the Exchange may obtain trading information regarding trading in the Shares from such markets and other entities.

Spot and Proxy Exposure to Ether

Exposure to ether through an ETP also presents certain advantages for retail investors compared to buying spot ether directly. The most notable advantage from the Sponsor's perspective is the elimination of the need for an individual retail investor to either manage their own private keys or to hold ether through a cryptocurrency exchange that lacks sufficient protections. Typically, retail exchanges hold most, if not all, retail investors' ether in ''hot'' (internet connected) storage and do not make any commitments to indemnify retail investors or to observe any particular cybersecurity standard. Meanwhile, a retail investor holding spot ether directly in a self-hosted wallet may suffer from inexperience in private key management (*e.g.,* insufficient password protection, lost key, etc.), which point of failure could cause them to lose some or all of their ether holdings. Thus, with respect to custody of the Trust's ether assets, the Trust presents advantages from an investment protection standpoint for retail investors compared to owning spot ether directly or via a digital asset exchange.

Availability of Information

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the prior Business Day's NAV per Share; (b) the prior Business Day's Nasdaq official closing price; (c) calculation of the premium or discount of such Nasdaq official closing price against such NAV per Share; (d) data in chart form displaying the frequency distribution of discounts and premiums of the Official Closing Price against the NAV, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (e) the prospectus; and (f) other applicable quantitative information. The NAV per Share for the Trust will be calculated by the Trust Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last sale information regarding the Shares will be disseminated through the facilities of the relevant securities information processor. Also, an estimated value that reflects an estimated IIV will be disseminated. For more information on the IIV, including the calculation methodology, see ''Intraday Indicative Value'' above.

The IIV disseminated during the Exchange's Regular Market Session should not be viewed as an actual real time update of the NAV per Share, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Market Session by one or more major market data vendors. In addition, the IIV will be available through online information services.

Quotation and last sale information for ether is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters, as well as CF Benchmarks. Information relating to trading, including price and volume information, in ether is available from major market data vendors and from the platforms on which ether are traded. Depth of book information is also available from ether platforms. The normal trading hours for ether platforms are 24 hours per day, 365 days per year.

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will

[38] This logic is reflected by the court in the Grayscale Order at 17–18. Specifically, the court found that ''Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market . . . But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin.''

[39] Source: CoinGecko.

[40] Source: CoinGecko, The Block, and BlackRock calculations.

be published daily in the financial section of newspapers.

Initial and Continued Listing

The Shares will be subject to Nasdaq Rule 5711(d)(vi), which sets forth the initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange will obtain a representation that the Trust's NAV per Share will be calculated daily and will be made available to all market participants at the same time. A minimum of 80,000 Commodity-Based Trust Shares, or the equivalent of 2 Baskets, will be required to be outstanding at the time of commencement of trading on the Exchange. Upon termination of the Trust, the Shares will be removed from listing. The Delaware Trustee, will be a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Nasdaq Rule 5711(d)(vi)(D) and no change will be made to the Delaware Trustee without prior notice to and approval of the Exchange.

As required in Nasdaq Rule 5711(d)(viii), the Exchange notes that any registered market maker (''Market Maker'') in the Shares must file with the Exchange, in a manner prescribed by the Exchange, and keep current a list identifying all accounts for trading the underlying commodity, related futures or options on futures, or any other related derivatives, which the registered Market Maker may have or over which it may exercise investment discretion. No registered Market Maker in the Shares shall trade in the underlying commodity, related futures or options on futures, or any other related derivatives, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by Nasdaq Rule 5711(d). In addition to the existing obligations under Exchange rules regarding the production of books and records, the registered Market Maker in the Shares shall make available to the Exchange such books, records or other information pertaining to transactions by such entity or any limited partner, officer or approved person thereof, registered or non-registered employee affiliated with such entity for its or their own accounts in the underlying commodity, related futures or options on futures, or any other related derivatives, as may be requested by the Exchange.

The Exchange is able to obtain information regarding trading in the Shares and the underlying ether, Ether Futures contracts, options on Ether Futures, or any other ether derivative through members acting as registered Market Makers, in connection with their proprietary or customer trades.

As a general matter, the Exchange has regulatory jurisdiction over its members, and their associated persons. The Exchange also has regulatory jurisdiction over any person or entity controlling a member, as well as a subsidiary or affiliate of a member that is in the securities business. A subsidiary or affiliate of a member organization that does business only in commodities would not be subject to Exchange jurisdiction, but the Exchange could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. The Exchange will allow trading in the Shares from 4:00 a.m. to 8:00 p.m. (ET). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. The Shares of the Trust will conform to the initial and continued listing criteria set forth in Nasdaq Rule 5711(d).

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121, including without limitation the conditions specified in Nasdaq Rule 4120(a)(9) and (10) and the trading pauses under Nasdaq Rules 4120(a)(11) and (12).

Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the ether underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

If the IIV or the value of the Index is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the IIV or the value of the Index occurs. If the interruption to the dissemination of the IIV or the value of the Index persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

In addition, if the Exchange becomes aware that the NAV per Share with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV per Share is available to all market participants.

Surveillance

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. The surveillance program includes real-time patterns for price and volume movements and post-trade surveillance patterns (*e.g.,* spoofing, marking the close, pinging, phishing). In addition to the Exchange's existing surveillance, a new pattern will be added to surveil for significant deviation in the Commodity-Based Trust Shares' price from the underlying asset's price. The Exchange will use the trade data from an external vendor that consolidates the real-time data from multiple ether platforms. Trading of Shares on the Exchange will be subject to the Exchange's surveillance program for derivative products, as well as cross-market surveillance administered by FINRA, on behalf of the Exchange pursuant to a regulatory services agreement, which are also designed to detect violations of Exchange rules and applicable federal securities laws. The Exchange is responsible for FINRA's performance under this regulatory services agreement. The Exchange will require the Trust to represent to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on

behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares from such markets and other entities. The Exchange also may obtain information regarding trading in the Shares and listed bitcoin derivatives via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an information circular (''Information Circular'') of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (1) the procedures for creations and redemptions of Shares in Baskets (and that Shares are not individually redeemable); (2) Section 10 of Nasdaq General Rule 9, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (3) how information regarding the IIV is disseminated; (4) the risks involved in trading the Shares during the pre-market and post-market sessions when an updated IIV will not be calculated or publicly disseminated; (5) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information. The Information Circular will also discuss any exemptive, no action and interpretive relief granted by the Commission from any rules under the Act.

The Information Circular will also reference the fact that there is no regulated source of last sale information regarding ether, that the Commission has no jurisdiction over the trading of ether as a commodity, and that the CFTC has regulatory jurisdiction over the trading of ETH Futures contracts and options on ETH Futures contracts.

Additionally, the Information Circular will reference that the Trust is subject to various fees and expenses described in the Registration Statement. The Information Circular will also disclose the trading hours of the Shares. The Information Circular will disclose that information about the Shares will be publicly available on the Trust's website.

2. Statutory Basis

The Exchange believes that the proposal is consistent with section 6(b) of the Act [41] in general and section 6(b)(5) of the Act [42] 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 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.

The Commission has approved numerous series of Trust Issued Receipts,[43] including Commodity-Based Trust Shares,[44] to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices; and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of section 6(b)(5) of the Act because this filing sufficiently demonstrates that the CME ETH Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order for a proposal to list and trade a series of Commodity-Based Trust Shares to be deemed consistent with the Act, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place with a regulated market of significant size. Both the Exchange and CME are members of ISG.[45] As such, the only remaining issue to be addressed is whether the ETH Futures market constitutes a market of significant size, which the Exchange believes that it does. The terms ''significant market'' and ''market of significant size'' include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[46]

The Commission has also recognized that the ''regulated market of significant size'' standard is not the only means for satisfying section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that ''other means to prevent fraudulent and manipulative acts and practices'' are sufficient to justify dispensing with the requisite surveillance-sharing agreement.[47]

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same rationale that the Commission applied to a Spot Bitcoin ETP in the Spot Bitcoin ETP Approval Order [48] also indicates that this test is satisfied for this proposal. As noted above, in the Spot Bitcoin ETP Approval Order, the SEC concluded that: . . . fraud or manipulation that impacts prices in spot bitcoin markets would likely similarly impact CME bitcoin futures prices. And because the CME's surveillance can assist in detecting those impacts on CME bitcoin futures prices, the Exchanges' comprehensive surveillance-sharing agreement with the CME . . . can be reasonably expected to assist in

[41] 15 U.S.C. 78f.

[42] 15 U.S.C. 78f(b)(5).

[43] *See* Exchange Rule 5720.

[44] Commodity-Based Trust Shares, as described in Exchange Rule 5711(d), are a type of Trust Issued Receipt.

[45] For a list of the current members and affiliate members of ISG, *see https://www.isgportal.com/.*

[46] *See* Wilshire Phoenix Disapproval.

[47] *See* Winklevoss Order at 37580. The Commission has also specifically noted that it ''is not applying a ''cannot be manipulated'' standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met. *Id.* at 37582.

[48] *See* Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008 (January 17, 2024) (Self-Regulatory Organizations; NYSE Arca, Inc.; The Nasdaq Stock Market LLC; Cboe BZX Exchange, Inc.; Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, To List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units) (the ''Spot Bitcoin ETP Approval Order'').

surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals.[49] The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Spot Bitcoin ETP Approval Order that the surveillance-sharing agreement with the CME ''can be reasonably expected to assist in surveilling for fraudulent and manipulative acts and practices in the specific context of the [p]roposals'' makes clear that the Commission believes that CME's surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME Bitcoin Futures. This same logic would extend to CME Ether Futures markets where CME's surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures.

(a) Predominant Influence on Prices in Spot and ETH Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in CME ETH Futures market or spot market for a number of reasons. First, because the Trust would not hold CME ETH Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME ETH Futures contracts use for pricing.[50] The Sponsor notes that ETH total 24-hour spot trading volume has averaged $9.1B over the year ending October 16, 2023,[51] with approximately $1.7B occurring on venues whose trades are included in the sponsor's benchmark.[52] The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ETH market even in its most aggressive projections for the Trust's assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME ETH Futures market. Second, much like the CME Bitcoin Futures market, the CME ETH Futures market has progressed and matured significantly. As the court found in the Grayscale Order ''Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less.'' The Exchange and sponsor agree with this sentiment and believe it applies equally to the spot ETH and CME ETH Futures markets.

(b) Other Means To Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that ''other means to prevent fraudulent and manipulative acts and practices'' are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

As noted in the Surveillance section, the surveillance program includes real-time patterns for price and volume movements and post-trade surveillance patterns (*e.g.,* spoofing, marking the close, pinging, phishing). In addition to the Exchange's existing surveillance, a new pattern will be added to surveil for significant deviation in the Commodity-Based Trust Shares' price from the underlying asset's price. The Exchange will use the trade data from an external vendor that consolidates the real-time data from multiple ether platforms.

Trading of Shares on the Exchange will be subject to the Exchange's surveillance program for derivative products, as well as cross-market surveillances administered by Financial Industry Regulatory Authority (''FINRA''), on behalf of the Exchange pursuant to a regulatory services agreement, which are also designed to detect violations of Exchange rules and applicable federal securities laws. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

The Exchange will require the Trust to represent to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

The Exchange will communicate as needed regarding trading in the Shares with other markets and other entities that are members of the ISG, and the Exchange may obtain trading information regarding trading in the Shares from such markets and other entities.

Designed To Protect Investors and the Public Interest

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ETH through OTC ETH Funds is greater than $5 billion. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through premium/discount volatility and management fees for OTC ETH Funds. The Exchange believes that, as described above, the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, such concerns are now at the very least outweighed by investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ETH in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in ETH Futures ETFs and operating companies that are imperfect proxies for ETH exposure; and (iv) providing an alternative to custodying spot ETH.

Commodity-Based Trust Shares—Nasdaq Rule 5711(d)

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in Nasdaq Rule 5711(d). The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under section 19(g)(1) of the

[49] *See* the Spot Bitcoin ETP Approval Order at 3011–3012.

[50] This logic is reflected by the court in the Grayscale Order at 17–18. Specifically, the court found that ''Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market . . . But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin.''

[51] Source: CoinGecko.

[52] Source: CoinGecko, The Block, and BlackRock calculations.

Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series. The Exchange may obtain information regarding trading in the Shares and listed ETH derivatives via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

Availability of Information

The Exchange also believes that the proposal promotes market transparency in that a large amount of information is currently available about ETH and will be available regarding the Trust and the Shares. In addition to the price transparency of the CF Benchmarks Index, the Trust will provide information regarding the Trust's ETH holdings as well as additional data regarding the Trust.

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the prior Business Day's NAV per Share; (b) the prior Business Day's Nasdaq official closing price; (c) calculation of the premium or discount of such Nasdaq official closing Price against such NAV per Share; (d) data in chart form displaying the frequency distribution of discounts and premiums of the Nasdaq official closing price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (e) the prospectus; and (f) other applicable quantitative information. The NAV per Share for the Trust will be calculated by the Trust Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last sale information regarding the Shares will be disseminated through the facilities of the relevant securities information processor. Also, an estimated value that reflects an estimated IIV will be disseminated. For more information on the IIV, including the calculation methodology, see ''Intraday Indicative Value'' above.

The IIV disseminated during the Exchange's Regular Market Session should not be viewed as an actual real time update of the NAV per Share, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Market Session by one or more major market data vendors. In addition, the IIV will be available through online information services.

Quotation and last sale information for ether is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters, as well as CF Benchmarks. Information relating to trading, including price and volume information, in ETH is available from major market data vendors and from the exchanges on which ETH is traded. Depth of book information is also available from ETH exchanges. The normal trading hours for ETH exchanges are 24 hours per day, 365 days per year.

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.

In sum, the Exchange believes that this proposal is consistent with the requirements of section 6(b)(5) of the Act, that this filing sufficiently demonstrates that the e CME ETH Futures market represents a regulated market of significant size, and that on the whole the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by investor protection issues that would be resolved by approving this proposal.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of section 6(b)(5) of the Act.

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 purpose of the Act. The Exchange notes that the proposed rule change rather will facilitate the listing and trading of additional exchange-traded product that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–NASDAQ–2023–045 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–NASDAQ–2023–045. 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–NASDAQ–2023–045 and should be submitted on or before May 20, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[53]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–09064 Filed 4–26–24; 8:45 am]

BILLING CODE 8011–01–P

[53] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100011; File No. SR–CboeEDGX–2024–021]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

April 23, 2024.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 9, 2024, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX Options'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule for its equity options platform (''EDGX Options'') relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange's equities platform (EDGX Equities), Cboe BZX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc., (''Affiliate Exchanges'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase over 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeEDGX–2023–045). On September 1, 2023, the Exchange withdrew that filing and submitted SR–CboeEDGX–2023–058. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On September 29, 2023, the Exchange filed the proposed fee change (SR–CboeEDGX–2023–063). On October 13, 2023, the Exchange withdrew that filing and submitted SR–CboeEDGX–2023–064. On December 12, 2023, the Exchange withdrew that filing and submitted SR–CboeEDGX–2023–080. On February 12, 2024, the Exchange withdrew that filing and submitted SR–CboeEDGX–2024–014. On April 9, 2024, the Exchange withdrew that filing and submitted this filing.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83430 (June 14, 2018), 83 FR 28697 (June 20, 2018) (SR–CboeEDGX–2018–017).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%. The Exchange is also unaware of any standard that suggests any fee proposal that exceeds a certain yearly or cumulative inflation rate is unreasonable, and in any event, in this instance the increase is well below the cumulative rate.

Additionally, the Exchange believes the proposed fee increase is [sic] The Exchange and its affiliated exchanges recently launched a multi-year initiative to improve Cboe Exchange Platform performance and capacity requirements to increase competitiveness, support growth and advance a consistent world class platform. The goal of the project, among other things, is to provide faster and more consistent order handling and matching performance for options, while ensuring quicker processing time and supporting increasing volumes and capacity needs. For example, the Exchange recently performed switch hardware upgrades. Particularly, the Exchange replaced existing customer access switches with newer models, which the Exchange believes resulted in increased determinism. The recent switch upgrades also increased the Exchange's capacity to accommodate more physical ports by nearly 50%. Network bandwidth was also increased nearly two-fold as a result of the upgrades, which among other things, can lead to reduce message queuing. The Exchange also believes these newer models result in less natural variance in the processing of messages. The Exchange notes that it incurred costs associated with purchasing and upgrading to these newer models, of which the Exchange has not otherwise passed through or offset.

As of April 1, 2024, market participants also having the option of connecting to a new data center (*i.e.,* Secaucus NY6 Data Center (''NY6'')), in addition to the current data centers at NY4 and NY5. The Exchange made NY6 available in response to customer requests in connection with their need for additional space and capacity. In order to make this space available, the Exchange expended significant resources to prepare this space, and will also incur ongoing costs with respect to maintaining this offering, including costs related to power, space, fiber, cabinets, panels, labor and maintenance of racks. The Exchange also incurred a large cost with respect to ensuring NY6 would be latency equalized, as it is for NY4 and NY5.

The Exchange also has made various other improvements since the current physical port rates were adopted in 2018. For example, the Exchange has updated its customer portal to provide more transparency with respect to firms' respective connectivity subscriptions, enabling them to better monitor, evaluate and adjust their connections based on their evolving business needs. The Exchange also performs proactive audits on a weekly basis to ensure that all customer cross connects continue to fall within allowable tolerances for Latency Equalized connections. Accordingly, the Exchange expended, and will continue to expend, resources to innovate and modernize technology so that it may benefit its Members and continue to compete among other options markets. The ability to continue to innovate with technology and offer new products to market participants allows the Exchange to remain competitive in the options space which currently has 17 options markets and potential new entrants.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network The Exchange also anticipates that firms that utilize 10 Gb ports will benefit the most from the Exchange's investment in offering NY6 as the Exchange anticipates there will be much higher quantities of 10 Gb physical ports connecting from NY6 as compared to 1 Gb ports. Indeed, the Exchange notes that 10 Gb physical ports account for approximately 90% of physical ports across the NY4, NY5, and NY6 data centers, and to date, 80% of new port connections in NY6 are 10 Gb ports. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Market participants may voluntarily choose to become a member of one or more of a number of different exchanges, of which, the Exchange is but one choice. Additionally, any Exchange member that is dissatisfied with the proposal is free to choose not to be a member of the Exchange and send order flow to another exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other options exchanges that a market participant may connect to in lieu of the Exchange and/or trading of any options product, such as within

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

the Over-the-Counter (OTC) markets which do not require connectivity to the Exchange. Indeed, there are currently 17 registered options exchanges that trade options (13 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single options exchange has more than approximately 19% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, there are 3 exchanges that have been added in the U.S. options markets in the last 5 years (*i.e.,* Nasdaq MRX, LLC, MIAX Pearl, LLC, MIAX Emerald LLC, and most recently MEMX LLC).

As noted above, there is no regulatory requirement that any market participant connect to any one options exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one options exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 51 members that trade options, Cboe BZX has 61 members that trade options, and Cboe C2 has 52 Trading Permit Holders (''TPHs'') (*i.e.,* members). There is also no firm that is a Member of EDGX Options only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE American Options has 71 members,[15] and NYSE Arca Options has 69 members,[16] MIAX Options has 46 members [17] and MIAX Pearl Options has 40 members.[18]

Vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 13 non-Cboe affiliated options markets. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

The Exchange lastly notes that it is not required by the Exchange Act, nor any other rule or regulation, to undertake a cost-of-service or rate-making approach with respect to fee proposals. Moreover, Congress's intent in enacting the 1975 Amendments to the Act was to enable competition—rather than government order—to determine prices. The principal purpose of the amendments was to facilitate the creation of a national market system for the trading of securities. Congress intended that this ''national market system evolve through the interplay of *competitive forces* as unnecessary regulatory restrictions are removed.'' [19] Other provisions of the Act confirm that intent. For example, the Act provides that an exchange must design its rules ''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.'' [20] Likewise, the Act grants the Commission authority to amend or repeal ''[t]he rules of [an] exchange [that] impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.'' [21] In short, the promotion of free and open competition was a core congressional objective in creating the national market system.[22] Indeed, the Commission has historically interpreted that mandate to promote competitive forces to determine prices whenever compatible with a national market system. Accordingly, the Exchange believes it has met its burden to demonstrate that its proposed fee change is reasonable and consistent with the immediate filing process chosen by Congress, which created a system whereby market forces determine access fees in the vast majority of cases, subject to oversight only in particular cases of abuse or market failure. Lastly, and importantly, the Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for the proposed fee would be so complicated that it could not be done practically.

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. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (i.e., all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing). While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and

[13] *Id.*

[14] *See* Cboe Global Markets U.S. Options Market Volume Summary (April 8, 2024), available at *https://markets.cboe.com/us/options/market_statistics/.*

[15] *See https://www.nyse.com/markets/american-options/membership#directory.*

[16] *See https://www.nyse.com/markets/arca-options/membership#directory.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Options_Exchange_Members_April_2023_04282023.pdf.*

[18] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Pearl_Exchange_Members_01172023_0.pdf.*

[19] *See* H.R. Rep. No. 94–229, at 92 (1975) (Conf. Rep.) (emphasis added).

[20] 15 U.S.C. 78f(b)(5).

[21] 15 U.S.C. 78f(8).

[22] *See* also 15 U.S.C. 78k–l(a)(1)(C)(ii) (purposes of Exchange Act include to promote ''fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets''); Order, 73 FR at 74781 (''The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'').

highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so. Indeed, market participants have numerous alternative venues that they may participate on and direct their order flow, including 13 non-Cboe affiliated options markets, as well as off-exchange venues, where competitive products are available for trading. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [23] The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[24] Accordingly, the Exchange does not believe its proposed change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [25] and paragraph (f) of Rule 19b–4 [26] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeEDGX–2024–021 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–CboeEDGX–2024–021. 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–CboeEDGX–2024–021 and should be submitted on or before May 20, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–09057 Filed 4–26–24; 8:45 am]

BILLING CODE 8011–01–P

[23] See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[24] *NetCoalition* v. *SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[25] 15 U.S.C. 78s(b)(3)(A).

[26] 17 CFR 240.19b–4(f).

[27] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100015; File No. SR–CboeBZX–2024–018]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To List and Trade Shares of the Franklin Ethereum ETF, a Series of the Franklin Ethereum Trust, Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

April 23, 2024.

On February 22, 2024, Cboe BZX Exchange, Inc. (''BZX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of the Franklin Ethereum ETF, a series of the Franklin Ethereum Trust, under BZX

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Rule 14.11(e)(4), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on March 13, 2024.[3]

Section 19(b)(2) of the Act[4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is April 27, 2024. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change and the issues raised therein. Accordingly, the Commission, pursuant to section 19(b)(2) of the Act,[5] designates June 11, 2024, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–CboeBZX–2024–018).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–09062 Filed 4–26–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100013; File No. SR–CboeBZX–2024–030]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

April 23, 2024.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 18, 2024, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX Options'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/BZX/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule for its equity options platform (''BZX Options'') relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange's equities platform (BZX Equities), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc., (''Affiliate Exchanges'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and

[3] *See* Securities Exchange Act Release No. 99686 (Mar. 7, 2024), 89 FR 18447. Comments on the proposed rule change are available at: *https://www.sec.gov/comments/sr-cboebzx-2024-018/srcboebzx2024018.htm*.

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeBZX–2023–047). On September 1, 2023, the Exchange withdrew that filing and submitted SR–CboeBZX–2023–068. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On September 29, 2023, the Exchange filed the proposed fee change (SR–CboeBZX–2023–79). On October 13, 2023, the Exchange withdrew that filing and submitted SR–CboeBZX–2023–083. On December 12, 2023 the Exchange withdrew that filing and submitted SR–CboeBZX–2023–104. On February 9, 2024, the Exchange withdrew that filing and submitted SR–CboeBZX–2024–017. On April 9, 2024, the Exchange withdrew that filing and submitted this SR–CboeBZX–2024–028. On April 18, 2024, the Exchange withdrew that filing and submitted this filing.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase over 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%. The Exchange is also unaware of any standard that suggests any fee proposal that exceeds a certain yearly or cumulative inflation rate is unreasonable, and in any event, in this instance the increase is well below the cumulative rate.

Additionally, the Exchange believes the proposed fee increase is reasonable in light of recent and anticipated connectivity-related upgrades and changes. The Exchange and its affiliated exchanges recently launched a multi-year initiative to improve Cboe Exchange Platform performance and capacity requirements to increase competitiveness, support growth and advance a consistent world class platform. The goal of the project, among other things, is to provide faster and more consistent order handling and matching performance for options, while ensuring quicker processing time and supporting increasing volumes and capacity needs. For example, the Exchange recently performed switch hardware upgrades. Particularly, the Exchange replaced existing customer access switches with newer models, which the Exchange believes resulted in increased determinism. The recent switch upgrades also increased the Exchange's capacity to accommodate more physical ports by nearly 50%. Network bandwidth was also increased nearly two-fold as a result of the upgrades, which among other things, can lead to reduce message queuing. The Exchange also believes these newer models result in less natural variance in the processing of messages. The Exchange notes that it incurred costs associated with purchasing and upgrading to these newer models, of which the Exchange has not otherwise passed through or offset.

As of April 1, 2024, market participants also having the option of connecting to a new data center (*i.e.,* Secaucus NY6 Data Center (''NY6'')), in addition to the current data centers at NY4 and NY5. The Exchange made NY6 available in response to customer requests in connection with their need for additional space and capacity. In order to make this space available, the Exchange expended significant resources to prepare this space, and will also incur ongoing costs with respect to maintaining this offering, including costs related to power, space, fiber, cabinets, panels, labor and maintenance of racks. The Exchange also incurred a large cost with respect to ensuring NY6 would be latency equalized, as it is for NY4 and NY5.

The Exchange also has made various other improvements since the current physical port rates were adopted in 2018. For example, the Exchange has updated its customer portal to provide more transparency with respect to firms' respective connectivity subscriptions, enabling them to better monitor, evaluate and adjust their connections based on their evolving business needs. The Exchange also performs proactive audits on a weekly basis to ensure that all customer cross connects continue to fall within allowable tolerances for Latency Equalized connections. Accordingly, the Exchange expended, and will continue to expend, resources to innovate and modernize technology so that it may benefit its Members and continue to compete among other options markets. The ability to continue to innovate with technology and offer new products to market participants allows the Exchange to remain competitive in the options space which currently has 17 options markets and potential new entrants.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83429 (June 14, 2018), 83 FR 28685 (June 20, 2018) (SR–CboeBZX–2018–038).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. The Exchange also anticipates that firms that utilize 10 Gb ports will benefit the most from the Exchange's investment in offering NY6 as the Exchange anticipates there will be much higher quantities of 10 Gb physical ports connecting from NY6 as compared to 1 Gb ports. Indeed, the Exchange notes that 10 Gb physical ports account for approximately 90% of physical ports across the NY4, NY5, and NY6 data centers, and to date, 80% of new port connections in NY6 are 10 Gb ports. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Market participants may voluntarily choose to become a member of one or more of a number of different exchanges, of which, the Exchange is but one choice. Additionally, any Exchange member that is dissatisfied with the proposal is free to choose not to be a member of the Exchange and send order flow to another exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other options exchanges that a market participant may connect to in lieu of the Exchange and/or trading of any options product, such as within the Over-the-Counter (OTC) markets which do not require connectivity to the Exchange. Indeed, there are currently 17 registered options exchanges that trade options (13 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single options exchange has more than approximately 19% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, there are 3 exchanges that have been added in the U.S. options markets in the last 5 years (*i.e.,* Nasdaq MRX, LLC, MIAX Pearl, LLC, MIAX Emerald LLC, and most recently, MEMX LLC).

As noted above, there is no regulatory requirement that any market participant connect to any one options exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one options exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 61 members that trade options, Cboe EDGX has 51 members that trade options, and Cboe C2 has 52 Trading Permit Holders (''TPHs'') (*i.e.,* members). There is also no firm that is a Member of BZX Options only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE American Options has 71 members [15], and NYSE Arca Options has 69 members [16], MIAX Options has 46 members [17] and MIAX Pearl Options has 40 members.[18]

Vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 13 non-Cboe affiliated options markets. Indeed, market participants are free to choose which exchange to use to satisfy their business needs. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee. The Exchange lastly notes that it is not required by the Exchange Act, nor any other rule or regulation, to undertake a cost-of-service or rate-making approach with respect to fee proposals. Moreover, Congress's intent in enacting the 1975 Amendments to the Act was to enable competition—rather than government order—to determine prices. The principal purpose of the amendments was to facilitate the creation of a national market system for the trading of securities. Congress intended that this ''national market system evolve through the interplay of *competitive forces* as unnecessary regulatory restrictions are removed.'' [19] Other provisions of the Act confirm that intent. For example, the Act provides that an exchange must design its rules ''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.'' [20] Likewise, the Act grants the Commission authority to amend or repeal ''[t]he rules of [an] exchange [that] impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.'' [21] In short, the promotion of free and open competition was a core congressional objective in creating the national market system.[22] Indeed, the Commission has historically interpreted that mandate to promote competitive forces to determine

[13] *Id.*

[14] *See* Cboe Global Markets U.S. Options Market Volume Summary (April 8, 2024), available at *https://markets.cboe.com/us/options/market_statistics/.*

[15] *See https://www.nyse.com/markets/american-options/membership#directory.*

[16] *See https://www.nyse.com/markets/arca-options/membership#directory.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Options_Exchange_Members_April_2023_04282023.pdf.*

[18] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Pearl_Exchange_Members_01172023_0.pdf.*

[19] *See* H.R. Rep. No. 94–229, at 92 (1975) (Conf. Rep.) (emphasis added)

[20] 15 U.S.C. 78f(b)(5).

[21] 15 U.S.C. 78f(8).

[22] *See* also 15 U.S.C. 78k–l(a)(1)(C)(ii) (purposes of Exchange Act include to promote ''fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets''); Order, 73 FR at 74781 (''The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'').

prices whenever compatible with a national market system. Accordingly, the Exchange believes it has met its burden to demonstrate that its proposed fee change is reasonable and consistent with the immediate filing process chosen by Congress, which created a system whereby market forces determine access fees in the vast majority of cases, subject to oversight only in particular cases of abuse or market failure. Lastly, and importantly, the Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for the proposed fee would be so complicated that it could not be done practically.

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. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.,* all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing). While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so. Indeed, market participants have numerous alternative venues that they may participate on and direct their order flow, including 13 non-Cboe affiliated options markets, as well as off-exchange venues, where competitive products are available for trading. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [23] The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[24] Accordingly, the Exchange does not believe its proposed change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

[23] See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[24] NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act [25] and paragraph (f) of Rule 19b–4 [26] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeBZX–2024–030 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeBZX–2024–030. 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

[25] 15 U.S.C. 78s(b)(3)(A).

[26] 17 CFR 240.19b–4(f).

Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeBZX–2024–030 and should be submitted on or before May 20, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–09065 Filed 4–26–24; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #20284 and #20285; MORONGO BAND OF MISSION INDIANS Disaster Number CA–20013]

Presidential Declaration of a Major Disaster for Public Assistance Only for the Morongo Band of Mission Indians

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the Morongo Band of Mission Indians (FEMA–4772–DR), dated 04/19/2024.

Incident: Severe Storms and Flooding.

Incident Period: 01/31/2024 through 02/09/2024.

DATES: Issued on 04/19/2024.

Physical Loan Application Deadline Date: 06/18/2024.

Economic Injury (EIDL) Loan Application Deadline Date: 01/21/2025.

ADDRESSES: *Visit the MySBA Loan Portal at https://lending.sba.gov* to apply for a disaster assistance loan.

FOR FURTHER INFORMATION CONTACT: Alan Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 04/19/2024, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications online using the MySBA Loan Portal *https://lending.sba.gov* or other locally announced locations. Please contact the SBA disaster assistance customer service center by email at *disastercustomerservice@sba.gov* or by phone at 1–800–659–2955 for further assistance.

The following areas have been determined to be adversely affected by the disaster:

Primary Area: Morongo Band of Mission Indians.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	3.250
Non-Profit Organizations without Credit Available Elsewhere	3.250
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	3.250

The number assigned to this disaster for physical damage is 202846 and for economic injury is 202850.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2024–09119 Filed 4–26–24; 8:45 am]

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SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #20280 and #20281; Vermont Disaster Number VT–20000]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of Vermont

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Vermont (FEMA–4770–DR), dated 04/19/2024.

Incident: Severe Winter Storm.

Incident Period: 01/09/2024 through 01/13/2024.

DATES: Issued on 04/19/2024.

Physical Loan Application Deadline Date: 06/18/2024.

Economic Injury (EIDL) Loan Application Deadline Date: 01/21/2025.

ADDRESSES: *Visit the MySBA Loan Portal at https://lending.sba.gov* to apply for a disaster assistance loan.

FOR FURTHER INFORMATION CONTACT: Alan Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 04/19/2024, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications online using the MySBA Loan Portal *https://lending.sba.gov* or other locally announced locations. Please contact the SBA disaster assistance customer service center by email at *disastercustomerservice@sba.gov* or by phone at 1–800–659–2955 for further assistance.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Chittenden, Essex, Franklin, Lamoille, Orleans.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	3.250
Non-Profit Organizations without Credit Available Elsewhere	3.250
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	3.250

The number assigned to this disaster for physical damage is 20280B and for economic injury is 202810.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2024–09120 Filed 4–26–24; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #20286 and #20287; Hoopa Valley Tribe Disaster Number CA–20014]

Presidential Declaration of a Major Disaster for Public Assistance Only for the Hoopa Valley Tribe

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

[27] 17 CFR 200.30–3(a)(12).

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the Hoopa Valley Tribe (FEMA–4773–DR), dated 04/19/2024.

Incident: Severe Winter Storm.

Incident Period: 01/30/2024 through 01/31/2024.

DATES: Issued on 04/19/2024.

Physical Loan Application Deadline Date: 06/18/2024.

Economic Injury (EIDL) Loan Application Deadline Date: 01/21/2025.

ADDRESSES: *Visit the MySBA Loan Portal at https://lending.sba.gov* to apply for a disaster assistance loan.

FOR FURTHER INFORMATION CONTACT: Alan Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 04/19/2024, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications online using the MySBA Loan Portal *https://lending.sba.gov* or other locally announced locations. Please contact the SBA disaster assistance customer service center by email at *disastercustomerservice@sba.gov* or by phone at 1–800–659–2955 for further assistance.

The following areas have been determined to be adversely affected by the disaster:

Primary Area: Hoopa Valley Tribe.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	3.250
Non-Profit Organizations without Credit Available Elsewhere	3.250
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	3.250

The number assigned to this disaster for physical damage is 20286B and for economic injury is 202870.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2024–09102 Filed 4–26–24; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #20282 and #20283; NEW HAMPSHIRE Disaster Number NH–20004]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of New Hampshire

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of New Hampshire (FEMA–4771–DR), dated 04/19/2024.

Incident: Severe Storms and Flooding.

Incident Period: 01/09/2024 through 01/14/2024.

DATES: Issued on 04/19/2024.

Physical Loan Application Deadline Date: 06/18/2024.

Economic Injury (EIDL) Loan Application Deadline Date: 01/21/2025.

ADDRESSES: *Visit the MySBA Loan Portal at https://lending.sba.gov* to apply for a disaster assistance loan.

FOR FURTHER INFORMATION CONTACT: Alan Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 04/19/2024, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications online using the MySBA Loan Portal *https://lending.sba.gov* or other locally announced locations. Please contact the SBA disaster assistance customer service center by email at *disastercustomerservice@sba.gov* or by phone at 1–800–659–2955 for further assistance.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Grafton, Rockingham.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	3.250
Non-Profit Organizations without Credit Available Elsewhere	3.250
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	3.250

The number assigned to this disaster for physical damage is 202826 and for economic injury is 202830.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2024–09100 Filed 4–26–24; 8:45 am]

BILLING CODE 8026–09–P

DEPARTMENT OF STATE

[Public Notice 12368]

30-Day Notice of Proposed Information Collection: Supplemental Questions for Visa Applicants

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995, the Department is requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to May 29, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Anabel Moreno-Mendez, who may be reached at 202–485–7611 or *PRA_BurdenComments@state.gov.*

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Supplemental Questions for Visa Applicants.
- *OMB Control Number:* 1405–0226.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* CA/VO.
- *Form Number:* DS–5535.

• *Respondents:* Immigrant Visa Applicants, Nonimmigrant Visa Applicants.
• *Estimated Number of Respondents:* 50,000.
• *Estimated Number of Responses:* 50,000.
• *Average Time per Response:* 55 minutes.
• *Total Estimated Burden Time:* 45,833 hours.
• *Frequency:* Once per respondent's application.
• *Obligation to Respond:* Required to obtain or retain a benefit.

We are soliciting public comments to permit the Department to:

• Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
• Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
• Enhance the quality, utility, and clarity of the information to be collected.
• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The Immigration and Nationality Act (''INA''), 8 U.S.C. 1101 *et seq.,* sets out application and eligibility requirements for an applicant seeking to obtain nonimmigrant or immigrant visa. Most of the standards for determining visa ineligibility are detailed in INA 212(a), 8 U.S.C. 1182(a), which includes terrorist activities and other security and related grounds at INA 212(a)(3), 8 U.S.C. 1182(a)(3).

INA 221(a), 8 U.S.C. 1201(a) provides that a consular officer may issue an immigrant or nonimmigrant visa to an individual who has made a proper application, subject to applicable conditions and limitations in the INA and related regulations. Under INA 222(c), 8 U.S.C. 1202(c), every applicant for a nonimmigrant visa must provide certain identifying particulars—name, date of birth and birthplace, nationality, purpose and length of intended stay in the United States, marital status—and ''such additional information necessary to the identification of the applicant, the determination of his eligibility for a nonimmigrant visa, and the enforcement of the immigration and nationality laws as may be by regulations prescribed.'' Similar requirements apply to applicants for immigrant visas, pursuant to INA 222(a), 8 U.S.C. 1201(a). Under regulations set out in Title 22 of the Code of Federal Regulations, visa applications must be made on a standard form and a consular officer ''may require the submission of additional necessary information or question an applicant on any relevant matter whenever the consular officer believes that the information provided in the application is inadequate to permit a determination of the applicant's eligibility to receive a nonimmigrant visa.'' 22 CFR 41.103; see also 22 CFR 42.63 (immigrant visas).

Consular officers may require submission of a completed DS–5535 to supplement the immigrant and nonimmigrant visa applications. The DS–5535 solicits additional biographic information that is necessary to determine the applicant's eligibility for a visa.

Methodology

Consular officers ask these questions of a subset of nonimmigrant and immigrant visa applicants worldwide either orally or by providing a copy of the questions electronically or on paper. The applicant can respond orally, via email, via written response or via Microsoft e-version. The e-version of the information collection asks identical questions to the paper version. There are slight differences in formatting due to the different platforms. In some instances, when a paper copy is provided, the applicant may still be permitted to return the form electronically.

Julie M. Stufft,

Acting Deputy Assistant Secretary, Bureau of Consular Affairs, Department of State.

[FR Doc. 2024–09082 Filed 4–26–24; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice 12369]

60-Day Notice of Proposed Information Collection: DS–156E, Nonimmigrant Treaty Trader/Investor Application

ACTION: Notice of request for public comment.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to June 28, 2024.

ADDRESSES: You may submit comments by any of the following methods:

• *Web:* Persons with access to the internet may comment on this notice by going to *www.Regulations.gov.* You can search for the document by entering ''Docket Number: DOS–2024–0012'' in the Search field. Then click the ''Comment Now'' button and complete the comment form.
• *Email: PRA_BurdenComments@state.gov.*
• *Regular Mail:* Send written comments to: Jami Thompson, Senior Regulatory Coordinator, Visa Services, Department of State, 600 19th St. NW, Washington, DC 20006.

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Anabel Moreno-Mendez, Visa Services, Department of State, 600 19th St. NW, Washington, DC 20006, who may be reached at 202–485–7611 or *PRA_BurdenComments@state.gov.*

SUPPLEMENTARY INFORMATION:

• *Title of Information Collection:* DS–156E, Nonimmigrant Treaty Trader/Investor Application.
• *OMB Control Number:* 1405–0101.
• *Type of Request:* Extension of a Currently Approved Collection.
• *Originating Office:* CA/VO.
• *Form Number:* DS–156E.
• *Respondents:* Nonimmigrant Treaty Traders/Investors applying for E-visas.
• *Estimated Number of Respondents:* 43,000.
• *Estimated Number of Responses:* 43,000.
• *Average Time per Response:* 4 hours.
• *Total Estimated Burden Time:* 172,000 hours.
• *Frequency:* Once Per Application.
• *Obligation to Respond:* Required to Obtain or Retain a Benefit.

We are soliciting public comments to permit the Department to:

• Evaluate whether the proposed information collection is necessary for the proper functions of the Department.

• Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

Under section 101(a)(15)(E) of the Immigration and Nationality Act (INA) (8 U.S.C. 1101(a)(15)(E)), noncitizens of certain countries may qualify for a nonimmigrant visa to carry out activities as a treaty traders, treaty investors, or other treaty workers in specialty occupation. Such individuals must be nationals of countries with a qualifying Treaty of Friendship, Commerce, and Navigation or its equivalent with the United States, or that is accorded such privileges by specific legislation. The Department uses the DS–156E to elicit information necessary to determine a foreign national's qualification for a nonimmigrant visa under these provisions. Only certain applicants seeking E nonimmigrant treaty trader/investor visas to the United States will complete Form DS–156E.

Methodology

After completing Form DS–160, Online Nonimmigrant Visa Application, applicants can access the DS- 156E online, print a copy of the form, and then submit it in person, via email, or via mail, depending on the procedures at the relevant consulate or embassy.

Signer's Name (usually Bureau DAS or Executive Director)

Julie M Stufft,

Deputy Assistant Secretary, Bureau of Consular Affairs, Department of State.

[FR Doc. 2024–09098 Filed 4–26–24; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2024–1345]

Agency Information Collection Activities: Requests for Comments; Clearance of a New Approval of Information Collection: Adopt-a-School Feedback Form

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval for a new information collection. The collection involves collecting feedback from participating school representatives to continuously improve the Adopt-a-School program. The information to be collected will be used to and/or is necessary because satisfaction rating is a metric measured by the Adopt-a-School program for success.

DATES: Written comments should be submitted by June 28, 2024.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov (Enter docket number into search field).

By mail: Christine Sharp, 800 Independence Ave., SW Washington DC 20591, Room 932.

FOR FURTHER INFORMATION CONTACT: Shannon Stearman by email at: *sstearman@faa.gov;* phone: 202–267–0236.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120–XXXX.

Title: Adopt-a-School Feedback Form.

Form Numbers: N/A.

Type of Review: New Information Collection.

Background: The Adopt-a-School Program is a Signature Program of the FAA's Science Technology Engineering and Math (STEM) Aviation and Space Education (AVSED) Program. The program provides 6 aerospace STEM-based lessons to participating schools in the nine FAA regions across the country each year in alignment with the strategic goals of the program. This form allows participating schools to provide feedback to the FAA regarding their experience in the program including feedback regarding scheduling, lesson efficacy, and presentation success. This information will then be used to review the program, initiate continuous improvement discussions, and determine necessary changes and/or improvements for following iterations of the program.

Respondents: 500 Educators, Principals or Administrative Staff at interested schools across the country.

Frequency: Annually.

Estimated Average Burden per Response: 5 Minutes.

Estimated Total Annual Burden: Per respondent: $2.46 Total: $1,228.75.

Issued in Washington, DC, on April 23, 2024.

Christine Sharp,

Manager, Aviation Workforce and Education Division.

[FR Doc. 2024–09144 Filed 4–26–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2024–1344]

Agency Information Collection Activities: Requests for Comments; Clearance of a New Approval of Information Collection: Adopt-a-School Application Form

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval for a new information collection. The collection involves collecting feedback from participating school representatives to continuously improve the Adopt-a-School program. The information to be collected will be used to and/or is necessary because satisfaction rating is a metric measured by the Adopt-a-School program for success.

DATES: Written comments should be submitted by June 28, 2024.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov (Enter docket number into search field).

By mail: Christine Sharp, 800 Independence Ave. SW, Washington, DC 20591, Room 932.

FOR FURTHER INFORMATION CONTACT: Shannon Stearman by email at: *sstearman@faa.gov;* phone: 202–267–0236.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120–XXXX.

Title: Adopt-a-School Application Form.

Form Numbers: N/A.

Type of Review: New Information Collection.

Background: The Adopt-a-School Program is a Signature Program of the FAA's Science Technology Engineering and Math (STEM) Aviation and Space Education (AVSED) Program. The program provides 6 aerospace STEM-based lessons to participating schools in the nine FAA regions across the country each year. This form allows schools to contact the FAA and express interest in the Adopt-a-School Program. The program has specific criteria, and collecting this information from interested schools allows the FAA to determine if a school qualifies and take next steps in the school selection process. Information collected will include the name of the school, point of contact information, basic school characteristics, and confirmation of the level of interest and familiarity of the school with the Adopt-a-School Program. This information will then be used to review and qualify schools, initiate ongoing discussions, and determine the selected schools for the following year.

Respondents: 1,000 Educators, Principals or Administrative Staff at interested schools across the country.

Frequency: Annually.

Estimated Average Burden per Response: 15 Minutes.

Estimated Total Annual Burden: Per respondent: $7.37 Total: $7,372.50.

Issued in Washington, DC, on April 23, 2024.

Christine Sharp,

Manager, Aviation Workforce and Education Division.

[FR Doc. 2024–09146 Filed 4–26–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice To Rescind Notice of Intent (NOI) To Prepare an Environmental Impact Statement: Dane County, Wisconsin

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice to rescind Notice of Intent for an Environmental Impact Statement.

SUMMARY: FHWA, in cooperation with the Wisconsin Department of Transportation (WisDOT), is issuing this notice to advise the public that FHWA will not be preparing an Environmental Impact Statement (EIS) for the United States Highway (US) 51 corridor located in Dane County, Wisconsin, between US 12/18 and Wisconsin State Highway (WIS) 19. FHWA is rescinding the NOI because the project has been downscoped.

FOR FURTHER INFORMATION CONTACT: Lisa Hemesath, Environmental Protection Specialist, Federal Highway Administration, 525 Junction Road, Suite 8000, Madison, Wisconsin, 53717–2157, Telephone: (608) 829–7503. You may also contact Jeff Berens, Project Manager, Wisconsin Department of Transportation, Southwest Region, 2101 Wright Street, Madison, WI 53704 Telephone: (608) 245–2656.

SUPPLEMENTARY INFORMATION: FHWA, in cooperation with the Wisconsin Department of Transportation (WisDOT), is issuing this notice to advise the public that FHWA will not be preparing an Environmental Impact Statement (EIS) for the United States Highway (US) 51 corridor located in Dane County, Wisconsin, between US 12/18 and Wisconsin State Highway (WIS) 19. FHWA issued the NOI to prepare an EIS in the **Federal Register** on August 6, 2012, at 77 FR 46790, for an approximate 11-mile corridor improvement project on US 51. The improvements were being considered to address existing and future transportation demand on US 51, safety concerns and operational concerns and to identify land which may need to be preserved for future transportation improvements. Based on further review of the project, it was determined appropriate for the project scope to be reduced due to changes in project needs and the local environment.

New Federal-aid studies are proposed for this corridor which will comply with the environmental requirements of the National Environmental Policy Act (NEPA) (42 U.S.C. 4321), FHWA environmental regulations (23 CFR part 771) and related authorities, as appropriate. Comments or questions concerning this notice of rescission or the future studies should be directed to FHWA or WisDOT at the addresses provided above.

Glenn Fulkerson,

Division Administrator, FHWA Wisconsin Division, Madison, Wisconsin.

[FR Doc. 2024–09091 Filed 4–26–24; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No.: OST–2023–0111]

Waiver of Buy America Requirements for the Pacific Island Territories and the Freely Associated States

ACTION: Notice.

SUMMARY: The Department of Transportation (DOT) seeks to maximize the use of American-made products and materials in all federally funded projects as part of the Biden-Harris Administration's implementation of the historic Bipartisan Infrastructure Law (BIL). In this notice, DOT is taking action to finalize a temporary general applicability waiver of the requirements of section 70914(a) of the Build America, Buy America Act (BABA), included in BIL, and related domestic preference statutes administered by DOT and its Operating Administrations (OAs) for federal financial assistance awarded by DOT and its OAs for infrastructure projects located in the Commonwealth of Northern Mariana Islands (CNMI), Guam, and American Samoa, collectively referred to as the ''Pacific Island territories.'' The waiver also applies to discretionary grant assistance provided by DOT and its OAs to the Freely Associated States (the Republic of Palau, Republic of the Marshall Islands, and Federated States of Micronesia) in the Pacific that are subject to a domestic preference statute. As it applies to the Freely Associated States, the waiver does not include BABA, which only applies to infrastructure projects in the United

States and its territories. The waiver will provide time for DOT to collect and analyze evidence to determine if a more targeted waiver of these requirements is in the public interest. The waiver allows time for DOT and its OAs to offer technical assistance to potential assistance recipients in the remote communities in the Pacific Island territories and Freely Associated States. The waiver will be reviewed prior to its expiration.

DATES: The waiver is applicable to awards that are obligated on or after April 29, 2024 until March 1, 2025.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Elizabeth Fox, DOT Office of the Assistant Secretary for Transportation Policy, at *elizabeth.fox@dot.gov* or at 202–981–2838. For legal questions, please contact Jennifer Kirby-McLemore, DOT Office of the General Counsel, 405–446–6883, or via email at *jennifer.mclemore@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Buy America preferences set forth in section 70914(a) of BABA included in BIL require that all iron, steel, manufactured products, and construction materials used for infrastructure projects in the United States under federal financial assistance awards be produced in the United States.

Under section 70914(b) and in accordance with the Office of Management and Budget (OMB)'s Memorandum M–24–02, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, DOT may waive the BABA application in any case in which it finds that: (i) applying the domestic content procurement preference would be inconsistent with the public interest; (ii) types of iron, steel, manufactured products, or construction materials are not produced in the U.S. in sufficient and reasonably available quantities or of a satisfactory quality; or (iii) the inclusion of iron, steel, manufactured products, or construction materials produced in the U.S. will increase the cost of the overall project by more than 25 percent. All waivers must have a written explanation for the proposed determination; provide a period of not less than fifteen (15) calendar days for public comment on the proposed waiver; and submit the proposed waiver to the OMB Made in America Office (MIAO) for review to determine if the waiver is consistent with policy.

BABA also provides that the preferences under section 70914 apply only to the extent that a domestic content procurement preference as described in section 70914 does not already apply to iron, steel, manufactured products, and construction materials. BIL § 70917(a)–(b). Federal financial assistance programs administered by DOT's Operating Administrations (OAs) [1] are subject to a variety of mode-specific statutes that apply specific Buy America [2] requirements to iron, steel, and manufactured products, including 49 U.S.C. 50101 (FAA); 23 U.S.C. 313 (FHWA); 49 U.S.C. 5323(j) (FTA); and 46 U.S.C. 54101(d)(2) (MARAD). Recent annual appropriations acts have also required DOT to apply the Buy American Act (41 U.S.C. chapter 83) to funds appropriated under those acts,[3] where a mode-specific statute is not in place. These statutes also allow for waivers of the Buy America requirements to be issued when the DOT determines that doing so is in the public interest.

DOT and its OAs provide financial assistance to the three Pacific Island territories of Guam, American Samoa, and CNMI through both discretionary grants and allocated programs, including assistance programs for highways and bridges, public transportation, airports, and port facilities. The Freely Associated States (the Republic of Palau, Republic of the Marshall Islands, and Federated States of Micronesia) in the Pacific region are also eligible recipients of discretionary grants under FAA's Airport Improvement Program (AIP).

Over five years from FY 2018 to FY 2022, DOT OAs provided over $340 million in financial assistance for 160 capital projects in the Pacific Island territories under various programs where infrastructure is an eligible activity and may be subject to BABA or other DOT existing Buy America requirements. FAA also provided $88 million in AIP discretionary grants to the Freely Associated States in the Pacific region for 20 projects over that same time period.

Economies in the Pacific Islands are over 5,000 miles from the mainland United States and must import products via air or sea. These economies have few local heavy manufacturers and rely largely on established regional supply chains from east Asia, Australia, and New Zealand. Most goods, equipment, materials, and supplies are imported and rely on shipping with associated timelines and unpredictable shipping fuel costs fluctuations. Moreover, materials sourced from the United States lead to additional shipping fees and longer lead times, thus significantly extending construction activity schedules. Lastly, ongoing gaps in supply chain availability impact lead times for materials, increasing project timelines. For these reasons, DOT is concerned that complying with Buy America requirements may increase already elevated project time and costs—particularly in the short run—and seeks time to better understand the local manufacturing footprint and the balance of equities for residents of the Pacific Island territories. DOT is aware that substantial changes to shipping and supply chains to incorporate domestic sourcing requirements in the Pacific Island territories could take multiple years to establish.

In considering this waiver, DOT consulted with the relevant Federal assistance programs in the respective OAs, including the regional offices in those agencies that directly administer DOT funding programs in the Pacific Island territories and Freely Associated States. DOT also relied on other communications that it has received from stakeholders in those territories. For example, CNMI and Guam have cited their isolated location in the Western Pacific and reliance on ocean freight as the only mode of transporting commodities to the island as creating significant challenges in obtaining materials from domestic sources, with impacts on both project costs and delivery schedules. The two territories have also indicated that shipping construction materials from the continental United States raises shipping costs by approximately 30 percent above the cost to ship directly to the islands from Asia.

Other Federal agencies have also conducted outreach efforts to the Pacific Island territories and received similar feedback. For example, representatives from American Samoa have indicated to the Federal Emergency Management Agency that ''As a containerized

[1] DOT OAs that provide or administer financial assistance covered under this proposed waiver include the Federal Aviation Administration (FAA); Federal Highway Administration (FHWA); Federal Transit Administration (FTA); and the Maritime Administration (MARAD).

[2] In this notice, references to ''Buy America'' include domestic preference laws called ''Buy American'' that apply to DOT financial assistance programs.

[3] For example, section 409 of the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2022 states that ''no funds appropriated pursuant to this Act may be expended by an entity unless the entity agrees that in expending the assistance the entity will comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. 8301–8305, popularly known as the ''Buy American Act'').''

community, our territories depend on goods, equipment, materials, and supplies to be imported.'' They further stated that ''we can purchase equipment from foreign countries closer to American Samoa and with reasonable prices and shorter shipping time.'' American Samoa representatives also noted that availability of materials from nearby foreign countries such as New Zealand and Australia would result in a significant cost savings to the grantors.

Issuance of the Proposed Waiver and Discussion of Comments Received

On August 9, 2023, DOT published a proposed Buy America waiver for projects located within the Pacific Island territories of CNMI, Guam, or American Samoa and funded under DOT-administered financial assistance programs in the **Federal Register** 88 FR 53949. DOT received five comments on the proposed waiver. Three of the comments were supportive of the waiver, while two opposed the waiver.

The opposing commenters noted that there are existing opportunities to purchase both US made equipment and steel in the Pacific Island territories. One commenter noted they have supplied BABA compliant equipment to Guam in the recent past. The other commenter noted that the domestic steel industry has capacity to support infrastructure in the Pacific Island territories.

The supportive commenters noted that higher costs and longer lead times are barriers to Buy America compliance in the Pacific Island territories. Additionally, higher cost estimates were cited as a reason for grant applications being less competitive with other states. Similarly, one commenter noted they have experienced considerable risk and uncertainty when bidding due to the limited time manufacturers and suppliers can hold steel pricing quotes and noted that in the recent past several projects have gone through the Invitation for Bid procurement process and received proposals that greatly exceed the grant funding allocation. The commenters also noted the impacts of fluctuating shipping costs add to the overall cost and uncertainty around procurement.

DOT acknowledges that there are current opportunities for purchase of Buy America compliant products in the territories; however, DOT also recognizes that the purchase of those compliant products may result in substantially higher costs and require longer lead times to procure, leading to impacts on both project competitiveness and project delivery. Moreover, the stated intent of the waiver is to provide time for DOT to collect and analyze evidence to determine if a more targeted waiver of these requirements is in the public interest and allow time for DOT and its OAs to offer technical assistance to potential assistance recipients in the remote communities in the Pacific Island territories and Freely Associated States. Thus, during this temporary general applicability waiver period, DOT will come to better understand the local manufacturing footprint, consider how to best balance the equities for residents of the Pacific Island territories, and work with other federal agencies on ways to help ease supply chain challenges for domestic sources in those territories.

One commenter also noted that the region's strategic locations should be guarded against technology that could be detrimental to their security. Another commenter also recognized the strategic importance of their location, but noted that a waiver is necessary to allow purchases even from countries who are in strategic defense alliances with the United States. DOT recognizes the importance of security considerations for port equipment purchases, particularly for ship to shore cranes, and the recently announced Biden-Harris Administration effort to bolster port security.[4] The Department also recognizes that the issues extend to U.S. ports more broadly, beyond those in the Pacific Island territories. As a result, DOT has chosen to exempt ship to shore cranes from the waiver and will address domestic supply issues for these critical assets through separate actions. DOT will exercise additional oversight for assistance agreements involving ports during the period the waiver is active.

One opposing commenter noted that the waiver would be inconsistent with Congressional intent and Administration policy because it would not be maintaining and strengthening the existing DOT Buy America requirements. DOT believes that this waiver will help ensure that all Americans, including those in the Pacific Island Territories, are able to access the benefits provided by the once in a generation investment in infrastructure provided by BIL. Providing these short-term flexibilities to projects in that region will help alleviate systemic barriers to opportunities that have limited DOT's ability to deliver resources and benefits equitably to all in these territories. The waiver will allow DOT to work with other infrastructure agencies to ensure that the shipping and supply chains to the Pacific Island territories integrate domestic sourcing requirements in a feasible and equitable way over the longer term.

One supporting commenter noted that they believe that the challenges they outlined in complying with Buy America requirements fully support a waiver for at least 18 months, potentially permanently. DOT believes that the time frame is appropriate and will reevaluate if a more targeted waiver is in the public interest as it gathers additional information.

DOT-assisted infrastructure projects located within the Pacific Island territories and Freely Associated States are expected continue to experience challenges with product delivery, availability, reliability, and project scheduling without the waiver. Infrastructure project schedules rely on readily available products delivered within reasonable timeframes. Due to the extreme shipping distances required for products produced in mainland United States and due to the lack of existing local product supply networks for these products, manufacturers may not be able to assure on-time delivery of compliant products. As a consequence, associated projects in the Pacific Island territories and Freely Associated States may face unreasonable scheduling uncertainty. The waiver will help grant recipients establish rules and procedures to manage Buy America requirements. Furthermore, the waiver will provide recipients more options to efficiently complete projects.

Uncertainties regarding capacity, shipping, and supply networks make domestic sourcing in the Pacific Island territories and Freely Associated States challenging for assistance recipients, shippers, and DOT staff in the short run. DOT is taking steps to understand opportunities to leverage existing shipping and transportation processes to make domestic sourcing more feasible over the longer term.

Finding on the Waiver

Based on all the information available to the Agency, DOT finds that it is in the public interest to issue a temporary general applicability public interest waiver of the requirements of 70914(a) of the Build America, Buy America preferences for iron, steel, manufactured products, and construction materials used in infrastructure projects located within the Pacific Island territories of CNMI, Guam, or American Samoa and funded under DOT-administered financial assistance programs. The waiver applies to recipients located in

[4] *https://www.whitehouse.gov/briefing-room/statements-releases/2024/02/21/fact-sheet-biden-harris-administration-announces-initiative-to-bolster-cybersecurity-of-u-s-ports/.*

CNMI, Guam or America Samoa of all DOT-administered financial assistance programs, including those subject to program-specific domestic preference requirements. The waiver applies to all awards obligated after the effective date and, in the case of awards obligated prior to the effective date, all expenditures for non-domestic iron, steel, manufactured products, and construction materials incurred after the effective date. However, this waiver does not apply to purchases of ship to shore cranes.

DOT is issuing this temporary general applicability public interest waiver under the following authorities; 70914(b) of BIL, 23 U.S.C. 313(b)(1), 49 U.S.C. 5323(j); 46 U.S.C. 54101(d)(2)(B)(i)(I), 49 U.S.C. 50101(b)(1), and 41 U.S.C. chapter 83. Under those DOT authorities, the proposed waiver would also apply to projects in the Freely Associated States (the Republic of Palau, Republic of the Marshall Islands, and Federated States of Micronesia). As it applies to the Freely Associated States, the waiver does not include BABA, which only applies to infrastructure projects in the United States and its territories.

The duration of the waiver is from the effective date April 29, 2024 until March 1, 2025. The proposed waiver had a duration of 18 months from the effective date of the final waiver. DOT is issuing the final waiver with a sunset date of March 1, 2025 to better align with the coordinated strategy for the issuance of this waiver type across the Federal government. DOT will review this waiver prior to its expiration to assess whether it remains necessary to the fulfillment of DOT's missions and goals and consistent with applicable legal authorities, such as BABA, Executive Order 14005, 2 CFR part 184, and OMB Memorandum M–24–02. DOT may, based on the results of that review, terminate the waiver, or take action to develop a new waiver in consultation with the MIAO.

Section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572) also requires an additional five-day comment period after FHWA publishes a waiver finding notice. Comments received during that period will be reviewed, but the finding will continue to remain valid. Those comments may influence DOT/FHWA's decision to terminate or modify a finding.

Issued in Washington, DC.

Christopher Coes,

Acting Under Secretary for Policy.

[FR Doc. 2024–09052 Filed 4–26–24; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket ID Number: DOT–OST–2018–0068]

Notice of Submission of Proposed Information Collection to OMB; Agency Request for Reinstatement of Previously Approved Collections: Traveling by Air With Service Animals—U.S. Department of Transportation Service Animal Air Transportation Form and U.S. Department of Transportation Service Animal Relief Attestation Form

AGENCY: Office of the Secretary (OST), Department of Transportation (Department or DOT).

ACTION: Notice of submission to the Office of Management and Budget (OMB) and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and DOT Order 1351.29A, this notice confirms the Department's intention to renew Office of Management and Budget (OMB) Control Number 2105–0576, concerning Traveling by Air with Service Animals—U.S. Department of Transportation Service Animal Air Transportation Form, and U.S. Department of Transportation Service Animal Relief Attestation Form.

DATES: Written comments on this notice must be received by May 29, 2024.

ADDRESSES: You may file comments regarding the burden estimate, including suggestions for reducing the burden, in docket number DOT–OST–2018–0068 by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov* and follow the online instructions for submitting comments. (You may access comments received for this notice at *https://www.regulations.gov* by searching docket DOT–OST–2018–0068.)
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590;
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE, Washington, DC 20590 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

Instructions: You must include the agency name and docket number DOT–OST–2010–0054 at the beginning of your comment. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

Privacy Act: Anyone is able to search the electronic form of all comments received in any of DOT's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Maegan Johnson or Livaughn Chapman, Jr., Office of Aviation Consumer Protection, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, telephone number (202) 366–9342 (voice), (202) 366–7152 (fax); *maegan.johnson@dot.gov* or *livaughn.chapman@dot.gov* (email). Arrangements to receive this document in an alternative format may be made by contacting the above-named individuals.

SUPPLEMENTARY INFORMATION: DOT published a **Federal Register** notice with a 60-day comment period soliciting comments on the information collections on November 13, 2023 (88 FR 77667). DOT received 149 comments on the 60-day notice, which are addressed below. The Department proposed to amend the U.S. Department of Transportation Service Animal Air Transportation Form by decreasing the number of questions on the form to reduce burdens on individuals with disabilities, including instructions to clarify how to complete the form, and making other clarifying and formatting changes to the form that will allow individuals to better navigate the form.

OMB Control Number: 2105–0576.

Title: Traveling by Air with Service Animals.

Type of Request: Reinstatement of information collections.

Background: The U.S. Department of Transportation (Department or DOT) published a final rule to amend the Department's Air Carrier Access Act (ACAA) regulation on the transport of service animals by air in the **Federal Register** on December 10, 2020 (85 FR 79742). Under 14 CFR 382.75, airlines are permitted to require passengers traveling with service animals to submit and provide to airlines, as a condition of travel, a U.S. Department of Transportation Service Animal Air Transportation Form (''Behavior and Health Attestation Form''), and, if applicable, a U.S. Department of Transportation Service Animal Relief Attestation Form (''Relief Attestation Form''). The Behavior and Health Attestation Form is designed to provide

assurances to airlines that a service animal does not pose a direct threat to the health and safety of passengers, crew, and others during air transportation by requiring passengers to attest that their service animal is currently vaccinated against rabies, has been trained to behave in a public setting, and that the animal has not behaved aggressively or caused serious injury to another person or animal. The form is also designed to educate passengers traveling with service animals on how service animals in air transportation are expected to behave and to inform passengers traveling with service animals of the consequences of service animal misbehavior. The Relief Attestation Form may only be required by the airlines when a passenger is traveling with a service animal on a flight segment scheduled to take 8 hours or more. The purpose of this form is to provide assurances to the airlines that the service animal will not need to relieve itself on the flight or that the animal can relieve itself in a way that does not create a health or sanitation issue. The form is also designed to educate passengers of the consequences should a service animal relieve itself on the aircraft in an unsanitary way.

The Behavior and Health Attestation Form and the Relief Attestation Form are the only forms that airlines are permitted to require from passengers traveling with service animals as a condition of transport, except in rare circumstances when additional documentation may be necessary to comply with animal transport requirements issued by a Federal agency, a U.S. territory, or a foreign jurisdiction.

The Paperwork Reduction Act of 1995 and its implementing regulations, 5 Code of Federal Regulations CFR) part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. On November 13, 2023, DOT published a 60-day notice in the **Federal Register** soliciting comment on the information collections, the Behavior and Health Attestation Form and Relief Attestation form, for which the agency seeks approval. See 85 FR 79742.

In its 60-day notice, the Department sought comment on an amended version of its original Behavior and Health Attestation Form that was published in DOT's final service animal rule in December of 2020. The amended form included formatting and clarifying amendments to the form that were intended to make the form easier for individuals with disabilities to navigate and complete. In addition to seeking comment on amendments to the form, the Department also sought comment on whether the information collections were necessary for the proper performance of the functions of the Department; the accuracy of the Department's estimated burden hours; ways to enhance the quality, utility and clarity of the information collected; and ways to minimize the burden of the collections on respondents. DOT received 149 comments in response to its 60-day notice; most of the comments received, approximately 120, were from individual commenters, while the remaining comments were received from disability advocacy organizations, two airlines trade organizations, and an airline contractor.

The majority of individual commenters stated that the DOT service animal forms were burdensome for passengers with disabilities to complete because there were too many questions on the form. Individual commenters also noted that each airline has a different method of collecting the forms, which makes it difficult for individuals with disabilities to both complete the forms and submit the forms to airlines. Individual commenters also stated that some airlines post the forms on their websites in formats that are not accessible for individuals with disabilities, especially individuals who are blind. Many individual commenters requested that the Department disallow airlines from collecting the forms altogether, or, alternatively, substantially decrease the number or questions on the form.

Commenters representing disability advocacy organizations shared many of the same concerns about the burdensome nature of the form expressed by individual commenters. Disability advocates representing individuals who are blind commented that airlines are not required to assist blind passengers with completing the form and that many blind passengers cannot complete the form independently and must seek the assistance of a sighted person to both complete and submit the form to airlines. Disability advocates also commented that it takes longer than the 15 minutes time period estimated by DOT for individuals with disabilities to complete the form because of the inaccessibility of the form on airline websites and the number of questions on the form. These commenters did not provide a suggested estimate for the amount of time it takes individuals with disabilities to complete the form.

Some of the disability advocacy organizations commented that they oppose airlines using third-party contractors to process the service animal forms and noted that airline staff should be trained on DOT's rules for processing the forms. Several advocacy organizations also encouraged DOT to state on the form that airlines must assist individuals with disabilities with completing the form, that the form should only require passengers to affirm that a service animal has been vaccinated instead of requiring the passengers to indicate the animal's vaccination dates, and that airlines should not be permitted to contact service animal trainers to verify that the animal has been trained. One advocacy organization also urged DOT to replace the term ''service animal user'' with ''service animal handler'' since ''service animal handler'' is a defined term in DOT's ACAA regulations that refers to either an individual with a disability traveling with the service animal, or a third party responsible for controlling the animal who is traveling with the passenger with a disability and service animal.

Some disability advocates were pleased with the some of the formatting and clarifying changes made by DOT to the amended form published in DOT's 60-day notice. Specifically, some commenters stated that they were glad to see that DOT clarified on the form that a service animal user may insert his or her own name and contact information if they train their own service animal. They were also glad to see that DOT eliminated some of the fields on the form, and that DOT added and amended section titles on the form.

Airline trade organizations and an airline contractor submitted comments recommending that DOT make additional clarifying changes to the form that exceed the amendments in DOT's 60-day notice. For instance, these commenters suggested that DOT include a uniform date format on the form, define some of the terms used in the form, attach form instructions, remove the field that requires the passenger to provide the date of the service animal's last vaccination, and clarify that an animal may be refused transport if it shows that it has not been trained to behave in public. These organizations also urged DOT to reinstate the ''service animal handler'' field on the form and commented that the form should require passengers to provide the service animal's weight, color, and species (or breed), require passengers to list the animal's work or task, and that DOT should strengthen the Federal crime warning for making fraudulent statements on the top of the form by including language clarifying that providing false, fictitious or fraudulent

statements on the form is a felony that is subject to a maximum civil penalty of $250,000.

Airline trade organizations provided data from five airlines on the number of service animal forms that were collected from these airlines from July 2022 to June 2023, and urged the Department to use those data to update its calculation on the estimated total annual burden of the information collection.

To address these comments, DOT refined the section titles on its U.S. Department of Transportation Service Animal Air Transportation Form to more accurately reflect the content of each section of the form and removed and combined certain questions on the form to reduce the number of check boxes, from ten check boxes to seven, and the number of fields that passengers are required to complete on the form. Specifically, in the first section of the form that requires the service animal handler to provide his or her contact information, DOT decreased the number of fields in this section, but added a check box that requires the handler to attest that the animal is required to assist with a disability. In the second section of the form, the Service Animal Identification and Health Information section, the handler is required to make a single attestation that the animal does not have fleas or a disease, and that the animal has been vaccinated for rabies. In the third and fourth sections of the form, the handler is required to make four individual attestations concerning the animal's task and behavior training and complete information on the animal's trainer. Finally, the last section requires the handler to check a single box to attest to three additional assurances in order to transport the service animal.

DOT also reinstated the ''service animal handler's'' field since the term ''service animal handler'' is defined in the Department's rules, and eliminated the service animal user's name field, since ''service animal user'' is not a term that is defined in the Department's rules. DOT also clarified on the form that the animal's description must include the animal's color, and that an airline may deny transportation to an animal if the animal shows that it has not been trained to behave in public. Finally, in response to comments received from both airline trade organizations and disability advocates, DOT also developed and included in the form specific instructions for completing the Behavior and Health Attestation Form. In these instructions, DOT defines certain terms used within the form (*i.e.,* service animal and service animal handler), makes clear that the form should be submitted to the airline and not to DOT, describes how passengers can obtain assistance with completing the form, and provides other instructions for completing the form. Additionally, DOT has used data from both airline trade organizations and disability advocates to update its annual burden calculation for the form.

DOT is aware that some of the recommendations from the commenters have not been implemented in the amended Behavior and Health Attestation Form published in this notice. However, as stated in the 60-day notice, the Department's next Air Carrier Access Act Advisory Committee will consider whether substantive changes to the Behavior and Health attestation form are necessary, such as whether to include a question asking passengers to state the task or work their service animal performs, whether to further reduce the number of attestation check-boxes on the form, and whether to amend the warning language at the top of the form.

Copies of the revised form and accompanying instructions reflecting the changes are included in this notice.

Accordingly, the Department announces that these information collection activities have been re-evaluated and certified under 5 CFR. 1320.5(a) and forwarded to OMB for review and approval pursuant to 5 CFR 1320.12(c). Before OMB decides whether to approve these proposed collections of information, it must provide 30 days for public comment. 44 U.S.C. 3507(b); 5 CFR 1320.12(d). Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507(b)–(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983 (Aug. 29, 1995). The 30-day notice informs the regulated community to file relevant comments to OMB and affords the Agency adequate time to review and respond to public comments before rendering a decision. See 60 FR 44983 (Aug. 29, 1995). Therefore, respondents should submit any comments to OMB within 30 days of publication to best ensure their full consideration. 5 CFR 1320.12(c); see also 60 FR 44983 (Aug. 29, 1995).

This notice addresses the information collection requirements set forth in the Department's regulation 14 CFR 382.75, which allows airlines to require passengers traveling with service animals to provide the airline with the two forms of documentation developed by the Department as a condition of travel. The renewed OMB control number will be applicable to all the provisions set forth in this notice.

As noted above, the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to monetary penalty for failing to comply with a collection of information if the collection of information does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

For each of these information collections, the title, a description of the respondents, and an estimate of the annual recordkeeping and periodic reporting burden are set forth below.

1. Requirement to prepare and submit to airlines the DOT Air Transportation Service Animal Behavior and Health Attestation Form (Behavior and Health Attestation Form).

Respondents: Passengers with disabilities traveling on aircraft with service animals.

Number of Respondents: The Department estimates that 639,709 respondents will complete the Service Animal Health and Attestation form. This estimate was calculated by using data provided from Airlines for America (A4A) on the number of Behavior and Health Attestation Forms collected by five of its member airlines between July 1, 2022, through June 30, 2023, and passenger trip data as represented in the origination and destination (O&D) data,[1] collected by DOT from airlines during this same time period.

According to A4A, five of its member airlines received 319,057 Behavior and Health Attestation Forms between July 1, 2022, through June 30, 2023.[2] The number of trips reported for these five airlines for this same time period was 352,265,055. DOT only permits airlines to collect its Behavior and Health

[1] According to DOT's Bureau of Transportation Statistics (BTS), the Airline Origin and Destination Survey is a 10% sample of airline tickets from reporting carriers collected by the Office of Airline Information of the BTS. Data include origin, destination and other itinerary details of passengers transported. This database is used to determine air traffic patterns, air carrier market shares and passenger flows. *https://www.transtats.bts.gov/DatabaseInfo.asp?QO_VQ=EFI&Yv0x=D.*

[2] Comment from Airlines for America, *https://www.regulations.gov/comment/DOT-OST-2018-0068-32515.*

Attestation Form from passengers no more than once per trip, or once for every one-way flight or once per round-trip flight, although some airlines that receive permission to store a passenger's Form may collect the form less than once per trip. As such, the estimated number of trips for the purposes of estimating the number of forms collected is 176,132,528 (352,265,055 trips divided by 2). Based on these figures, the rate of Behavior and Health Attestation Forms received by airlines is .00181 (319,057 forms divided by 176,132,528 trips), or 1.81 forms received by airlines per 1,000 for each trip.

According to BTS data, U.S. and foreign airlines reported a total of 706,861,040 O&D trips between July 1, 2022, through June 30, 2023. Using the rate of .00181 or 1.81 forms received by airlines per 1,000 for each trip, we estimate that 639,709 forms (706,861,040 total trips, divided by 2, and multiplied by .00181 rate of forms received by airlines) were submitted to airlines between July 1, 2022, through June 30, 2023. Assuming that one passenger traveling with a service animal represents each form, DOT estimates that 639,709 passengers will have submitted service animal forms between July 1, 2022, through June 30, 2023.

Estimated Total Annual Burden on Respondents: We estimate that completing the Behavior and Health Attestation Form would require 20 minutes (.333 hours) per response, including the time it takes to retrieve an electronic or paper version of the form from the airline's website, reviewing the instructions, and completing the questions. The Department previously estimated that it took passengers 15 minutes to complete its Behavior and Health Attestation Form, but a number of individuals commented that it took more than 15 minutes to complete the form, although none of the commenters stated the amount of time it takes to complete the form.

Based on this estimate, passengers would spend a total of 213,023 hours annually (0.333 hours × 639,709 forms) to retrieve and complete an accessible version of the form. Passengers would fill out the forms on their own time without pay. To estimate the value of this uncompensated activity, we use median wage data from the Bureau of Labor Statistics.[3] We use a post-tax wage estimate of $18.48 ($22.26 median for all occupations minus a 17% percent estimated tax rate). The estimated annual value of this time is $3,936,668 ($18.48 × 213,023 hours).[4]

2. Requirement to prepare and submit to airlines the DOT Service Animal Relief Attestation Form.

Respondents: Passengers with disabilities traveling on aircraft with service animals on flight segments scheduled to take 8 hours or more.

Number of Respondents: The Department estimates that 5 percent of the Behavior and Health Attestation Form would be collected for round trip flights scheduled to take 8 hours or more and would also have to complete the Relief Attestation Form, for a total of 31,985 forms (639,709 forms × 0.05).

Estimated Total Annual Burden on Respondents: We estimate that completing the form would require 15 minutes (.25 hours) per response, including the time it takes to retrieve an electronic or paper version of the form from the airline's website, reviewing the instructions, and completing the questions. Passengers would spend a total of 7,996 hours annually (0.25 hours × 31,985 forms) to retrieve an accessible version of the form and complete the form. Passengers would fill out the forms on their own time without pay, as they would with the Animal Behavior and Health Attestation Form. The estimated annual value of this time is $147,770 ($18.48 × 7,996 hours).

Comments Invited

We invite comments on the Relief Attestation Form renewal and on the formatting and clarity amendments made to the Behavior and Health Attestation Form. We also invite comments on: (a) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record on the docket.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; and 59 CFR 1.48.

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[3] For a discussion of estimating the value of uncompensated activities, see ''Valuing Time in U.S. Department of Health and Human Services Regulatory Impact Analyses: Conceptual Framework and Best Practices'' from the Department of Health and Human Services, available at *https://aspe.hhs.gov/system/files/pdf/257746/VOT.pdf*.

[4] Bureau of Labor Statistics (2022). ''May 2022 National Occupational Employment and Wage Estimates: United States.'' May 2022 National Occupational Employment and Wage Estimates (*bls.gov*).

U.S. Department of Transportation Service Animal Air Transportation Form

Warning: It is a Federal crime to make materially false, fictitious, or fraudulent statements, entries, or representations knowingly and willfully on this form to secure disability accommodations provided under regulations of the United States Department of Transportation (18 U.S.C. § 1001).

PLEASE REFER TO THE U.S. DEPARTMENT OF TRANSPORTATION SERVICE ANIMAL AIR TRANSPORTATION FORM INSTRUCTIONS WHEN COMPLETING THIS FORM

A. Service Animal Handler Information

Service Animal Handler's full Name: _____

Phone: _____ Email: _____

☐ I attest that a service animal is required to accompany me, or the passenger with a disability traveling with me, in air transportation.

B. Service Animal Identification and Health Information

Animal's Name: _____ Animal's Description (including weight and color): _____

_____

☐ I attest that the animal:

- Does not have fleas or ticks or a disease that would endanger people or other animals.
- Is vaccinated for rabies.

Date vaccination expires in the animal _____ (mm/dd/yyyy)

Veterinarian's Name (signature **not** required): _____ Phone: _____

C. Service Animal Task Training

☐ I attest that the animal has been individually trained to perform a task to assist with a disability.

Name of Task Trainer or Training Organization: _____ Phone: _____

D. Service Animal Behavior Training

☐ I attest that the animal has been trained to behave in a public setting.

Name of Behavior Trainer or Training Organization: _____ Phone: _____

☐ I understand that:

- The animal must be under the control of the Handler at all times.
- A properly trained service animal does not act aggressively by biting, barking, jumping, lunging, or injuring people or animals, and does not urinate or defecate on the aircraft or in the gate area.
- If the animal shows that it has not been properly trained to behave in public, then the airline may treat the animal as a pet by charging a pet fee and requiring that the animal be transported in a pet carrier, or denying transport.

☐ I attest that, to the best of my knowledge, the animal has not behaved aggressively or caused serious injury to another person or animal. If you are unable to make this attestation, please explain why: _____

_____

E. Other Assurances

☐ I understand that:

- The animal must be harnessed, leashed, or tethered at all times in the airport and on the aircraft.
- If the animal causes damage, then the airline may charge the Handler for the cost to repair it, as long as the airline would also charge passengers without disabilities to repair similar kinds of damage.
- I am signing an official document of the U.S. Department of Transportation, and if I knowingly make false statements on this document, I can be subject to fines and other penalties.

Handler's Signature: _____ Date: _____ (mm/dd/yyyy)

INSTRUCTIONS FOR COMPLETING THE U.S. DEPARTMENT OF TRANSPORTATION SERVICE ANIMAL AIR TRANSPORTATION FORM

General instructions:

1. **What is a Service Animal for the purpose of this form?** A service animal means a dog, regardless of breed or type, that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Animal species other than dogs, emotional support animals, comfort animals, companionship animals, and service animals in training are not service animals for purpose of this form. 14 CFR 382.3.

2. **What is a Service Animal Handler for the purpose of this form?** A Service Animal Handler is a passenger in air transportation who is a qualified individual with a disability who receives assistance from a service animal(s) that does work or performs tasks that are directly related to the individual's disability, or a third party who accompanies the individual with a disability traveling with a service animal such as a parent of a minor child or a caretaker. The service animal Handler is responsible for keeping the animal under control at all times, and caring for and supervising the service animal, which includes toileting and feeding. 14 CFR 382.3.

3. **What if I need assistance completing the form**? An airline must provide assistance in completing the form to individuals with a disability who state to the airline that they are unable to complete the form due to a disability. This assistance must be provided as part of the airline's general obligation to modify its policies, practices, and facilities when needed to provide nondiscriminatory service to individuals with a disability under 14 CFR 382.13.

4. **Do I submit the form to the airline or DOT?** Do not submit the form to DOT. If an airline requires a passenger traveling with a service animal to submit the form, the completed form must be submitted **directly to the airline**. 14 CFR 382.75(f).

5. **How often can an airline require me to submit the form?** Airlines can require passengers with a disability who are traveling with a service animal to submit the form once each trip, but not each time the passenger travels. This means that an airline can only require the form be submitted once if the passenger with a disability purchased a roundtrip ticket as that would be considered one trip. 85 FR 79742, 79764 (December 10, 2020).

6. **Must I submit the form to the airline in advance?** An airline can require a passenger with a disability who is traveling with a service animal to submit the form up to 48 hours in advance of the passenger's flight if the passenger's reservation was booked more than 48 hours before the passenger's departure. However, if the passenger fails to submit the form in advance, the airline cannot refuse to transport the service animal without trying to make reasonable efforts to accommodate the passenger. 14 CFR 382.75(g)(1) and 14 CFR 382.75(h).

7. **Can an airline require me to submit the form in advance if I purchase last minute travel?** An airline is **not** permitted to require a passenger with a disability who is traveling with a service animal and purchased a ticket within 48 hours of the flight to provide the form in advance. If the ticket is purchased within 48 hours of the flight, the airline must allow the passenger to submit the completed form at the gate on the date of travel. 14 CFR 382.75(g)(3).

8. **Must airlines accept either a hard copy or electronic version of the form?** An airline must provide passengers with a disability the option of submitting an electronic or hard copy version of the form if the person is required to submit the form ***in advance*** of the passenger's travel date. If a passenger is not required to submit the form in advance of the date of travel, the passenger may submit a hard copy of the form to the airline at the passenger's departure gate on the date of travel. 14 CFR 382.75 (f) and (g). Passengers are encouraged to contact the airline to familiarize themselves with the airline's process for receiving the form.

Section A Instructions:

Section A, titled Service Animal Handler Information, requires the Service Animal Handler completing the form to provide their full first and last name, phone number, and email address so that the airline or its contractor may contact the Handler about the information provided on the form if needed.

The Handler completing this form must be the passenger with a disability receiving assistance from the service animal, or a third party accompanying the passenger with a disability traveling with the service animal such as a parent of a minor child or a caretaker. 14 CFR 382.3. This section requires the Handler to check a box attesting that a service animal is

required to accompany the Handler, or the passenger with a disability traveling with the Handler.

Section B Instructions:

Section B, titled Service Animal Identification and Health Information, requires the Handler to provide the name of the service animal accompanying the Handler in air transportation and a description of the animal (including the animal's weight and color). The airline or its contractor may use the description of the animal provided by the Handler on the form to verify the identity of the service animal at the airport on the day of travel.

In this section, the Handler must provide the airline assurances that it is safe to transport the animal on an aircraft by checking a box to attest that the animal is free of fleas, ticks, or disease, and that the animal has been vaccinated for rabies. The Handler must also provide the month, day, and year that the animal's rabies vaccination expires. The Handler must provide the name of the animal's veterinarian, and the veterinarian's phone number, but the animal's veterinarian is not required to sign the form.

The airline or its contractor may contact the animal's veterinarian to verify the vaccination information provided on the form. The Handler should verify that the contact information on the form is current and correct to ensure that there are no delays when the airline or its contractor attempts to process the form.

Section C Instructions:

In Section C, titled Service Animal Task Training, the Handler must check a box attesting that the animal is a service animal because it has been trained to perform a task to assist the passenger with a disability.

Task training means that the dog is trained to take a specific action when needed to assist the person with a disability. Dogs can be trained to perform many important tasks to assist people with disabilities, such as providing stability for a person who has difficulty walking, picking up items for a person who uses a wheelchair, helping a person who has epilepsy detect the onset of a seizure and stay safe during the seizure, or alerting a person who has hearing loss when someone is approaching from behind. Task training is different from behavior training because task training is focused on mitigating the effects of a person's disability.

The Handler is not required to provide a training certificate or other evidence that the animal has been trained to perform a task, but the Handler must provide the name and phone number of the person or organization that trained the service animal to perform the disability-mitigating task. If the Handler trained the animal, the Handler may provide their name and contact information. The airline or its contractor may contact the task trainer to verify that the animal has been trained to perform a task to assist with a disability. The Handler should verify that the contact information on the form is current and correct to ensure that there are no delays when the airline attempts to process the form.

Section D Instructions:

In Section D, titled Service Animal Behavior Training, the Handler must provide the airline assurances that the service animal traveling in air transportation will not harm other people or animals on the aircraft by checking a box to attest that the animal has been trained to behave in public. The behavior training attestation in this section is different from the task training attestation required in Section C on this form. A service animal that has been trained to behave in public does not act aggressively by biting, barking, jumping, lunging, or injuring people or animals. Further, a service animal that has been trained to behave in public does not urinate or defecate on the aircraft or in the gate area of the airport.

This form does not require the Handler to provide the airline with a training certificate or other evidence that the animal has been trained to behave in a public setting. However, the airline may observe the animal on the day of travel, and if it is evident that the animal has not been trained, the animal may be treated like a pet and/or the animal may be denied transportation on the aircraft.

In this section, the Handler must provide the name and phone number of the person or organization that trained the service animal to behave in public. If the Handler trained the animal, the Handler may provide their name and contact information. The airline or its contractor may contact the behavior trainer to verify that the animal has been trained to behave in public. The Handler should verify that the contact information on the form is current and correct to ensure that there are no delays when the airline attempts to process the form.

Section D also requires the Handler to check a box attesting that the Handler understands that the service animal must be under the Handler's control at all times, that properly trained service animals must act appropriately, and that if it shows

that it has not been properly trained to behave in public, the animal may be treated like a pet, which includes being charged a pet fee to transport the animal, requiring the animal to be transported in a carrier, or denying the animal transport.

The Handler must also check a box attesting that the animal has not behaved aggressively or caused serious injury to another person or animal. If the Handler is unable to make this attestation, the Handler must describe, in the space provided on the form, the reasons why it cannot attest that the animal has not behaved aggressively or caused serious injury to another person or animal. Animals that have a history of aggressive behavior may be denied transport on the aircraft and the airline may contact the animal's trainer or veterinarian to verify the animal's behavioral history.

Section E Instructions:

Section E, titled Other Assurances, requires the Handler to check a box to confirm that the Handler understands that the service animal traveling must be harnessed, leashed, or tethered at all times in the airport and on the aircraft; that the airline may charge the Handler a fee if the animal causes damage; that the Handler is signing an official document of the U.S. Department of Transportation; and that the Handler may be subject to Federal fines and other penalties for knowingly making false statements on the form. Handlers must also sign and date the form before submitting the form to the airline.

Paperwork Reduction Act Burden Statement

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The OMB Control Number for this information collection is 2105-0576. Public reporting for this collection of information is estimated to be approximately 20 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, completing and reviewing the collection of information.

All responses to this collection of information are mandatory if an airline requires the submission of the forms (14 CFR 382.75(a) and (b)). Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, U.S. Department of Transportation, 1200 New Jersey Ave., S.E., West Building Ground Floor Room W12-140, Washington, D.C. 20590.

Issued in Washington, DC.

Livaughn Chapman Jr.,

Deputy Assistant General Counsel, Office of Aviation Consumer Protection.

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DEPARTMENT OF THE TREASURY

Community Development Financial Institutions Fund

Funding Opportunities: Bank Enterprise Award (BEA) Program; FY 2024 Funding Round

Funding Opportunity Title: Notice of Funds Availability (NOFA) inviting Applications for the Fiscal Year (FY) 2024 Funding Round of the Bank Enterprise Award Program (BEA Program).

Announcement Type: Announcement of funding opportunity.

Funding Opportunity Number: CDFI–2024–BEA.

Catalog of Federal Domestic Assistance (CFDA) Number: 21.021.

Dates:

TABLE 1—FY 2024 BEA PROGRAM FUNDING ROUND—CRITICAL DEADLINES FOR APPLICANTS

Description	Deadline	Time (Eastern Time—ET)	Submission method
OMB Standard Form (SF)–424 Mandatory form ..	May 28, 2024	11:59 p.m. ET	Electronically via *Grants.gov*.
Last day to create an AMIS Organization account and to enter the Employer Identification Number (EIN) and the Unique Entity Identifier (UEI) number in AMIS.	May 28, 2024	11:59 p.m. ET	Electronically via Awards Management Information System (AMIS).
Last day to contact BEA Program Staff	June 21, 2024	5:00 p.m. ET	Service Request via AMIS; or *bea@cdfi.treas.gov*; CDFI Fund BEA Helpdesk: 202–653–0421.
Last day to contact Office of Compliance Monitoring and Evaluation (OCME) Help Desk.	June 21, 2024	5:00 p.m. ET	Service Request via AMIS; or OCME Helpdesk: 202–653–0423.
Last day to contact Office of Certification Policy and Evaluation (OCPE) Help Desk.	June 21, 2024	5:00 p.m. ET	Service Request via AMIS; *ocpecert@cdfi.treas.gov*; or OCPE Helpdesk: 202–653–0423.
Last day to contact IT Help Desk regarding AMIS support only.	June 25, 2024	5:00 p.m. ET	Service Request via AMIS; or CDFI Fund IT Helpdesk: 202–653–042.
Last day to submit Title VI Compliance Worksheet (all Applicants).	June 25, 2024	11:59 pm ET	Electronically via AMIS.
FY 2024 BEA Program Application and Required Attachments.	June 25, 2024	11:59 pm ET	Electronically via AMIS.

Executive Summary: This NOFA is issued in connection with the fiscal year (FY) 2024 funding round of the Bank Enterprise Award Program (BEA Program). The BEA Program is administered by the U.S. Department of the Treasury's Community Development Financial Institutions Fund (CDFI Fund). Through the BEA Program, the CDFI Fund awards formula-based grants to depository institutions that are insured by the Federal Deposit Insurance Corporation (FDIC) for increasing their levels of loans, investments, Service Activities, and Technical Assistance to residents and businesses in the most economically Distressed Communities, and financial assistance and Technical Assistance to Certified Community Development Financial Institutions (CDFIs) through equity investments, equity-like loans, grants, stock purchases, loans, deposits, and other forms of assistance, during a specified period.

I. Program Description

A. History: The CDFI Fund was established by the Riegle Community Development and Regulatory Improvement Act of 1994 to promote economic revitalization and community development through investment in and assistance to CDFIs.

The BEA Program encourages the community development activities of banks and thrifts (collectively referred to as banks for purposes of this NOFA) by providing financial incentives to expand investments in CDFIs and to increase lending, investments, and Service Activities within Distressed Communities. Providing monetary awards to banks for increasing their community development activities leverages the CDFI Fund's dollars and puts more capital to work in Distressed Communities throughout the nation.

B. Authorizing Statutes and Regulations: The BEA Program was authorized by the Bank Enterprise Award Act of 1991, as amended. The regulations governing the BEA Program can be found at 12 CFR part 1806 (the Interim Rule). The Interim Rule provides the evaluation criteria and other requirements of the BEA Program. Detailed BEA Program requirements are also found in the application materials associated with this NOFA (the Application). The CDFI Fund encourages interested parties and Applicants to review the authorizing statute, Interim Rule, this NOFA, the Application, and the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Administrative Requirements) for a complete understanding of the BEA Program. Capitalized terms in this NOFA are defined in the authorizing statute, the Interim Rule, this NOFA, the Application, or the Uniform Administrative Requirements. Details regarding Application content requirements are found in the Application and related materials. Application materials can be found on *Grants.gov* and the CDFI Fund's website at *www.cdfifund.gov/bea.*

C. Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR part 200): The Uniform Administrative Requirements codify financial, administrative, procurement, and program management standards that Federal award-making agencies and Award Recipients must follow. When evaluating award applications, awarding agencies must evaluate the risks to the program posed by each Applicant, and each Applicant's merits and eligibility. These requirements are designed to ensure that Applicants for Federal

assistance receive a fair and consistent review prior to an award decision. This review will assess items such as the Applicant's financial stability, quality of management systems, history of performance, and audit findings. In addition, the Uniform Requirements include guidance on audit requirements and other award requirements with which Award Recipients must comply.

D. Priorities: Through the BEA Program, the CDFI Fund specifies the following priorities:

1. Estimated Award Amounts: The award percentage used to derive the estimated award amount for Applicants that are CDFIs is three times greater than the award percentage used to derive the estimated award amount for Applicants that are not CDFIs;

2. Priority Factors: Priority Factors will be assigned based on an Applicant's asset size, as described in Section V.A.14 of this NOFA (Application Review Information: Priority Factors); and

3. Priority of Awards: The CDFI Fund will rank Applicants in each category of Qualified Activity according to the priorities described in Section V of this NOFA .

E. Baseline Period and Assessment Period Dates: A BEA Program Award is based on an Applicant's increase in Qualified Activities from the Baseline Period to the Assessment Period, as reported on an individual transaction basis in the Application. For the FY 2024 funding round, the Baseline Period is January 1, 2022 through December 31, 2022, and the Assessment Period is January 1, 2023 through December 31, 2023.

F. Funding Limitations: The CDFI Fund reserves the right to fund, in whole or in part, any, all, or none of the Applications submitted in response to this NOFA. The CDFI Fund also reserves the right to reallocate funds from the amount that is available through this NOFA to other CDFI Fund programs, or to reallocate remaining funds to a future BEA Program funding round, particularly if the CDFI Fund determines that the number of awards made through this NOFA is fewer than projected.

G. Persistent Poverty Counties: Pursuant to the Consolidated Appropriations Act, 2024 (Pub. L. 118–42), Congress mandated that at least ten percent of the CDFI Fund's appropriations be directed to counties that meet the criteria for ''Persistent Poverty'' designation. Persistent Poverty Counties (PPCs) are defined as any county, including county equivalent areas in Puerto Rico, that has had 20 percent or more of its population living in poverty over the past 30 years, as measured by the 1990, 2000, and 2010 decennial censuses, and the 2016–2020 5-year data series available from the American Community Survey of the Census Bureau or any other territory or possession of the United States that has had 20 percent or more of its population living in poverty over the past 30 years, as measured by the 1990, 2000 and 2010 Island Areas Decennial Censuses, or equivalent data, of the Bureau of the Census and published by the CDFI Fund at: *https://www.cdfifund.gov/sites/cdfi/files/2023-03/PPC_2020_ACS_Jan20_2023.xlsx.* Applicants that apply under this NOFA will be required to indicate the percentage of the BEA Program Award that the Applicant will commit to investing in PPCs.

II. Federal Award Information

A. Funding Availability: The CDFI Fund expects to award up to $40 million for the FY 2024 BEA Program Award round under this NOFA. The CDFI Fund reserves the right to award in excess of said funds under this NOFA, provided that the appropriated funds are available. The minimum award size will be $10,000. The maximum award size is $1 million; however, the CDFI Fund reserves the right to impose a lower maximum award amount based on Application demand and availability of funds.

B. Types of Awards: BEA Program Awards are made in the form of grants.

C. Anticipated Start Date and Period of Performance: The CDFI Fund anticipates the period of performance for the FY 2024 funding round will begin in the fall of calendar year 2024. Specifically, the Period of Performance begins on the Federal Award Date and will conclude at least one (1) full year after the Federal Award Date as further specified in the BEA Program Award Agreement (Award Agreement), during which the Award Recipient must meet the performance goals set forth in the Award Agreement.

D. Eligible Activities: Eligible activities for BEA Program Applicants are referred to as Qualified Activities and are defined in the Interim Rule to include CDFI Related Activities, Distressed Community Financing Activities, and Service Activities (12 CFR 1806.103).

CDFI Related Activities (12 CFR 1806.103) means CDFI Equity and CDFI Support Activities. CDFI Equity consists of Equity Investments, Equity-Like Loans, and Grants. CDFI Support Activities includes Certificates of Deposits, Loans, and Technical Assistance.

Distressed Community Financing Activities (12 CFR 1806.103) means Consumer Loans and Commercial Loans and Investments. Consumer Loans include Affordable Housing Loans; Education Loans; Home Improvement Loans; and Small Dollar Consumer Loans. Commercial Loans and Investments includes Affordable Housing Development Loans and related Project Investments; Commercial Real Estate Loans and related Project Investments; and Small Business Loans and related Project Investments. Service Activities (12 CFR 1806.103) include Deposit Liabilities, Financial Services, Community Services, Targeted Financial Services, and Targeted Retail Savings/Investment Products.

When calculating BEA Program Award amounts, the CDFI Fund will only consider the amount of a Qualified Activity that has been fully disbursed, subject to the requirements outlined in Section VI of this NOFA. In the case of Commercial Real Estate Loans and related Project Investments, the total principal amount of the transaction must be $10 million or less to be considered a Qualified Activity. Notwithstanding the foregoing, the CDFI Fund, in its sole discretion, may consider transactions with a total principal value of over $10 million, subject to review.

An activity funded with prior BEA Program Award dollars or funded to satisfy requirements of an Award Agreement from a prior BEA Program award or an agreement under any CDFI Fund program, shall not constitute a Qualified Activity for the purposes of calculating or receiving an award under this NOFA.

E. Distressed Community: A Distressed Community must meet certain minimum geographic area and eligibility requirements, which are defined in the Interim Rule in 12 CFR 1806.103 and more fully described in 12 CFR 1806.401. Applicants should use the CDFI Information Mapping System (CIMS) mapping tool to determine whether a Baseline Period activity or Assessment Period activity is located in a qualified Distressed Community. The CIMS mapping tool can be accessed through AMIS or the CDFI Fund's website at *https://www.cdfifund.gov/Pages/mapping-system.aspx.* The CIMS mapping tool contains a step-by-step training manual on how to use the tool. In addition, further instructions to determine whether an activity is located in a qualified BEA Distressed Community can be located in the BEA Program Application CIMS3 Instructions document in the ''Application Materials'' section of the

BEA web page on the CDFI Fund's website located here: *https://www.cdfifund.gov/programs-training/programs/bank-enterprise-award/apply-step.* If you have any questions or issues accessing the CIMS mapping tool, please contact the CDFI Fund IT Help Desk via an AMIS Service Request (select IT) or telephone at (202) 653–0300.

Please note that a Distressed Community as defined by the BEA Program is not the same as an Investment Area as defined by the CDFI Program, a Low-Income Community as defined by the NMTC Program, or an Area of Economic Distress as defined by the Capital Magnet Fund Program.

1. Designation of Distressed Community by a CDFI Partner: CDFI Partners that receive CDFI Support Activities in the form of loans, Technical Assistance or deposits from an Applicant must be integrally involved in a Distressed Community. Applicants must provide evidence that each CDFI Partner that is the recipient of CDFI Support Activities is integrally involved in a Distressed Community, as noted in the Application. CDFI Partners that receive Equity Investments, Equity-Like Loans or Grants are not required to demonstrate Integral Involvement. Additional information on Integral Involvement can be found in Section V of this NOFA.

2. Distressed Community Determination by a BEA Applicant: Applicants applying for a BEA Program Award for performing Distressed Community Financing Activities or Service Activities must verify that addresses of both Baseline Period and Assessment Period activities are in Distressed Communities when completing their Application.

A BEA Applicant shall determine an area is a Distressed Community by:

a. selecting a census tract where the Qualified Activity occurred that meets the minimum area and eligibility requirements; or

b. selecting the census tract where the Qualified Activity occurred, plus one or more census tracts directly contiguous to where the Qualified Activity occurred, that when considered in the aggregate, meet the minimum area and eligibility requirements set forth in this section.

F. Award Agreement: Each Award Recipient under this NOFA must electronically sign an Award Agreement via AMIS prior to payment of the award proceeds by the CDFI Fund. The Award Agreement contains the terms and conditions of the award. For further information, see Section VI. of this NOFA.

G. Use of Award: It is the policy of the CDFI Fund that BEA Program Awards may not be used by Award Recipients to recover overhead or Indirect Costs. The Award Recipient may use up to 15 percent of the total BEA Program Award amount on Qualified Activities as Direct Administrative Expenses. ''Direct Administrative Expenses'' shall mean Direct Costs, as described in section 2 CFR 200.413 of the Uniform Requirements, which are incurred by the Award Recipient to carry out the Qualified Activities. Such costs must be able to be specifically identified with the Qualified Activities and not also recovered as Indirect Costs. ''Indirect Costs'' means costs or expenses defined in accordance with section 2 CFR 200.1 of the Uniform Requirements. In addition, the Award Recipient must comply, as applicable, with the Buy American Act of 1933, 41 U.S.C. 8301–8303 and section 2 CFR 200.216 of the Uniform Requirements,[1] with respect to any Direct Costs.

III. Eligibility Information

A. Eligible Applicants: For the purposes of this NOFA, the following table sets forth the eligibility criteria to receive a BEA Program award from the CDFI Fund.

TABLE 2—ELIGIBILITY REQUIREMENTS FOR BEA APPLICANTS

Criteria	Description
Eligible Applicants	• Eligible Applicants for the BEA Program must be Insured Depository Institutions, as defined in the Interim Rule. • For the FY 2024 funding round, an Applicant must have been FDIC-insured as of the first day of the Baseline Period, January 1, 2022, and maintain its FDIC-insured status at the time of Application submission. • The depository institution holding company of an Insured Depository Institution may not apply on behalf of an Insured Depository Institution. Applications received from depository institution holding companies will be disqualified.
CDFI Applicant	• For the FY 2024 funding round, an eligible Certified-CDFI Applicant is an Insured Depository Institution that is one of the following: (1) is certified as a CDFI as of December 31, 2023 (end of the Assessment Period) and remains certified at the time BEA Program Awards are announced; OR (2) has submitted a CDFI Certification Application by May 28, 2024 and receives its status as a Certified CDFI by the time BEA Program Awards are announced. • No Applicant may receive a FY 2024 BEA Program Award, either directly or through a community partnership, if it has: (1) an application pending for assistance under the CDFI Program; (2) been awarded assistance from the CDFI Fund under the CDFI Program within the 12-month period prior to the Federal Award Date of the FY 2024 BEA Program Award Agreement; (3) ever received assistance under the CDFI Program based on the same activities during the same period for which it is seeking a FY 2024 BEA Program Award; or (4) ever received assistance from another CDFI Fund program or federal program based on the same activities during the same period for which it is seeking a FY 2024 BEA Program Award.

[1] § 200.216 Prohibition on certain telecommunications and video surveillance services or equipment.

(a) Recipients and subrecipients are prohibited from obligating or expending loan or grant funds to:

(1) Procure or obtain; (2) Extend or renew a contract to procure or obtain; or

(3) Enter into a contract (or extend or renew a contract) to procure or obtain, equipment, services, or systems that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. As described in Public Law 115–232, section 889, covered telecommunications equipment is telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliated of such entities).

TABLE 2—ELIGIBILITY REQUIREMENTS FOR BEA APPLICANTS—Continued

Criteria	Description
Application and submission in *Grants.gov* and Awards Management Information System (AMIS).	• The CDFI Fund will only accept Applications that use the official Application templates provided on *Grants.gov* and AMIS. Applications submitted with alternative or altered templates will not be considered. • Applicants undergo a two-step process that requires the submission of Application documents by two separate deadlines in two different locations: (1) the SF–424 in *Grants.gov* and (2) all other Required Application Documents in AMIS. • *Grants.gov* and the Standard Form 424 (SF–424): ○ Applicants must submit the SF–424, Application for Federal Assistance, through *Grants.gov.* ○ All Applicants must register in the *Grants.gov* system to successfully submit an Application. The CDFI Fund strongly encourages Applicants to register as soon as possible. ○ The CDFI Fund will not extend the SF–424 application deadline for any Applicant that started the *Grants.gov* registration process on, before, or after the date of the publication of this NOFA, but did not complete it by the deadline, except in the case of a federal government administrative or federal technological error that directly resulted in a late submission of the SF–424. ○ The SF–424 must be submitted in *Grants.gov* on or before the deadline listed in Table 1. Applicants are strongly encouraged to submit their SF–424 as early as possible in the *Grants.gov* portal. The deadline for the *Grants.gov* submission is before the AMIS submission deadline. ○ The SF–424 must be submitted under the BEA Program Funding Opportunity Number. ○ If the SF–424 is not accepted by *Grants.gov* by the deadline, the CDFI Fund will not review any material submitted in AMIS and the Application will be deemed ineligible. • AMIS and all other Required Application Documents: ○ The CDFI Fund's Award Management Information System (AMIS) is an enterprise-wide information technology system (*amis.cdfifund.gov*). Applicants will use AMIS to submit and store organization and Application information with the CDFI Fund. ○ Applicants are only allowed one BEA Program Application submission in AMIS. ○ Each Application in AMIS must be signed by an Authorized Representative. ○ Applicants must ensure that the Authorized Representative is an employee or officer of the Applicant, authorized to sign legal documents on behalf of the organization. *Consultants working on behalf of the organization may not be designated as Authorized Representatives.* ○ Only the Authorized Representative or Application Point of Contact listed as an Organization Contact may submit the Application in AMIS. ○ All Required Application Documents must be submitted in AMIS on or before the deadline specified in Tables 1. • The CDFI Fund will not extend the deadline for any Applicant except in the case of a federal government administrative or federal technological error that directly resulted in the late submission of the Application in AMIS.
Employer Identification Number (EIN)	• Applicants must have a unique EIN assigned by the Internal Revenue Service (IRS). • The CDFI Fund will reject an Application submitted with the EIN of a parent or Affiliate organization. • The EIN in the Applicant's AMIS account must match the EIN in the Applicant's System for Award Management (SAM) account. The CDFI Fund reserves the right to reject an Application if the EIN in the Applicant's AMIS account does not match the EIN in its SAM account. • Applicants must enter their EIN into their AMIS profile by the deadline specified in Table 1.
Unique Entity Identifier (UEI)	• The transition from the Dun and Bradstreet Universal Numbering System (DUNS) to UEI is a federal, government-wide initiative. • The CDFI Fund will reject an Application submitted with the UEI number of a parent or Affiliate organization. • The UEI number in the Applicant's AMIS account must match the UEI number in the Applicant's *Grants.gov* and SAM accounts. The CDFI Fund will reject an Application if the UEI number in the Applicant's AMIS account does not match the UEI number in its *Grants.gov* and SAM accounts. • Applicants must enter their UEI number into their AMIS profile on or before the deadline specified in Table 1.
System for Award Management (SAM)	• SAM is a web-based, government-wide application that collects, validates, stores, and disseminates business information about the federal government's trading partners in support of the contract awards, grants, and electronic payment processes (*SAM.gov*). • Applicants must register in SAM as part of the *Grants.gov* registration process. • Applicants that have an active SAM registration are already assigned a UEI. Applicants must also have an EIN number in order to register in SAM. • Applicants must be registered in SAM in order to submit an SF–424 in *Grants.gov.* • The CDFI Fund reserves the right to deem an Application ineligible if the Applicant's SAM account expires during the time period between the submission of the Applicant's SF–424 and the Award announcement, or is set to expire before September 30, 2024 and the Applicant does not re-activate, or renew, as applicable, the account within the deadlines that the CDFI Fund communicates to affected Applicants during the Application evaluation period.
AMIS Account	• Each Applicant must register as an organization in AMIS and submit its Application and all required documents through the AMIS portal (*amis.cdfifund.gov*).

TABLE 2—ELIGIBILITY REQUIREMENTS FOR BEA APPLICANTS—Continued

Criteria	Description
	• The Application of any organization that does not properly register in AMIS by the deadline set forth in Table 1 will be rejected without further consideration. • The Authorized Representative and/or Application Point of Contact must be included as ''users'' in the Applicant's AMIS account. • An Applicant that fails to properly register and update its AMIS account may miss important communication from the CDFI Fund and/or may not be able to successfully submit an Application.
501(c)(4) status	• Pursuant to 2 U.S.C. 1611, any 501(c)(4) organization that engages in lobbying activities is not eligible to receive a BEA Program Award.
Compliance with Nondiscrimination and Equal Opportunity Statutes, Regulations, and Executive Orders.	• An Applicant may not be eligible to receive a BEA Award if proceedings have been instituted against it in, by, or before any court, governmental agency, or administrative body, and a final determination within the time period beginning three years prior to the publication of this NOFA until the execution of the Award Agreement that indicates the Applicant has violated any federal civil rights laws or regulations, including but not limited to: Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C.2000d *et seq.*); the Fair Housing Act (42 U.S.C. 3601 *et seq.*); the Equal Credit Opportunity Act (15 U.S.C. 1691 *et seq.*); Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Age Discrimination Act of 1975, (42 U.S.C. 6101–6107); and Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*). • Applicants will be required to submit the Title VI Compliance Worksheet (Worksheet) once annually to assist the CDFI Fund in determining whether Applicants are compliant with the Treasury regulations implementing Title VI of the Civil Rights Act of 1964 (Title VI), set forth in 31 CFR part 22, Nondiscrimination on the Basis of Race, Color, or National Origin in Programs or Activities Receiving Federal Financial Assistance from the Department of the Treasury. • In addition, an Applicant must be compliant with federal civil rights requirements in order to be deemed eligible to receive an Award from the CDFI Fund. The CDFI Fund will consider an Application submitted by an Applicant that may have pending Title VI noncompliance issues; however, until the CDFI Fund makes a final determination that the Applicant is Title VI compliant, it will not enter into an Award Agreement. • The Title VI Compliance Worksheet and program award terms and conditions do not impose antidiscrimination requirements on Tribal governments beyond what would otherwise apply under federal law.
Depository Institution Holding Company	• The depository institution holding company of an Insured Depository Institution may not apply on behalf of an Insured Depository Institution. Applications received from depository institution holding companies will be disqualified.
Regulated Institutions	• Eligible Applicants for the BEA Program must be Insured Depository Institutions, as defined in the Interim Rule.
Use of Award	• All awards made through this NOFA must be used to support the Applicant's Eligibility Activities per Section II (D). • Awards may not be used to support the activities of, or otherwise be passed through, transferred, or co-awarded to, third-party entities, whether Affiliates, Subsidiaries, or others, unless done pursuant to a merger or acquisition or similar transaction, and with the CDFI Fund's prior written consent. The Recipient of any award made through this NOFA must comply, as applicable, with the Buy American Act of 1933, 41 U.S.C. 8301–8303 and section 2 CFR 200.216 of the Uniform Requirements, with respect to any Direct Costs.
Pending resolution of noncompliance or default	• If an Applicant (or Affiliate of an Applicant) that is a prior Recipient or Allocatee under any CDFI Fund program: (i) Has demonstrated it has been in noncompliance or default with a previous assistance agreement, award agreement, allocation agreement, bond loan agreement, or agreement to guarantee and (ii) the CDFI Fund has yet to make a final determination as to whether the entity is in noncompliance with or default of its previous agreement, the CDFI Fund will consider the Applicant's Application under this NOFA pending full resolution, in the sole determination of the CDFI Fund, of the noncompliance or default.
Noncompliance or default status	• The CDFI Fund will not consider an Application submitted by an Applicant that is a prior CDFI Fund award Recipient or Allocatee under any CDFI Fund program if, as of the AMIS Application deadline in this NOFA, (i) the CDFI Fund has made a final determination in writing that such Applicant (or Affiliate of such Applicant) is in noncompliance with or default of a previously executed assistance agreement, award agreement, allocation agreement, bond loan agreement, or agreement to guarantee, and (ii) the CDFI Fund has provided written notification that such entity is ineligible to apply for or receive any future CDFI Fund awards or allocations. Such entities will be ineligible to submit an Application for such time period as specified by the CDFI Fund in writing. • The CDFI Fund will not consider any Applicant that has defaulted on a loan from the CDFI Fund within five years of the Application deadline.
Debarment/Do Not Pay Verification	• The CDFI Fund will conduct a debarment check and will not consider an Application submitted by an Applicant (or Affiliate of an Applicant) if the Applicant is delinquent on any Federal debt. • The Do Not Pay Business Center was developed to support Federal agencies in their efforts to reduce the number of improper payments made through programs funded by the Federal government. The Do Not Pay Business Center provides delinquency information to the CDFI Fund to assist with the debarment check.

B. Prior Award Recipients: Prior BEA Program Award Recipients and prior Award Recipients of other CDFI Fund programs are eligible to apply under this NOFA, except as noted in the following table:

TABLE 3—ELIGIBILITY REQUIREMENTS FOR APPLICANTS WITH PRIOR CDFI FUND AWARDS

Criteria	Description
Pending resolution of Default or Noncompliance	• If an Applicant (or Affiliate of an Applicant) that is a prior Award Recipient or Allocatee under any CDFI Fund program: (i) has demonstrated it is in noncompliance with or default of a previous assistance agreement, award agreement, allocation agreement, bond loan agreement, or agreement to guarantee and (ii) the CDFI Fund has yet to make a final determination as to whether the entity is in noncompliance with or default of its previous agreement, the CDFI Fund will consider the Applicant's Application under this NOFA pending full resolution, in the sole determination of the CDFI Fund, of the noncompliance or default.
Default or Noncompliance status	• The CDFI Fund will not consider an Application submitted by an Applicant (or Affiliate of such Applicant) that has a previously executed assistance agreement, award agreement, bond loan agreement, or agreement to guarantee or allocation agreement if, as of the date of the Application, (i) the CDFI Fund has made a determination that such entity is noncompliant with and or in default of such previously executed agreement, and (ii) the CDFI Fund has provided written notification that such entity is ineligible to apply for or receive any future CDFI Fund awards or allocations. Such entities will be ineligible to submit an Application for such time period as specified by the CDFI Fund in writing.

C. Contact the CDFI Fund: Accordingly, Applicants that are prior Award Recipients and/or Allocatees under any CDFI Fund program are advised to comply with requirements specified in an assistance agreement, award agreement, allocation agreement, bond loan agreement, or agreement to guarantee. All outstanding reports and compliance questions should be directed to the Certification, Compliance Monitoring and Evaluation helpdesk by submitting a BEA Compliance and Reporting AMIS Service Request or by telephone at (202) 653–0423. The CDFI Fund will respond to Applicants' reporting, compliance, or disbursement questions between the hours of 9:00 a.m. and 5:00 p.m. ET, starting on the date of the publication of this NOFA. The CDFI Fund will not respond to Applicants' reporting, compliance, or disbursement telephone calls or electronic inquiries received after 5:00 p.m. ET on June 21, 2024, until after the Application deadline. The CDFI Fund will respond to technical issues related to AMIS Accounts through 5:00 p.m. ET on June 25, 2024, via an IT AMIS Service Request, email at *AMIS@cdfi.treas.gov,* or by telephone at (202) 653–0422.

D. Cost sharing or matching fund requirements: Not applicable.

IV. Application and Submission Information

A. Address to Request an Application Package: Application materials can be found on *Grants.gov* and the CDFI Fund's website at *www.cdfifund.gov/bea.* If an Applicant is unable to access *Grants.gov* or the CDFI Fund's website, an Applicant may request a paper version of any Application material by contacting the CDFI Fund Help Desk at *bea@cdfi.treas.gov* or (202) 653–0421.

B. Content and Form of Application Submission: The CDFI Fund will post to its website, at *www.cdfifund.gov/bea,* instructions for accessing and submitting an Application. Detailed Application content requirements are found in the Application and related guidance documents. All Application materials must be prepared using the English language and calculations must be made in U.S. dollars. Applicants must submit all required documents identified in the FY 2024 BEA Program Application Instructions for the Application to be deemed complete. The CDFI Fund reserves the right to request and review other pertinent or public information that has not been specifically requested in this NOFA or the Application. Information submitted by the Applicant that the CDFI Fund has not specifically requested will not be reviewed or considered as part of the Application.

C. Application Submission: The CDFI Fund has a two-step submission process for BEA Applications that requires the submission of required application information on two separate deadlines and in two separate systems. The SF–424 form must be submitted through *Grants.gov*, and all other Application documents through the AMIS portal. The CDFI Fund will not accept Applications via email, mail, facsimile, or other forms of communication, except in extremely rare circumstances that have been pre-approved by the CDFI Fund. The separate Application deadlines for the SF–424 and all other Application materials are listed in Table 1 and Table 4. Only the Authorized Representative for the Organization or Application Point of Contact designated in AMIS may submit the Application through AMIS.

Applicants are strongly encouraged to submit the SF–424 as early as possible through *Grants.gov* in order to provide sufficient time to resolve any potential submission issues. Applicants should contact *Grants.gov* directly with questions related to the registration or submission process, as the CDFI Fund does not administer the *Grants.gov* system. The CDFI Fund strongly encourages Applicants to start the *Grants.gov* registration process as soon as possible, as it may take several weeks to complete (refer to the following link: *http://www.grants.gov/web/grants/register.html*). An Applicant that has previously registered with *Grants.gov* must verify that its registration is current and active. If an Applicant has not previously registered with *Grants.gov*, it must first successfully register in *SAM.gov*, as described in Section IV.D below.

D. System for Award Management: Any entity applying for federal grants or other forms of federal financial assistance through *Grants.gov* must be registered in SAM before submitting its Application materials through that platform. When accessing *SAM.gov*, users will be asked to create a login.gov user account (if they do not already have one). Registration in SAM is required as part of the *Grants.gov* registration process. Going forward, users will use their login.gov username and password every time when logging into *SAM.gov*. The SAM registration process can take four weeks or longer to complete, so Applicants are strongly encouraged to begin the registration process upon publication of this NOFA in order to avoid potential Application submission issues. An original, signed

notarized letter identifying the authorized entity administrator for the entity associated with the UEI number is required by SAM and must be mailed to the Federal Service Desk. This requirement is applicable to new entities registering in SAM or on existing registrations where there is no existing entity administrator. Existing entities with registered entity administrators do not need to submit an annual notarized letter. Applicants that have previously completed the SAM registration process must verify that their SAM accounts are current and active. Applicants are required to maintain a current and active SAM account at all times during which it has an active federal award or an Application under consideration for an award by a federal awarding agency.

The CDFI Fund will not consider any Applicant that fails to properly register or activate its SAM account and, as a result, is unable to submit its Application by the Application deadline. Applicants must contact SAM directly with questions related to registration or SAM account changes, as the CDFI Fund does not maintain this system. For more information about SAM, please visit *https://www.sam.gov* or call 866–606–8220.

E. Unique Entity Identifier: The Unique Entity Identifier (UEI), generated in the System for Award Management (*SAM.gov*), has become the official identifier for doing business with the federal government. This allows the federal government to streamline the entity identification and validation process, making it easier and less burdensome for entities to do business with the federal government. If an entity is registered in *SAM.gov*, its UEI has already been assigned and is viewable in *SAM.gov*, including inactive registrations. New registrants will be assigned a UEI as part of their SAM registration.

F. Submission Dates and Times: Table 4 lists the deadlines for submission of the documents related to the FY 2024 BEA Program Funding Round.

TABLE 4—SUBMISSION DEADLINES FOR THE FY 2024 BEA FUNDING ROUND

Description	Deadline	Time (Eastern Time)
OMB Standard Form (SF)–424 Mandatory Form	May 28, 2024	11:59 p.m. ET.
Submission Method: Electronically via Grants.gov..		
Title VI Compliance Worksheet (all Applicants)	June 25, 2024	11:59 pm ET.
FY 2024 BEA Program AMIS Application and Required Attachments	June 25, 2024	11:59 pm ET.
Submission Method: Electronically via AMIS..		

G. Confirmation of Application Submission in Grants.gov and AMIS: Applicants are required to submit the SF–424 Mandatory Form through the *Grants.gov* system under the FY 2024 BEA Program Funding Opportunity Number (listed at the beginning of this NOFA). All other required Application materials must be submitted through AMIS. Application materials submitted through each system are due by the applicable deadline listed in Table 1 and Table 4. Applicants must submit the SF–424 by an earlier deadline than that of the other required Application materials in AMIS. If a valid SF–424 is not submitted through *Grants.gov* by the corresponding deadline, the Applicant will not be able to submit the additional Application materials in AMIS, and the Application will be deemed ineligible. Thus, Applicants are strongly encouraged to submit the SF–424 as early as possible in the *Grants.gov* portal, given that potential submission issues may impact the ability to submit a complete Application.

(a) Grants.gov Submission Information: Each Applicant will receive an initial email from *Grants.gov* immediately after submitting the SF–424, confirming that the submission has entered the *Grants.gov* system. This email will contain a tracking number for the submitted SF–424. Within forty-eight (48) hours, the Applicant will receive a second email which will indicate if the submitted SF–424 was either successfully validated or rejected with errors. However, Applicants should not rely on the email notification from *Grants.gov* to confirm that their SF–424 was validated. Applicants are strongly encouraged to use the tracking number provided in the first email to closely monitor the status of their SF–424 by checking *Grants.gov* directly. The Application materials submitted in AMIS are not accepted by the CDFI Fund until *Grants.gov* has validated the SF–424. In the *Grants.gov* Workspace function, please note that the Application package has not been submitted if you have not received a tracking number.

(b) AMIS Submission Information: AMIS is a web-based portal where Applicants will directly enter their Application information and upload required documents identified in the FY 2024 BEA Program Application Instructions. Each Applicant must register as an organization in AMIS in order to submit the required Application materials through this portal. AMIS will verify that the Applicant provided the minimum information required to submit an Application. Applicants are responsible for the quality and accuracy of the information and attachments included in the Application submitted in AMIS. The CDFI Fund strongly encourages the Applicant to allow sufficient time to confirm the Application content, review the material submitted, and remedy any issues prior to the Application deadline. Applicants can only submit one Application in AMIS. Upon submission, the Application will be locked and cannot be resubmitted, edited, or modified in any way. The CDFI Fund will not unlock or allow multiple AMIS Application submissions.

Prior to submission, each Application in AMIS must be signed by an Authorized Representative. An Authorized Representative is an employee or officer and has the authority to legally bind and make representations on behalf of the Applicant; consultants working on behalf of the Applicant cannot be designated as Authorized Representatives. The Applicant may include consultants as Application point(s) of contact, who will be included on any communication regarding the Application and will be able to submit the Application but cannot sign the Application. The Authorized Representative and/or Application point(s) of contact must be included as ''Contacts'' in the Applicant's AMIS account. The Authorized Representative must also be a ''user'' in AMIS. An Applicant that fails to properly register and update its AMIS account may miss important communications from the CDFI Fund or fail to submit an Application successfully. Only an Authorized Representative for the organization or an Application point of contact can submit

the Application in AMIS. After submitting its Application, the Applicant will not be permitted to revise or modify its Application in any way or attempt to negotiate the terms of an Award.

(c)Multiple Application Submissions: Applicants are only permitted to submit one complete Application. However, the CDFI Fund does not administer *Grants.gov*, which does allow for multiple submissions of the SF–424. If an Applicant submits multiple SF–424 Applications in *Grants.gov*, the CDFI Fund will only review the SF–424 Application submitted in *Grants.gov* that is attached to the AMIS Application. Applicants can only submit one Application through AMIS.

(d) Late Submission or AMIS Account Creation: The CDFI Fund will not accept an SF–424 submitted after the applicable *Grants.gov,* an AMIS Application submitted after the AMIS Application deadline, or an Application from an Applicant that failed to create an AMIS account by the deadlines specified in Table 1 and Table 4, or if an Applicant did not submit the required Title VI Compliance Worksheet by the Application deadline listed in Table 1 and Table 4, except where the submission delay was a direct result of a federal government administrative or federal government technological error. This exception includes any errors associated with *Grants.gov, SAM.gov,* AMIS, or any other applicable government system. In cases that are not the direct result of a federal government administrative or federal government technological error, the CDFI Fund will not review any material submitted, and the Application will be deemed ineligible. However, in cases where a federal government administrative or technological error directly resulted in precluding an Applicant from submitting the SF–424, the Application, or creating an AMIS account, or precluding an Applicant from submitting the Title VI Compliance Worksheet by the deadlines stated in this NOFA, Applicants are provided the opportunity to submit a written request for acceptance of late submissions. The CDFI Fund will not consider the late submission of the SF–424, the Application, the Title VI Compliance worksheet, or the late creation of an AMIS account that was a direct result of a delay in a federal government process, unless such delay was the result of a federal government administrative or technological error.

(1) Creation of AMIS Account: In cases where a federal government administrative or technological error directly precluded an Applicant from creating an AMIS account by the required deadline, the Applicant must submit a written request for approval to create its AMIS account after the deadline, and include documentation of the error, no later than two business days after the AMIS account creation deadline. The CDFI Fund will not respond to requests for creating an AMIS account after that time. Applicants must submit such request via an AMIS Service Request with a subject line of ''BEA Program—AMIS Account Creation Deadline Extension Request.''

(2) SF–424 Late Submission: In cases where a federal government administrative or federal government technological error directly resulted in the late submission of the SF–424, the Applicant must submit a written request for acceptance of the late SF–424 submission and include documentation of the error no later than two business days after the SF–424 deadline. The CDFI Fund will not respond to requests for acceptance of late SF–424 submissions after that period. Applicants must submit late SF–424 submission requests to the CDFI Fund via an AMIS service request to the BEA Program with a subject line of ''BEA Program—Late SF–424 Submission Request.''

(3) Title VI Compliance Worksheet Late Submission: In cases where a federal government administrative or technological error directly precluded an Applicant from submitting the Title VI Compliance Worksheet by the required deadline, the Applicant must submit a written request for approval to submit the Worksheet after the deadline, and include documentation of the error, no later than two business days after the Title VI Compliance Worksheet submission deadline. The CDFI Fund will not respond to requests for submitting a Title VI Compliance Worksheet after that time. Applicants must submit such request via an AMIS Service Request to the BEA Program with a subject line of ''BEA Program—Title VI Compliance Worksheet Deadline Extension Request.''

(4) AMIS Application Late Submission: In cases where a federal government administrative or federal government technological error directly resulted in a late submission of the Application in AMIS, the Applicant must submit a written request for acceptance of the late Application submission and include documentation of the error no later than two business days after the Application deadline. The CDFI Fund will not respond to requests for acceptance of late AMIS Application submissions after that time period. Applicants must submit late Application submission requests to the CDFI Fund via an AMIS service request to the BEA Program with a subject line of ''BEA Program—Late Application Submission Request.''

H. Funding Restrictions: BEA Program Awards are limited by the following:

1. The Award Recipient shall use BEA Program Award funds only for the eligible activities described in Section II. D. of this NOFA and the Authorized BEA Program Activities described in its Award Agreement.

2. The Award Recipient may not distribute BEA Program Award funds to an Affiliate, Subsidiary, or any other entity, without the CDFI Fund's prior written approval.

3. BEA Program Award funds shall only be disbursed to the Award Recipient.

4. The CDFI Fund, in its sole discretion, may disburse BEA Program Award funds in amounts, or under terms and conditions, which are different from those requested by an Applicant.

I. Other Submission Requirements: None.

V. Application Review Information

A. Contacting Applicant for Clarification: If the Applicant submitted a complete and eligible Application, the CDFI Fund will conduct a substantive review in accordance with the criteria and procedures described in the Regulations, this NOFA, the Application guidance, and the Uniform Requirements. The CDFI Fund reserves the right to contact the Applicant by telephone, email, or mail for the sole purpose of clarifying or confirming Application information. If contacted, the Applicant must respond within the time period communicated by the CDFI Fund or run the risk that the Applicant's Application will be rejected.

B. Personally Identifiable Information (PII): The CDFI Fund will not collect or accept any Personally Identifiable Information (PII) in AMIS or in any of the Application submission materials. PII is information, which if lost, compromised, or disclosed without authorization, could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual. Although Applicants are required to enter addresses of individual borrowers or residents of Distressed Communities in AMIS, Applicants must not include the following PII for the individuals who received the financial products or services in AMIS or in the supporting documentation: name of the individual, Social Security Number, driver's license or state identification

number, passport number, and Alien Registration Number. This information should be redacted from all supporting documentation. If the CDFI Fund discovers PII during the review of an Application, the transaction will be deleted from the application record and deemed ineligible.

C. Qualified Activities Criteria and Requirements: Applicants may submit transactions for Qualified Activities for the categories outlined below. Applicants must provide all required transaction information in the AMIS Application as required in this NOFA and the FY 2024 BEA Program Application Instructions. If an Applicant fails to provide the mandatory information on a transaction, it will be deemed ineligible for the purposes of calculating the BEA Award amount.

1. CDFI Related Activities: For CDFI Related Activities, Applicants may select transactions in the following two sub-categories: (1) CDFI Equity; and (2) CDFI Support Activities.

(1) CDFI Equity: This sub-category includes the following three components: a. Equity Investments; and b. Equity-Like Loans. Additional requirements and limitations for this sub-category are described in Parts c. through e.

a. Equity Investment: An Equity Investment means financial assistance provided by an Applicant or its Subsidiary to a CDFI, which CDFI meets such criteria as set forth in this NOFA, in the form of a grant, a stock purchase, a purchase of a partnership interest, a purchase of a limited liability company membership interest, or any other investment deemed to be an Equity Investment by the CDFI Fund.

b. Equity-Like Loan: An Equity-Like Loan is a loan provided by an Applicant or its Subsidiary to a CDFI and made on such terms that it has characteristics of an Equity Investment, as such characteristics may be specified by the CDFI Fund (12 CFR 1806.103). For purposes of this NOFA, an Equity-Like Loan must meet the following characteristics:

(i) At the end of the initial term, the loan must have a definite rolling maturity date that is automatically extended on an annual basis if the CDFI borrower continues to be financially sound and carry out a community development mission;

(ii) Periodic payments of interest and/or principal may only be made out of the CDFI borrower's available cash flow after satisfying all other obligations;

(iii) Failure to pay principal or interest (except at maturity) will not automatically result in a default of the loan agreement; and

(iv) The loan must be subordinated to all other debt except for other Equity-Like Loans. Notwithstanding the foregoing, the CDFI Fund reserves the right to determine, in its sole discretion and on a case-by-case basis, whether an instrument meets the above-stated characteristics of an Equity-Like Loan.

c. CDFI Partner: CDFI Partner is defined as a Certified CDFI that has been provided assistance in the form of CDFI Related Activities by an unaffiliated Applicant (12 CFR 1806.103). For the purposes of this NOFA, an eligible CDFI Partner that receives CDFI Support Activities from an Applicant must be Integrally Involved in a Distressed Community and have been certified as a CDFI as of the date that the BEA Applicant made its investment or provided support.

d. Limitations on eligible Qualified Activities provided to certain CDFI Partners: A CDFI Applicant cannot receive credit for any financial assistance or Qualified Activities provided to a CDFI Partner that is also an FDIC-insured depository institution or a depository institution holding company.

e. CDFI Program Matching Funds: Equity Investments, Equity-Like Loans, and CDFI Support Activities (except Technical Assistance) provided by a BEA Applicant to a CDFI and used by the CDFI for matching funds under the CDFI Program are eligible as a Qualified Activity under the CDFI Related Activity category.

(2) CDFI Support Activity: A CDFI Support Activity is defined as assistance provided by an Applicant or its Subsidiary to a CDFI that is Integrally Involved in a Distressed Community, in the form of certificates of deposits, loans, or Technical Assistance. This sub-category consists of three components: (a) Certificates of Deposits; (b) Loans; and (c) Technical Assistance. Additional requirements and limitations for this sub-category are described in Part (d).

(a) Certificates of Deposit: A Certificate of Deposit (CD), a CDFI Support Activity, placed by an Applicant or its Subsidiary in a CDFI Partner that is a bank, thrift, or credit union must be: (i) uninsured and committed for at least three years; or (ii) insured, committed for a term of at least three years, and provided at an interest rate that is materially below market rates, in the determination of the CDFI Fund.

i. For purposes of this NOFA, ''materially below market interest rate'' is defined as an annual percentage rate that does not exceed the yields on Treasury securities at constant maturity as interpolated by Treasury from the daily yield curve and available on the Treasury website at *www.treas.gov/offices/domestic-finance/debt-management/interest-rate/yield.shtml.* For example, for a three-year CD, Applicants should use the three-year rate U.S. Government securities, Treasury Yield Curve Rate posted for that business day. The Treasury updates the website daily at approximately 5:30 p.m. ET. CDs placed prior to that time may use the rate posted for the previous business day. The annual percentage rate on a CD should be compounded daily, quarterly, semi-annually, or annually. If a variable interest rate is used, the CD must also have an interest rate that is materially below the market interest rate over the life of the CD, in the determination of the CDFI Fund. If a variable rate is used, the Applicant must describe its methodology for determining that the interest rate over the life of the CD is a materially below market interest rate. The CDFI Fund reserves the right to follow up with an Applicant regarding variable interest rate CD transactions.

ii. For purposes of this NOFA, a deposit placed by an Applicant directly with a CDFI Partner that participates in a deposit network or service may be treated as eligible under this NOFA if it otherwise meets the criteria for deposits specified in this NOFA and the CDFI Partner retains the full amount of the initial deposit or an amount equivalent to the full amount of the initial deposit through a deposit network exchange transaction.

(b) Loans: Loans, a CDFI Support Activity, refers to an Applicant providing loans to an Eligible CDFI Partner.

(c) Technical Assistance: Technical Assistance, a CDFI Support Activity, refers to the provision of consulting services, resources, training, and other nonmonetary support to an Eligible CDFI Partner relating to an organization, individual, or operation of a trade or business.

(d) Integrally Involved: Integrally Involved is defined at 12 CFR 1806.103. For purposes of this NOFA, in order for an Applicant to report CDFI Support Activities in its Application, the CDFI Partner which received the support must be deemed to be Integrally Involved by demonstrating it has: (i) provided at least 10 percent of the number of its financial transactions or dollars transacted (*e.g.,* loans or Equity Investments), or 10 percent of the number of its Development Service Activities (as defined in 12 CFR

1805.104) or value of the administrative cost of providing such services, in one or more Distressed Communities identified by the CDFI Partner, in each of the three calendar years preceding the date of this NOFA; or (ii) transacted at least 25 percent of the number of its financial transactions or dollars transacted (*e.g.,* loans or equity investments) in one or more Distressed Communities in at least one of the three calendar years preceding the date of this NOFA, or 25 percent of the number of its Development Service Activities (as defined in 12 CFR 1805.104) or value of the administrative cost of providing such services, in one or more Distressed Communities identified by the CDFI Partner, in at least one of the three calendar years preceding the date of this NOFA; or (iii) demonstrated that it has attained at least 10 percent of market share for a particular financial product in one or more Distressed Communities (such as home mortgages originated in one or more Distressed Communities) in at least one of the three calendar years preceding the date of this NOFA; or (iv) at least 25 percent of the CDFI Partner's physical locations (*e.g.,* offices or branches) are located in one or more Distressed Communities where it provided financial transactions or Development Service Activities during the one calendar year preceding the date of the NOFA.

2. Distressed Community Financing Activities and Service Activities: Distressed Community Financing Activities comply with consumer protection laws and are defined as the following: (1) Consumer Loans; or (2) Commercial Loans and Investments. In addition to the requirements set forth in the Interim Rule, this NOFA provides the following additional requirements:

(1) Consumer Loans: Consumer Loans is a sub-category of Distressed Community Financing Activities and is defined as the following lending activity types: a. Affordable Housing Loans; b. Education Loans; c. Home Improvement Loans; and d. Small Dollar Consumer Loans.

a. Affordable Housing Loans: Affordable Housing Loans are Consumer Loans that refer to the origination of a loan to finance the purchase or improvement of the borrower's primary residence, and that is secured by such property, where such borrower is an Eligible Resident who meets Low- and Moderate-Income requirements.

b. Education Loans: Education Loans are Consumer Loans that refer to an advance of funds to a student who is an Eligible Resident who meets Low- and Moderate-Income requirements for the purpose of financing a college or vocational education.

c. Home Improvement Loans: Home Improvement Loans are Consumer Loans that refer to an advance of funds, either unsecured or secured by a one-to-four family residential property, the proceeds of which are used to improve the borrower's primary residence, where such borrower is an Eligible Resident who meets Low- and Moderate-Income requirements.

d. Small Dollar Consumer Loans: For purposes of this NOFA, eligible Small Dollar Consumer Loans are responsible and affordable loans that serve as available alternatives to the marketplace for individuals who are Eligible Residents who meet Low- and Moderate-Income requirements with a total principal value of no less than $500 and no greater than $5,000 and have a term of ninety (90) days or more. A responsible Small Dollar Loan generally considers the borrower's ability to repay and may also reflect repayment terms, pricing, and safeguards that minimize adverse customer outcomes, including cycles of debt due to rollovers or reborrowing.

(2) Commercial Loans and Investments: Commercial Loans and Investments is a sub-category of Distressed Community Financing Activities and is defined as the following lending activity types: a. Affordable Housing Development Loans and related Project Investments; b. Commercial Real Estate Loans and related Project Investments; and c. Small Business Loans and related Project Investments.

a. Affordable Housing Development Loans and Project Investments: Affordable Housing Development Loans are Commercial Loans that refer to the origination of a loan to finance the acquisition, construction, and/or development of single- or multifamily residential real property, where at least 60 percent of the units in such property are affordable, to Eligible Residents who meet Low- and Moderate-Income requirements. For the purposes of this NOFA, eligible Affordable Housing Development Loans and related Project Investments do not include housing for students, or school dormitories. In addition, for such transactions, Applicants will be required to provide supporting documentation that demonstrates that at least 60 percent of the units in the property financed are or will be sold or rented to Eligible Residents who meet Low-and-Moderate-Income requirements, as noted in the Application instructions.

b. Commercial Real Estate Loans and related Project Investments: For purposes of this NOFA, eligible Commercial Real Estate Loans (12 CFR 1806.103) and related Project Investments are generally limited to transactions with a total principal value of $10 million or less. Notwithstanding the foregoing, the CDFI Fund, in its sole discretion, may consider transactions with a total principal value of over $10 million, subject to review. For such transactions, Applicants must provide a separate narrative, or other information, to demonstrate that the proposed project offers, or significantly enhances the quality of, a facility or service not currently provided to the Distressed Community.

c. Small Business Loans and Project Investments: Small Business Loans are Commercial Loans that refer to the origination of a loan used for commercial or industrial activities (other than an Affordable Housing Loan, Affordable Housing Development Loan, Commercial Real Estate Loan, or Home Improvement Loan) to a business or farm that meets the size eligibility standards of the Small Business Administration's Development Company or Small Business Investment Company programs (13 CFR 121.301) and is located in a Distressed Community.

d. Distressed Community Financing Activities for Transactions Less Than $250,000: For purposes of this NOFA, Applicants are expected to maintain records for any transaction submitted as part of the FY 2024 BEA Program Application, including supporting documentation for transactions in the Distressed Community Financing Activity category of less than $250,000. The CDFI Fund reserves the right to request supporting documentation from an Applicant during its Application Review process for a Distressed Community Financing Activities transaction less than $250,000.

3. Service Activities: Service Activities consist of the following five types: a: Deposit Liabilities; b. Community Services; c. Financial Services; d. Targeted Financial Services; and e. Targeted Retail Savings/ Investment Products.

a. Deposit Liabilities: Deposit Liabilities are considered Service Activities and refer to time or savings deposits or demand deposits. Any such deposit must be accepted from Eligible Residents at the offices of the Applicant or of the Subsidiary of the Applicant and located in the Distressed Community. Deposit Liabilities may only include deposits held by individuals in transaction accounts (*e.g.,* demand deposits, negotiable order of withdrawal accounts, automated

transfer service accounts, and telephone or preauthorized transfer accounts) or non-transaction accounts (*e.g.,* money market deposit accounts, other savings deposits, and all time deposits), as defined by the Appropriate Federal Banking Agency.

b. Community Services: Community Services are considered Service Activities and refer to the following forms of assistance provided by officers, employees or agents (contractual or otherwise) of the Applicant: (1) Provision of Technical Assistance and financial education to Eligible Residents regarding managing their personal finances; (2) Provision of Technical Assistance and consulting services to newly formed small businesses and nonprofit organizations located in the Distressed Community; (3) Provision of Technical Assistance and financial education to, or servicing the loans of, homeowners who are Eligible Residents and meet Low- and Moderate-Income requirements; and (4) Other services provided to Eligible Residents who meet Low- and Moderate-Income requirements or enterprises that are Integrally Involved in a Distressed Community, as deemed appropriate by the CDFI Fund.

c. Financial Services: Financial Services are Service Activities that refer to check cashing, providing money orders and certified checks, automated teller machines, safe deposit boxes, new branches, and other comparable services, that are provided by the Applicant to Eligible Residents or enterprises that are Integrally Involved in the Distressed Community.

The CDFI Fund will value the administrative cost of providing certain Financial Services using the following per unit values:

(1) $100.00 per account for Targeted Financial Services including safe transaction accounts, youth transaction accounts, Electronic Transfer Accounts (ETA) and Individual Development Accounts (IDA);

(2) $50.00 per account for checking and savings accounts that do not meet the definition of Targeted Financial Services;

(3) $5.00 per check cashing transaction;

(4) $50,000 per new ATM installed at a location in a Distressed Community;

(5) $500,000 per new retail bank branch office opened in a Distressed Community, including school-based bank branches approved by the Applicant's Federal bank regulator;

(6) In the case of Applicants engaging in Financial Services activities not described above, the CDFI Fund will determine the unit value of such services;

(7) When reporting the opening of a new retail bank branch office, the Applicant must certify that such new branch is intended to remain in operation for at least the next five years;

(8) Financial Service Activities must be provided by the Applicant to Eligible Residents or enterprises that are located in a Distressed Community. An Applicant may determine the number of Eligible Residents who are Award Recipients of Financial Services by either: (i) collecting the addresses of its Financial Services customers, or (ii) certifying that the Applicant reasonably believes that such customers are Eligible Residents or enterprises located in a Distressed Community and providing a brief analytical narrative with information describing how the Applicant made this determination. Citations must be provided for external sources. In addition, if external sources are referenced in the narrative, the Applicant must explain how it reached the conclusion that the cited references are directly related to the Eligible Residents or enterprises to whom it is claiming to have provided the Financial Services.

(9) When reporting changes in the dollar amount of deposit accounts, only calculate the net change in the total dollar amount of eligible Deposit Liabilities between the Baseline Period and the Assessment Period. Do not report each individual deposit. Instructions for determining the net change is available in the FY 2024 BEA Program Application Instructions in AMIS.

d. Targeted Financial Services: Targeted Financial Services are Service Activities that are targeted to Eligible Residents, including Electronic Transfer Accounts (ETAs), Individual Development Accounts (IDAs), and similar banking products.

e. Targeted Retail Savings/Investment Products: Targeted Financial Services are Service Activities targeted to Eligible Residents that include certificates of deposit, mutual funds, and life insurance.

C. Priority Factors: Priority Factors are the numeric values assigned to individual types of activity within: (i) the Distressed Community Financing Activities, and (ii) Services Activities categories of Qualified Activities. For the purposes of this NOFA, Priority Factors will be based on the Applicant's asset size as of the end of the Assessment Period (December 31, 2023) as reported by the Applicant in the Application. Asset size classes (*i.e.,* small institutions, intermediate-small institutions, and large institutions) will correspond to the Community Reinvestment Act (CRA) asset size classes set by the three Federal bank regulatory agencies and that were effective as of the end of the Assessment Period. The Priority Factor works by multiplying the change in a Qualified Activity by the assigned Priority Factor to achieve a ''weighted value.'' This weighted value of the change would be multiplied by the applicable Award percentage to yield the Award amount for that particular activity. For purposes of this NOFA, the CDFI Fund is establishing Priority Factors based on Applicant asset size to be applied to all activity types within the Distressed Community Financing Activities and Service Activities categories only, as follows:

TABLE 5—CRA ASSET SIZE CLASSIFICATION

	Priority factor
Small institutions (assets of less than $391 million as of 12/31/2023)	5.0
Intermediate—small institutions (assets of at least $391 million but less than $1.564 billion as of 12/31/2023)	3.0
Large institutions (assets of $1.564 billion or greater as of 12/31/2023)	1.0

D. Certain Limitations on Qualified Activities:

1. Low-Income Housing Tax Credits: Financial assistance provided by an Applicant for which the Applicant receives benefits through Low-Income Housing Tax Credits, authorized pursuant to Section 42 of the Internal Revenue Code, as amended (26 U.S.C. 42), shall not constitute an Equity Investment, Project Investment, or other Qualified Activity, for the purposes of calculating or receiving a BEA Program Award.

2. New Markets Tax Credits: Financial assistance provided by an Applicant for which the Applicant receives benefits as an investor in a Community Development Entity that has received an allocation of New Markets Tax Credits, authorized pursuant to Section 45D of the Internal Revenue Code, as amended (26 U.S.C. 45D), shall not constitute an Equity Investment, Project Investment, or other Qualified Activity, for the purposes of calculating or receiving a BEA Program Award. Leverage loans used in New Markets Tax Credit structured transactions that meet the requirements outlined in this NOFA are considered Distressed Community Financing Activities. The Application materials will provide further guidance on requirements for BEA transactions which were leverage loans used in a New Markets Tax Credit structured transaction.

3. Loan Renewals and Refinances: Financial assistance provided by an Applicant shall not constitute a Qualified Activity, as defined in this part, for the purposes of calculating or receiving a BEA Program Award if such financial assistance consists of a loan to a borrower that has matured and is then renewed by the Applicant, or consists of a loan to a borrower that is retired or restructured using the proceeds of a new commitment by the Applicant.

4. Certain Business Types: Financial assistance provided by an Applicant shall not constitute a Qualified Activity for the purposes of financing the following business types: adult entertainment providers, golf courses, race tracks, gambling facilities, country clubs, facilities offering massage services, hot tub facilities, suntan facilities, or stores where the principal business is the sale of alcoholic beverages for consumption off premises.

5. Prior BEA Program Awards: Qualified Activities funded with prior funding round BEA Program Award dollars or funded to satisfy requirements of the BEA Program Award Agreement shall not constitute a Qualified Activity for the purposes of calculating or receiving a BEA Program Award.

6. Prior CDFI Fund Awards: No Applicant may receive a BEA Program Award for the same activities funded by another CDFI Fund program or federal program.

B. Review and Selection Process:

1. Application Review Process: All Applications will be initially evaluated by external non-federal reviewers. Reviewers are selected based on their experience in understanding various financial transactions, analyzing and interpreting financial documentation, strong written communication skills, and strong mathematical skills. Reviewers must complete the CDFI Fund's conflict of interest process and be approved by the CDFI Fund.

2. Selection Process: The Interim Rule and this NOFA describe the process for selecting Applicants to receive a BEA Program Award and determining Award amounts. If the amount of funds available during the funding round is insufficient for all estimated Award amounts, Award Recipients will be selected based on the process described in the Interim Rule at 12 CFR 1806.404. This process gives funding priority to Applicants that undertake activities in the following order: (i) CDFI Related Activities, (ii) Distressed Community Financing Activities, and (iii) Service Activities.

a. Award percentages: In the CDFI Related Activities subcategory of CDFI Equity, for all Applicants, the estimated award amount will be equal to 18 percent of the increase in Qualified Activities reported in this subcategory.

In the CDFI Related Activities subcategory of CDFI Support Activities, for a Certified CDFI Applicant, the estimated award amount will be equal to 18 percent of the increase in Qualified Activities in this subcategory. If an Applicant is not a Certified CDFI, the estimated award amount will be equal to 6 percent of the increase in Qualified Activities in this subcategory.

In the Distressed Community Financing Activities subcategory of Consumer Lending, the estimated award amount for Certified CDFI Applicants will be 18 percent of the weighted value of the increase in Qualified Activities in this subcategory. If an Applicant is not a Certified CDFI Applicant, the estimated award amount will be equal to 6 percent of the weighted value of the increase in Qualified Activities in this subcategory.

In the Distressed Community Financing Activities subcategory of Commercial Lending and Investments, for a Certified CDFI Applicant, the estimated award amount will be equal to 9 percent of the weighted value of the increase in Qualified Activities in this subcategory. If an Applicant is not a Certified CDFI, the estimated award amount will be equal to 3 percent of the weighted value of the increase in Qualified Activity in this subcategory.

In the Service Activities category, for a Certified CDFI Applicant, the estimated award amount will be equal to 9 percent of the weighted value of the increase in Qualified Activity for the category. If an Applicant is not a Certified CDFI, the estimated award amount will be equal to 3 percent of the weighted value of the increase in Qualified Activity for the category.

Within each category, CDFI Applicants will be ranked first based on the ratio of the award amount calculated by the CDFI Fund for the category relative to the Applicant's total assets, followed by Applicants that are not CDFIs based on the ratio of the award amount calculated by the CDFI Fund for the category relative to the Applicant's total assets.

Selections within each priority category will be based on the Applicants' relative rankings within each such category, subject to the availability of funds and any established maximum dollar amount of total awards that may be awarded for the Distressed Community Financing Activities category of Qualified Activities, as determined by the CDFI Fund.

b. Award Amounts: An Applicant's estimated award amount will be calculated according to the procedure outlined in the Interim Rule (at 12 CFR 1806.403 and 1806.404). As outlined in the Interim Rule, the CDFI Fund will determine actual award amounts based on the availability of funds, increases in Qualified Activities from the Baseline Period to the Assessment Period, and the priority ranking of each Applicant.

In calculating the increase in Qualified Activities, the CDFI Fund will determine the eligibility of each transaction for which an Applicant has applied for a BEA Program Award.

The CDFI Fund, in its sole discretion: (i) may adjust the estimated award amount that an Applicant may receive; (ii) may establish a maximum amount that may be awarded to an Applicant; and (iii) reserves the right to limit the amount of an award to any Applicant if the CDFI Fund deems it appropriate.

The CDFI Fund reserves the right to change its eligibility and evaluation criteria and procedures. If those changes materially affect the CDFI Fund's award decisions, the CDFI Fund will provide information regarding the changes through the CDFI Fund's website.

3. Programmatic and Financial Risk: The CDFI Fund will consider safety and soundness information from the appropriate Federal bank regulatory agency as defined in Section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)). If the appropriate Federal bank regulatory agency identifies safety and soundness concerns, the CDFI Fund will assess whether the concerns cause or will cause the Applicant to be incapable of completing the activities for which funding has been requested. The CDFI Fund will not approve a BEA Program Award under any circumstances for an

Applicant if the appropriate Federal bank regulatory agency indicates that the Applicant received a composite rating of ''5'' on its most recent examination, performed in accordance with the Uniform Financial Institutions Rating System.

Furthermore, the CDFI Fund will not approve a BEA Program Award for an Applicant if the CDFI Fund determines that the Applicant has:

(i) a CRA assessment rating of below ''Satisfactory'' on its most recent examination; (ii) a financial audit with: a going concern paragraph, an adverse opinion, a disclaimer of opinion, or a withdrawal of an opinion on its most recent audit; or (iii) a Prompt Corrective Action directive from its regulator imposing restrictions on its level of lending activities, that was active at the time the Applicant submitted its Application to the CDFI Fund or becomes active during the CDFI Fund's evaluation of the Application for: activities for which funding has been requested, activities which meet the BEA Program criteria of Qualified Activities, or other circumstances which may impact an Applicant's ability to successfully manage, re-invest, and/or report on a FY 2024 BEA Program Award.

Applicants and/or their appropriate Federal bank regulator agency may be contacted by the CDFI Fund to provide additional information related to Federal bank regulatory or CRA information. The CDFI Fund will consider this information and may choose to not approve a FY 2024 BEA Program Award for an Applicant if the information indicates that the Applicant may be unable to responsibly manage, re-invest, and/or report on a FY 2024 BEA Program Award during the period of performance.

4. Persistent Poverty Counties: Should the CDFI Fund determine, upon analysis of the initial pool of BEA Program Award Recipients, that it has not achieved the 10 percent PPC requirement mandated by Congress, Award preference will be given to Applicants that committed to deploying at least 10 percent of their FY 2024 BEA Program Award in PPCs. Applicants that committed to serving PPCs and are selected to receive a FY 2024 BEA Program award, will have their PPC commitment incorporated into their Award Agreement as a Performance Goal which will be subject to compliance and reporting requirements. No Applicant, however, will be disqualified from consideration for not making a PPC commitment in its BEA Program Application.

5. Application Rejection: The CDFI Fund reserves the right to reject an Application if information (including administrative error) comes to the CDFI Fund's attention that either: adversely affects an Applicant's eligibility for an award; adversely affects the CDFI Fund's evaluation or scoring of an Application; or indicates fraud or mismanagement on the Applicant's part. If the CDFI Fund determines any portion of the Application is incorrect in a material respect, the CDFI Fund reserves the right, in its sole discretion, to reject the Application.

There is no right to appeal the CDFI Fund's award decisions. The CDFI Fund's award decisions are final. The CDFI Fund will not discuss the specifics of an Applicant's FY 2024 BEA Program Application or provide reasons why an Applicant was not selected to receive a FY 2024 BEA Program Award. The CDFI Fund will only respond to general questions regarding the FY 2024 BEA Program Application and award decision process until 30 days after the award announcement date.

C. Anticipated Announcement: The CDFI Fund anticipates making its FY 2024 BEA Program award announcement in the fall of 2024.

VI. Federal Award Administration Information

A. Federal Award Notices: Each successful Applicant will receive notification from the CDFI Fund stating that its Application has been approved for an Award. Each Applicant not selected for an Award will receive notification and provided a debriefing document in its AMIS account.

B. Administrative and Policy Requirements Prior to Entering into an Award Agreement: If, prior to entering into an Award Agreement, information (including an administrative error) comes to the CDFI Fund's attention that: adversely affects the CDFI Fund's evaluation of the Application; indicates that the Recipient is not in compliance with any requirement listed in the Uniform Requirements; indicates that the Recipient is not in compliance with a term or condition of any prior Award Agreement, Assistance Agreement, and/or Allocation Agreement from the CDFI Fund; indicates the Recipient has failed to execute and return a prior round Award Agreement Assistance Agreement, and/or Allocation Agreement to the CDFI Fund within the CDFI Fund's deadlines; or indicates fraud or mismanagement on the Recipient's part, the CDFI Fund may, in its discretion and without advance notice to the Recipient, terminate the award or take such other actions as it deems appropriate. If a Certified CDFI Award Recipient's certification status ceases, the CDFI Fund reserves the right, in its sole discretion, to re-calculate the award, and modify the Award Agreement based on the Award Recipient's non-CDFI status.

By executing an Award Agreement, the Award Recipient agrees that, if the CDFI Fund becomes aware of any information (including an administrative error) prior to the effective date of the Award Agreement that either adversely affects the Award Recipient's eligibility for an award, or adversely affects the CDFI Fund's evaluation of the Award Recipient's Application, or indicates fraud or mismanagement on the part of the Award Recipient, the CDFI Fund may, in its discretion and without advance notice to the Award Recipient, terminate the Award Agreement or take other actions as it deems appropriate.

The CDFI Fund reserves the right, in its sole discretion, to rescind an award if the Award Recipient fails to return the Award Agreement, signed by the authorized representative of the Award Recipient, and/or provide the CDFI Fund with any other requested documentation, within the CDFI Fund's deadlines.

In addition, the CDFI Fund reserves the right, in its sole discretion, to terminate and rescind the Award Agreement and the award made under this NOFA for any criteria described in the following table:

TABLE 6—CRITERIA THAT MAY RESULT IN AWARD TERMINATION PRIOR TO THE EXECUTION OF AN AWARD AGREEMENT

Criteria	Description
Failure to maintain FDIC-insured status	• If prior to entering into an Award Agreement under this NOFA, the Award Recipient does not maintain its FDIC-insured status, the CDFI Fund will terminate and/or rescind the Award Agreement and the award made under this NOFA.

TABLE 6—CRITERIA THAT MAY RESULT IN AWARD TERMINATION PRIOR TO THE EXECUTION OF AN AWARD AGREEMENT—Continued

Criteria	Description
Failure to meet reporting requirements	• If a Recipient received a prior award or allocation under any CDFI Fund program and is not current on the reporting requirements set forth in the previously executed assistance, award, allocation, bond loan agreement(s), or agreement to guarantee, as of the date of the notice of award, the CDFI Fund reserves the right, in its sole discretion, to delay entering into an Assistance Agreement and/or to delay making a payment of BEA Program Award, until said prior Recipient or Allocatee is current on the reporting requirements in the previously executed assistance, award, allocation, bond loan agreement(s), or agreement to guarantee. • If such a prior Recipient or Allocatee is unable to meet this requirement within the timeframe set by the CDFI Fund, the CDFI Fund reserves the right, in its sole discretion, to terminate and rescind the notice of award and the BEA Program Award made under this NOFA. • Please note that automated systems employed by the CDFI Fund for receipt of reports submitted electronically typically acknowledge only a report's receipt; such acknowledgment does not warrant that the report received was complete, nor that it met reporting requirements.
Pending resolution of Default or Noncompliance	• The CDFI Fund will delay entering into an Award Agreement with a Recipient that has pending noncompliance or default issue with any of its previously executed CDFI Award Agreement(s), Allocation Agreement(s), and/or Assistance Agreement(s), if the CDFI Fund has not yet made a final compliance determination. • If the Recipient is unable to satisfactorily resolve the compliance issues, the CDFI Fund may terminate and rescind the Assistance Agreement and the award made under this NOFA.
Default or Noncompliance status	• If, at any time prior to entering into an Award Agreement, the CDFI Fund determines that a Recipient is noncompliant or found in default with any previously executed Award Agreement(s), Allocation Agreement(s), and/or Assistance Agreement(s), and the CDFI Fund has provided written notification that the Recipient is ineligible to apply for or receive any future awards or allocations for a time period specified by the CDFI Fund in writing, the CDFI Fund may delay entering into an Award Agreement until the Recipient has cured the noncompliance or default by taking actions the CDFI Fund has specified within such specified timeframe. If the Recipient is unable to cure the noncompliance or default within the specified timeframe, the CDFI Fund may terminate and rescind the Award Agreement and the award made under this NOFA.
Compliance with Federal civil rights requirements.	• If, within the period starting three years prior to this NOFA and through the date of the Award Agreement, the Recipient received a final determination, in any proceeding instituted against the Recipient in, by, or before any court, governmental, or administrative body or agency, declaring that the Recipient violated any federal civil rights laws or regulations, including, but not limited to: Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d et seq.); Fair Housing Act (42 U.S.C. 3601 et seq.); Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.); Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Age Discrimination Act of 1975 (42 U.S.C. 6101–6107); and Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the CDFI Fund may terminate and rescind the Award Agreement and the Award made under this NOFA. The CDFI Fund will delay entering into an Award Agreement with a Recipient that has pending Title VI noncompliance issues, if the CDFI Fund has not yet made a final compliance determination. • If the Recipient is unable to satisfactorily resolve the Title VI noncompliance issues, the CDFI Fund may terminate and rescind the Award Agreement and the award made under this NOFA. • The Title VI Compliance Worksheet and program award terms and conditions do not impose antidiscrimination requirements on Tribal governments beyond what would otherwise apply under federal law.
Do Not Pay	• The CDFI Fund reserves the right, in its sole discretion, to rescind an award if the Recipient (or Affiliate of a Recipient) is determined to be ineligible based on data in the Do Not Pay database. • The Do Not Pay Business Center was developed to support federal agencies in their efforts to reduce the number of improper payments made through programs funded by the federal government.
Safety and Soundness	• If it is determined the Recipient is or will be incapable of meeting its award obligations, the CDFI Fund will deem the Recipient to be ineligible or require it to improve safety and soundness conditions prior to entering into an Award Agreement.

C. Award Agreement: After the CDFI Fund selects an Award Recipient, except as otherwise specified in this NOFA, the CDFI Fund and the Award Recipient will enter into an Award Agreement. The Award Agreement will set forth certain required terms and conditions of the award, which will include, but not be limited to: (i) the amount of the award; (ii) the approved uses of the award; (iii) the Performance Goals and measures; (iv) the period of performance; and (v) the reporting requirements. The Award Agreement shall provide that an Award Recipient shall: (i) carry out its Qualified Activities in accordance with applicable law, the approved Application, and all other applicable requirements; (ii) not receive any disbursement of award dollars until the CDFI Fund has

determined that the Award Recipient has fulfilled all applicable requirements; and (iii) use the BEA Program Award amount for Qualified Activities. Award Recipients which committed to serving PPCs will have their PPC commitment incorporated into their Award Agreement as a Performance Goal, which will be subject to compliance and reporting requirements.

D. Reporting: Through this NOFA, the CDFI Fund will require each Award Recipient to account for and report to the CDFI Fund on the use of the award. This will require Award Recipients to establish administrative controls, subject to applicable OMB Circulars. The CDFI Fund will collect information from each such Award Recipient on its use of the award at least once following the award and more often if deemed appropriate by the CDFI Fund in its sole discretion. The CDFI Fund will provide guidance to Award Recipients outlining the format and content of the information required to be provided to describe how the funds were used.

The CDFI Fund may collect information from each Award Recipient including, but not limited to, an Annual Report with the following components:

TABLE 7—REPORTING REQUIREMENTS

Criteria	Description
Use of BEA Program Award Report—for all Award Recipients.	Award Recipients must submit the Use of Award Report to the CDFI Fund via AMIS.
Use of BEA Program Award Report—Funds Deployed in Persistent Poverty Counties—as applicable.	The CDFI Fund will require each Award Recipient with Persistent Poverty County commitments to report data for Award funds deployed in persistent poverty counties and maintain proper supporting documentation and records which are subject to review by the CDFI Fund.
Explanation of Noncompliance or successor report—as applicable.	If the Award Recipient fails to meet a Performance Goal or reporting requirement, it must submit the Explanation of Noncompliance via AMIS.

Each Award Recipient is responsible for the timely and complete submission of the reporting requirements. The CDFI Fund reserves the right to contact the Award Recipient to request additional information and documentation. The CDFI Fund may consider financial information filed with Federal regulators during its compliance review. The CDFI Fund will use such information to monitor each Award Recipient's compliance with the requirements in the Award Agreement and to assess the impact of the BEA Program. The CDFI Fund reserves the right, in its sole discretion, to modify these reporting requirements if it determines it to be appropriate and necessary; however, such reporting requirements will be modified only after notice has been provided to Award Recipients.

E. Financial Management and Accounting: The CDFI Fund will require Award Recipients to maintain financial management and accounting systems that comply with federal statutes, regulations, and the terms and conditions of the award. These systems must be sufficient to permit the preparation of reports required by general and program specific terms and conditions, including the tracing of funds to a level of expenditures adequate to establish that such funds have been used according to the federal statutes, regulations, and the terms and conditions of the award.

Each of the Qualified Activities categories will be ineligible for indirect costs and an associated indirect cost rate. The cost principles used by Award Recipients must be consistent with Federal cost principles and support the accumulation of costs as required by the principles and must provide for adequate documentation to support costs charged to the BEA Program Award. In addition, the CDFI Fund will require Award Recipients to: maintain effective internal controls; comply with applicable statutes, regulations, and the Award Agreement; evaluate and monitor compliance; take action when not in compliance; and safeguard personally identifiable information, as described in Section V.A. of this NOFA.

VII. Federal Awarding Agency Contacts

A. Questions Related to Application and Prior Award Recipient Reporting, Compliance and Disbursements: The CDFI Fund will respond to questions concerning this NOFA, the Application and reporting, compliance, or disbursements between the hours of 9:00 a.m. and 5:00 p.m. Eastern Time, starting on the date that this NOFA is published through the date listed in Table 1 and Table 4. The CDFI Fund will post responses to frequently asked questions in a separate document on its website. Other information regarding the CDFI Fund and its programs may be obtained from the CDFI Fund's website at *https://www.cdfifund.gov.*

The following table lists contact information for the CDFI Fund, *Grants.gov* and SAM:

TABLE 8—CONTACT INFORMATION

Type of question	Telephone number (not toll free)	Electronic contact method
BEA Program	(202) 653–0421	BEA AMIS Service Request; or *BEA@cdfi.treas.gov.*
Certification, Compliance Monitoring, and Evaluation	(202) 653–0423	BEA Compliance and Reporting AMIS Service Request.
AMIS—IT Help Desk	(202) 653–0422	IT AMIS Service Request.
Grants.gov Help Desk	(800) 518–4726	*support@grants.gov.*
SAM.gov (Federal Service Desk)	(866) 606–8220	*https://www.sam.gov.*

B. Information Technology Support: People who have visual or mobility impairments that prevent them from using the CDFI Fund's website should call (202) 653–0422 for assistance (this is not a toll-free number).

C. Communication with the CDFI Fund: The CDFI Fund will use AMIS to communicate with Applicants and Award Recipients under this NOFA. Award Recipients must use AMIS to submit required reports. The CDFI Fund

will notify Award Recipients by email using the addresses maintained in each Award Recipient's AMIS account. Therefore, an Award Recipient and any Subsidiaries, signatories, and Affiliates must maintain accurate contact information (including contact person and authorized representative, email addresses, fax numbers, phone numbers, and office addresses) in their AMIS account(s).

D. Civil Rights and Equal Opportunity: Any person who is eligible to receive benefits or services from the CDFI Fund or its Recipients under any of its programs or activities is entitled to those benefits or services without being subjected to prohibited discrimination. The Department of the Treasury's Office of Civil Rights and Equal Employment Opportunity enforces various federal statutes and regulations that prohibit discrimination in financially assisted and conducted programs and activities of the CDFI Fund. If a person believes that they have been subjected to discrimination and/or reprisal because of race, color, religion, national origin, age, sex, marital status, familial status, disability and/or reprisal, they may file a complaint with: Director, Office of Civil Rights and Equal Employment Opportunity, 1500 Pennsylvania Ave. NW, Washington, DC 20220 or by email at *crcomplaints@treasury.gov.*

E. Statutory and National Policy Requirements: The CDFI Fund will manage and administer the Federal award in a manner to ensure that Federal funding is expended and associated programs are implemented in full accordance with the U.S. Constitution, federal law, and public policy requirements: including but not limited to, those protecting free speech, religious liberty, public welfare, the environment, and prohibiting discrimination.

VIII. Other Information

A. Reasonable Accommodations: Requests for reasonable accommodations under section 504 of the Rehabilitation Act should be directed to Mr. Jay Santiago, Community Development Financial Institutions Fund, U.S. Department of the Treasury, at *SantiagoJ@cdfi.treas.gov* no later than 72 hours in advance of the application deadline.

B. Paperwork Reduction Act: Under the Paperwork Reduction Act (44 U.S.C. chapter 35), an agency may not conduct or sponsor a collection of information, and an individual is not required to respond to a collection of information, unless it displays a valid OMB control number. Pursuant to the Paperwork Reduction Act, the BEA Program funding Application has been assigned the following control number: 1559–0005.

C. Application Information Sessions: The CDFI Fund may conduct webinars or host information sessions for organizations that are considering applying to, or are interested in learning about, the CDFI Fund's programs. For further information, please visit the CDFI Fund's website at *https://www.cdfifund.gov.*

Authority: 12 U.S.C. 1834a, 4703, 4703 note, 4713; 12 CFR part 1806.

Pravina Raghavan,

Director, Community Development Financial Institutions Fund.

[FR Doc. 2024–09124 Filed 4–26–24; 8:45 am]

BILLING CODE 4810–05–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Revision of an Approved Information Collection; Submission for OMB Review; Record and Disclosure Requirements—Consumer Financial Protection Bureau Regulations B, E, M, Z, and DD and Board of Governors of the Federal Reserve System Regulation CC

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995 (PRA). In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment concerning a revision to its information collection titled, ''Record and Disclosure Requirements—Consumer Financial Protection Bureau Regulations B, E, M, Z, and DD and Board of Governors of the Federal Reserve System Regulation CC.'' The OCC also is giving notice that it has sent the collection to OMB for review.

DATES: Comments must be received by May 29, 2024.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, Attention: 1557–0176, 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 ''1557–0176'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Written comments and recommendations for the proposed information collection should also be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* You can find this information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

You may review comments and other related materials that pertain to this information collection following the close of the 30-day comment period for this notice by the method set forth in the next bullet.

- *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Hover over the ''Information Collection Review'' tab and click on ''Information Collection Review'' from the drop-down menu. From the ''Currently under Review'' drop-down menu, select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching OMB control number ''1557–0176'' or ''Record and Disclosure Requirements—Consumer Financial Protection Bureau Regulations B, E, M, Z, and DD and Board of Governors of the Federal Reserve System Regulation CC.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.

• For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649–5490, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from the OMB for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. The OCC asks the OMB to approve this revised collection.

Title: Record and Disclosure Requirements—Consumer Financial Protection Bureau Regulations B, E, M, Z, and DD and Board of Governors of the Federal Reserve System Regulation CC.

OMB Control No.: 1557–0176.

Type of Review: Regular.

Affected Public: Businesses or other for-profit.

Frequency of Response: On occasion.

Description: This information collection covers Consumer Financial Protection Bureau (CFPB) Regulations B, E, M, Z, and DD and Board of Governors of the Federal Reserve System (FRB) Regulation CC. The CFPB and FRB regulations include the following provisions:

Regulation B—12 CFR 1002—Equal Credit Opportunity Act

This regulation prohibits lenders from discriminating against credit applicants on certain prohibited bases. The regulation also requires creditors to: (i) notify applicants of action taken on their credit application; (ii) report credit history in the names of both spouses on an account; (iii) retain records of credit applications; (iv) collect information about the applicant's race and other personal characteristics in applications for certain dwelling-related loans; and (v) provide applicants with copies of appraisal reports used in connection with credit transactions. The regulation was amended to implement changes to the Equal Credit Opportunity Act (ECOA) made by section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (88 FR 35150). Section 1071 requires covered financial institutions to collect and report data on applications for credit for small businesses. The regulation's revision includes additional information collection requirements that require the compilation and maintenance of reportable data, including notice requirements and reporting and recordkeeping requirements for small business lending data.[1]

Regulation E—12 CFR 1005—Electronic Fund Transfers (Except Prepaid Card Provisions 1557–0346)

This regulation carries out the purposes of the Electronic Fund Transfer Act (15 U.S.C. 1693 *et seq.*), which establishes the basic rights, liabilities, and responsibilities of consumers who use electronic fund transfers and remittance transfer services and of financial institutions or other persons that offer these services.

Regulation M—12 CFR 1013—Consumer Leasing

This regulation implements the consumer leasing provisions of the Truth in Lending Act, including by, among other actions, requiring meaningful disclosure of leasing terms.

Regulation Z—12 CFR 1026—Truth in Lending

This regulation is intended to promote the informed use of consumer credit by requiring disclosures about its terms and cost, to ensure that consumers are provided with greater and more timely information on the nature and costs of the residential real estate settlement process and to effect certain changes in the settlement process for residential real estate that will result in more effective advance disclosure to home buyers and sellers of settlement costs. The regulation gives consumers the right to cancel certain credit transactions that involve a lien on a consumer's principal dwelling, regulates certain credit card practices, and provides a means for fair and timely resolution of credit billing disputes. Other provisions of the regulation include rules specific to credit card accounts, certain dwelling-secured transactions, home-equity plans, and private education loans.

Regulation DD—12 CFR 1030—Truth in Savings

This regulation requires depository institutions to provide disclosures to enable consumers to make meaningful comparisons among accounts at depository institutions.

Regulation CC—12 CFR 229—Availability of Funds and Collection of Checks

This regulation includes timeframes to govern the availability of funds deposited into certain transaction accounts, rules to govern the collection and return of checks and electronic checks, and general provisions to govern the use of substitute checks.

Estimated Burden:

Estimated Number of Respondents: 1,005.

Estimated Total Annual Burden: 2,661,240 hours.

Comments: On February 01, 2024, the OCC published a 60-day notice for this information collection, 89 FR 6566. No comments were received.

Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Patrick T. Tierney,

Assistant Director, Office of the Comptroller of the Currency.

[FR Doc. 2024–09099 Filed 4–26–24; 8:45 am]

BILLING CODE 4810–33–P

[1] However, the OCC is not reporting an estimate for burden associated with the small business lending rule, given that, as the CFPB has noted, the rule is stayed: ''As a result of ongoing litigation, all deadlines for compliance with the small business lending rule currently are stayed for all covered financial institutions.'' CFPB, Small Business Lending under the Equal Credit Opportunity Act (Regulation B), available at *https://www.consumerfinance.gov/rules-policy/final-rules/small-business-lending-under-the-equal-credit-opportunity-act-regulation-b/.*

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Financial Crimes Enforcement Network (FinCEN) Information Collection Requests

AGENCY: Financial Crimes Enforcement Network, Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to comment on proposed or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Comments should be received on or before May 29, 2024 to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Copies of the submissions may be obtained from Melody Braswell by emailing *PRA@treasury.gov,* calling (202) 622–1035, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Financial Crimes Enforcement Network (FinCEN)

1. Title: Reports Relating to Currency in Excess of $10,000 Received in a Trade or Business or Received as Bail by Court Clerks; Form 8300 (31 CFR 1010.330 and 31 CFR 1010.331).

OMB Control Number: 1506–0018.

Form Number: Form 8300.

Abstract: FinCEN is issuing this notice to renew the OMB control number for the Form 8300 and the regulations at 31 CFR 1010.330 and 31 CFR 1010.331.

Affected Public: Businesses or other for-profit institutions, and non-profit institutions.

Type of Review: Extension without change of a currently approved information collection.

Frequency: As required.

Estimated Number of Respondents: 35,000.

Estimated Total Annual Responses: 400,112.

Estimated Reporting and Recordkeeping Burden: 30 minutes.

Estimated Total Annual Reporting and Recordkeeping Burden: 200,056 hours.

2. Title: Administrative Rulings Regulations.

OMB Control Number: 1506–0050.

Abstract: FinCEN is issuing this notice to renew the OMB control number for the administrative ruling regulations.

Affected Public: Businesses or other for-profit institutions, non-profit institutions, and individuals.

Type of Review: Extension without change of a currently approved information collection.

Frequency: As required.

Estimated Number of Requests Annually: 44 requests.

Estimated Burden per Respondent/Request: 2 hours.

Estimated Recordkeeping Burden: 88 hours.

3. Title: Reports and Records of Certain Domestic Transactions.

OMB Control Number: 1506–0056.

Form Number: FinCEN will specify the form and method for reporting in the GTO.

Abstract: FinCEN is issuing this notice to renew the OMB control number for regulations permitting the issuance of orders, commonly referred to as GTOs, requiring reports and records of certain domestic transactions.

Affected Public: Businesses or other for-profit institutions, and non-profit institutions.

Type of Review: Renewal without change of a currently approved information collection.

Frequency: As required.

Estimated Number of Respondents: 709.

Estimated Total Annual Responses: 21,513.

Estimated Reporting and Recordkeeping Burden per Response: 45 minutes for reporting and 5 minutes for recordkeeping.

Estimated Total Annual Reporting and Recordkeeping Burden: 17,928 hours.

4. Title: Beneficial Ownership Requirements for Legal Entity Customers (31 CFR 1010.230).

OMB Control Number: 1506–0070.

Form Number: Appendix A to § 1010.230—Certification Regarding Beneficial Owners of Legal Entity Customers.

Abstract: FinCEN is issuing this notice to renew the OMB control number for the beneficial ownership requirements for legal entity customers regulations contained in 31 CFR 1010.230.

Affected Public: Business and other for-profit institutions and non-profit institutions.

Type of Review: Renewal without change of a currently approved information collection.

Frequency: As required.

Estimated Number of Respondents: 15,221.

Estimated Total Annual Responses: 5,723,096.

Estimated Recordkeeping Burden per Response: 80-minute average.

Estimated Total Annual Recordkeeping Burden: 7,615,574 hours.

Authority: 44 U.S.C. 3501 *et seq.*

Melody Braswell,

Treasury PRA Clearance Officer.

[FR Doc. 2024–09056 Filed 4–26–24; 8:45 am]

BILLING CODE 4810–02–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.

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 May 29, 2024 to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Melody Braswell by emailing *PRA@treasury.gov,* calling (202)-622–1035, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Alcohol and Tobacco Tax and Trade Bureau (TTB)

1. OMB Control No. 1513–0019

Title: Application for Amended Permit under the Federal Alcohol Administration Act.

TTB Form Number: TTB F 5100.18.

Abstract: The Federal Alcohol Administration Act (FAA Act), at 27 U.S.C. 203, requires that persons apply for and receive a permit to: (1) Import distilled spirits, wine, or malt beverages into the United States; (2) distill spirits

or produce wine, rectify or blend distilled spirits or wine, or bottle and/or warehouse distilled spirits; or (3) purchase distilled spirits, wine, or malt beverages for resale at wholesale. The FAA Act, at 27 U.S.C. 204, also imposes certain requirements for such permits and authorizes the Secretary of the Treasury (the Secretary) to prescribe regulations for all permit applications. The TTB regulations in 27 CFR part 1 provide for the amendment of an existing permit using form TTB F 5100.18 when changes occur to the name, trade name, address, ownership, or control of the permitted business. The collected information allows TTB to determine if amended permit applicants meet the FAA Act's statutory eligibility criteria for a permit.

Current Actions: There are no program changes associated with this information collection, and TTB is submitting it for extension purposes only. As for adjustments, due to changes in agency estimates, TTB is increasing the estimated number of annual respondents, responses, and burden hours associated with this information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits.

Number of Respondents: 14,000.

Average Responses per Respondent: 1 per year.

Number of Responses: 14,000.

Average per-Response Burden: 20.6 minutes.

Total Burden: 5,250 hours.

2. OMB Control No. 1513–0028

Title: Application for an Industrial Alcohol Under Permit.

TTB Form Number: TTB F 5150.22.

Abstract: The Internal Revenue Code (IRC) at 26 U.S.C. 5271 requires persons to obtain a permit before they: (1) Procure or use tax-free distilled spirits; (2) procure, deal in, or use specially denatured distilled spirits; or (3) recover specially denatured or completely denatured distilled spirits. That section also prescribes the reasons a permit may be denied or suspended. It also authorizes the Secretary to issue regulations regarding new and amended permit applications. Under that IRC authority, TTB has issued regulations regarding industrial alcohol user permits, which are contained in 27 CFR part 20, Distribution and Use of Denatured Alcohol and Rum, and 27 CFR part 22, Distribution and Use of Tax-Free Alcohol. Specifically, the TTB regulations require persons who desire to use tax-free alcohol withdraw or to deal in, use, or recover specially denatured alcohol (alcohol or rum) to apply for and receive an industrial alcohol user permit using TTB F 5150.22 before beginning such activities or when amending an existing permit. TTB uses the collected information to protect the revenue by determining the eligibility of the applicant to engage in operations involving industrial alcohol, the location of the proposed operations, and whether those operations will be conducted in compliance with Federal laws and regulations.

Current Actions: There are no program changes or adjustments associated with this information collection, and TTB is submitting it for extension purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits; State, local, and Tribal governments.

Number of Respondents: 4,000.

Average Responses per Respondent: 1 per year.

Number of Responses: 4,000.

Average per-Response Burden: 0.8 hours.

Total Burden: 3,040 hours.

3. OMB Control No. 1513–0033

Title: Report—Manufacturer of Tobacco Products or Cigarette Papers and Tubes; Report—Manufacturer of Processed Tobacco.

TTB Form Numbers: TTB F 5210.5; TTB F 5250.1.

Abstract: The IRC at 26 U.S.C. 5722 requires manufacturers of tobacco products, cigarette papers and tubes, and processed tobacco to make reports containing such information, in such form, at such times, and for such periods as the Secretary prescribes by regulation. The TTB regulations prescribe the use of TTB F 5210.5 to report information about tobacco products and cigarette papers and tubes manufactured, received, and removed each month, and the use of TTB F 5250.1 to report information about processed tobacco manufactured, received, and removed each month. TTB uses the collected information to determine whether the manufacturers of such articles are properly paying Federal excise taxes due and are in compliance with the applicable Federal law and regulations.

Current Actions: There are no program changes or adjustments associated with this information collection, and TTB is submitting it for extension purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits.

Number of Respondents: 235.

Average Responses per Respondent: 12 per year.

Number of Responses: 2,820.

Average per-Response Burden: 1 hour.

Total Burden: 2,820 hours.

4. OMB Control No. 1513–0034

Title: Schedule of Tobacco Products, Cigarette Papers, or Tubes Withdrawn from the Market.

TTB Form Number: TTB F 5200.7.

Abstract: The IRC at 26 U.S.C. 5705 provides that a manufacturer, importer, or export warehouse proprietor may receive credit for, or refund of, the Federal excise taxes paid on tobacco products, cigarette papers, or cigarette tubes withdrawn from the market upon providing satisfactory proof of the withdrawal. Under that IRC authority, the TTB regulations provide for the use of TTB F 5200.7 to identify tobacco products, cigarette papers, or cigarette tubes to be withdrawn from the market and the location of those articles. The form also documents the taxpayer's planned disposition of the articles (destroyed, reduced to materials, or returned to bond), and TTB's decision to witness or not witness that disposition. Taxpayers then file the completed form to support their subsequent claim for credit or refund of the excise taxes paid on the withdrawn articles. The collected information is necessary to protect the revenue as it allows TTB to determine if such claims are valid.

Current Actions: There are no program changes or adjustments associated with this information collection, and TTB is submitting it for extension purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits.

Number of Respondents: 50.

Average Responses per Respondent: 5 per year.

Number of Responses: 250.

Average per-Response Burden: 45 minutes.

Total Burden: 188 hours.

5. OMB Control No. 1513–0069

Title: Tobacco Products Manufacturers—Supporting Records for Removals for the Use of the United States.

Abstract: While tobacco products and cigarette papers and tubes made in the United States are generally subject to Federal excise under the IRC at 26 U.S.C. 5701, the IRC also provides at 26 U.S.C. 5704(b) that manufacturers may remove tobacco products and cigarette papers and tubes without payment of that tax ''for use of the United States''

under regulations issued by the Secretary. As such, the TTB regulations at 27 CFR 45.51 require manufacturers removing such articles for use of the United States to keep records documenting certain information, including the kind and quantity of articles removed or returned and the name and address of the receiving or returning Federal agency. The required records, which may consist of usual and customary commercial records such as invoices, are necessary to ensure that tobacco products and cigarette papers and tubes removed without payment of tax are delivered to a Federal agency for an authorized tax-exempt use.

Current Actions: There are no program changes or adjustments associated with this information collection, and TTB is submitting it for extension purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits.

Number of Respondents: 205.

Average Responses per Respondent: 1 per year.

Number of Responses: 205.

Average per-Response Burden: 1 hour.

Total Burden: 205 hours.

6. OMB Control No. 1513–0073

Title: Manufacturers of Nonbeverage Products—Records to Support Claims for Drawback.

TTB Recordkeeping Number: TTB REC 5530/2.

Abstract: While the IRC at 26 U.S.C. 5001 imposes Federal excise tax on distilled spirits produced or imported into the United States, sections 5111–5114 allow manufacturers of certain ''nonbeverage'' products—medicines, medicinal preparations, food products, flavors, flavoring extracts, or perfume—to claim drawback (refund) of all but $1.00 per proof gallon of the excise tax paid on the distilled spirits contained in or used in the production of such products. Under those IRC authorities, TTB has issued regulations in 27 CFR part 17 governing nonbeverage product drawback claims, which includes requirements to keep source records supporting such claims. The required records, which may consist of usual and customary business records, document the distilled spirits received, taxes paid, date and quantity used, amount of alcohol recovered, other ingredients received and used (to validate formula compliance), quantity of intermediate products transferred to other plants, and the disposition or purchaser of the products. The collected information is necessary to protect the revenue as it helps prevent payment of incorrect or fraudulent claims and the diversion to beverage use of distilled spirits subject to nonbeverage drawback.

Current Actions: There are no program changes associated with this information collection, and TTB is submitting it for extension purposes only. As for adjustments, due to changes in agency estimates, TTB is increasing the estimated number of annual respondents, responses, and burden hours associated with this information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits.

Number of Respondents: 670.

Average Responses per Respondent: 1.

Number of Responses: 670.

Average per-Response Burden: 1 hour.

Total Burden: 670 hours.

7. OMB Control No. 1513–0075

Title: Proprietors or Claimants Exporting Liquors.

TTB Recordkeeping Number: TTB REC 5900/1.

Abstract: Under the IRC at 26 U.S.C. 5053, 5214, and 5362, distilled spirits, wine, and beer may be exported without payment of Federal excise tax. In addition, under the IRC at 26 U.S.C. 5055 and 5062, taxpaid distilled spirits, wine, and beer may be exported and the exporter may claim drawback (refund) on the excise taxes paid. Exporters must complete various TTB and Customs information collections to show that the products were in fact exported. Specific to this information collection, the TTB alcohol export regulations in 27 CFR part 28 require proprietors and drawback claimants to maintain for 3 years record copies of all pertinent forms and commercial records that document the exportation of non-taxpaid alcohol beverages and taxpaid alcohol beverages for which drawback will be claimed. The collected information is necessary to protect the revenue as it allows TTB to verify the exportation of untaxpaid alcohol beverages and taxpaid alcohol beverages on which drawback will be claimed.

Current Actions: There are no program changes or adjustments associated with this information collection, and TTB is submitting it for extension purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits.

Number of Respondents: 750.

Average Responses per Respondent: 1 per year.

Number of Responses: 750.

Average per-Response Burden: 1 hour.

Total Burden: 750 hours.

8. OMB Control No. 1513–0099

Title: Administrative Remedies—Requests for Closing Agreements.

Abstract: The IRC at 26 U.S.C. 7121 authorizes the Secretary to enter into a written agreement with any person, or their agent, relating to the liability of that person for any internal revenue tax for any taxable period. Under that authority, TTB has issued regulations pertaining to such ''closing agreements,'' which require a taxpayer or their agent to submit a written request to TTB to enter into such an agreement to resolve excise tax matters. TTB uses the information collected in the request and any attached supporting documentation to determine whether the Bureau should pursue a closing agreement with the taxpayer. Closing agreements allow TTB and a taxpayer to resolve tax liability matters prior to any adversarial legal or administrative proceedings.

Current Actions: There are no program changes or adjustments associated with this information collection, and TTB is submitting it for extension purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits.

Number of Respondents: 10.

Average Responses per Respondent: 1 (one).

Number of Responses: 10.

Average per-Response Burden: 1 hour.

Total Burden: 10 hours.

9. OMB Control No. 1513–0101

Title: Marks and Notices on Packages of Tobacco Products.

TTB Recordkeeping Number: TTB REC 5210/13.

Abstract: The IRC at 26 U.S.C. 5723(b) requires packages of tobacco products (cigars, cigarettes, smokeless tobacco (snuff and chewing tobacco), pipe tobacco, and roll-your-own tobacco) and cigarette paper or tubes to bear the marks and notices required by regulation. Under that authority, the TTB regulations in 27 CFR parts 40, 41, 44, and 45 require packages or, in certain cases, containers, of domestic and imported tobacco products and cigarette papers and tubes to bear certain marks identifying the product, its producer, place of production, excise tax class, and its quantity or weight, depending on the basis of the tax. The TTB regulations also require certain tax-exemption notices to appear on packages or shipping containers of tobacco products and cigarette papers or tubes intended for export or for use of

the United States as such articles may be removed without tax payment or with benefit of tax drawback. The required marks and notices are necessary to protect the revenue as they identify tobacco-related articles, the applicable Federal excise tax classification, and the responsible taxpayers, and help prevent the diversion of untaxed articles into the domestic market.

Current Actions: There are no program changes associated with this information collection, and TTB is submitting it for extension purposes only. As for adjustments, due to changes in agency estimates, TTB is decreasing the estimated number of annual respondents, responses, and burden hours associated with this information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits.

Number of Respondents: 680.

Average Responses per Respondent: 1 per year.

Number of Responses: 680.

Average per-Response Burden: 1 hour.

Total Burden: 680 hours.

10. OMB Control No. 1513–0121

Title: Labeling of Major Food Allergens and Petitions for Exemption.

Abstract: The FAA Act at 27 U.S.C. 205(e) authorizes the Secretary to issue regulations regarding the labeling of distilled spirits, certain wines, and certain beers in order to, among other things, prohibit consumer deception and ensure that labels provide consumers with adequate information as to the identity and quality of such products. Under that authority, the TTB regulations provide for the voluntary labeling of major food allergens used in the production of alcohol beverages.[1] Under the TTB regulations, if an alcohol beverage bottler declares on the label that any one of these allergens are contained in a product or used in its production, the bottler must declare all such allergens, including those used as fining or processing agents. However, the regulations allow a bottler to petition TTB for a labeling exemption for an allergen if evidence shows that, while used in the product's production, it is not present in the finished product at levels that would pose a risk to human health. This information collection provides a consistent means through which bottlers can alert consumers sensitive to these major food allergens to their presence in finished alcohol beverages.

Current Actions: There are no program changes associated with this information collection, and TTB is submitting it for extension purposes only. As for adjustments, due to changes in agency estimates, TTB is increasing the estimated number of annual respondents, responses, and burden hours associated with this information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits.

Number of Respondents: 40.

Average Responses per Respondent: 5 per year.

Number of Responses: 215.

Average per-Response Burden: 1 hour.

Total Burden: 240 hours.

Authority: 44 U.S.C. 3501 *et seq.*

Melody Braswell,

Treasury PRA Clearance Officer.

[FR Doc. 2024–09133 Filed 4–26–24; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF VETERANS AFFAIRS

Response To Comments for The Department of Veterans Affairs To Assess the Scientific Literature and Claims Data Regarding Certain Medical Conditions Associated With Military Environmental Exposures

AGENCY: Department of Veterans Affairs.

ACTION: Response to comments.

SUMMARY: On July 26, 2023, the Department of Veterans Affairs (VA) published a notice soliciting public comment on its plan to assess the scientific literature and historical claims data regarding certain medical conditions (multiple myeloma, acute leukemias, and chronic leukemias) associated with military environmental exposures. On October 24, 2023, VA published a second notice announcing its intent to host a virtual public listening session on this topic on November 7, 2023. This third notice provides responses to the public comments received during the open comment period and public listening session.

FOR FURTHER INFORMATION CONTACT: Peter Rumm, MD, Director of Policy, Health Outcomes Military Exposures, Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, 202–461–7297. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: VA provided a 30-day comment period, which ended on August 25, 2023. Individuals or organizations submitted 26 comments to this first **Federal Register** Notice (FRN). Participation in the public listening session included 12 comments presented by speakers and 13 comments submitted using the chat feature during the meeting. The Veterans Health Administration's (VHA's) HOME Program Office received and responded to 357 emails from Veterans and made 8 telephone calls to address individual Veterans' potential military environmental exposure concerns for those who were unable to speak during the listening session due to time constraints.

Overall, comments supported VA's plan to assess the scientific literature and historical claims data regarding multiple myeloma, acute leukemias, and chronic leukemia associated with military environmental exposures although some discussed additional concerns. The 26 formal comments received during the 30-day comment period on the first FRN were grouped into 3 main categories, with some comments falling into more than one category:

- *Category 1*—Comments directly related to multiple myeloma, acute leukemias, and chronic leukemia: 18 out of 26 (69%). Notably, of the 18, 17 out of 18 (94%) of these comments expressed support for VA's plan to assess the scientific literature and historical claims data regarding certain medical conditions (multiple myeloma, acute leukemias, and chronic leukemias) associated with military environmental exposures.
  - More comments were received specifically supportive of multiple myeloma versus the leukemias.
  - There was only 1 non-supportive comment out of 18 (under 6%).
- *Category 2*—Comments pertaining to additional locations: 8 out of 26 (31%) comments suggested VA consider presumptions for locations outside Gulf War and southwest Asia locations that are covered by the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics (PACT) Act.
- *Category 3*—Comments pertaining to additional conditions: 7 out of 26 (27%) comments suggested various conditions for future review.

VA thanks the commenters and attendees for their support and comments. To expand upon the comments in more detail, participants suggested that VA include additional conditions (*e.g.,* neurologic conditions, sleep apnea, hypertension, chronic multi-symptom illness, and immune disorders) to be considered for association with exposure from burn pits and other toxic substances (*e.g.,*

benzene, formaldehyde, dioxin, and heavy metals) present on post-9/11 deployments in addition to the PACT Act established categories of presumptive conditions. Other deployments, including burn pits or other toxins in Vietnam (see also below) were mentioned. Commenters also noted a preference for additional locations (*e.g.,* Naval Air Facility Atsugi, Japan, Vietnam, Haiti, Honduras, Panama, and Bosnia) to be considered for toxic exposure, as well as various military bases or garrisons. Finally, some participants expressed a desire for more public input into the VA decision-making process.

Senior VA leadership attended the November 7, 2023, WEBEX virtual public listening session. After Mr. Josh Jacobs, Under Secretary for Benefits (USB), provided opening remarks, Dr. Patricia Hastings, Chief Consultant HOME, delivered a presentation on the revised presumptive decision process. Twelve representatives from Veterans Service Organizations, academia, and the Veteran community expressed their views and comments during the session. In addition to the 12 speakers, the chat feature within WEBEX recorded an additional 13 comments. Dr. Shereef Elnahal, Under Secretary for Health (USH), provided closing remarks and emphasized VA and Congress' interest in responding to the public's instructive and important comments. USB Jacobs and USH Elnahal expressed appreciation for the public's participation in this process.

The listening session allowed VA to be proactive in its approach to improve care, treatment, and benefits for toxic-exposed Veterans, and consider areas of public interest regarding current or planned research of potential presumptive conditions. During the listening session, most comments fell into the additional location and conditions categories. Several comments supported future study and potential recognition of sleep apnea as a presumptive condition. Listeners were assured that additional locations and conditions are continuously monitored and may be presented for a formal review in the future. HOME and Veterans Benefits Administration (VBA) Military Exposures Team staff members communicated with participants who raised specific questions during the session.

VBA's compensation disability evaluation and rating system is complex, as is the arena of military environmental exposures. Some comments indicated misunderstandings of the VA's benefits system and decision-making process. Additional evidence of misunderstandings regarding VHA in areas such as the impact of vaccines and chemical exposures were also expressed. To limit misunderstanding, VBA and VHA are expanding outreach efforts each year to enhance understanding of Veteran health and benefits systems.

Moving Forward

VA continues to review and assess information about military environmental exposure incidents, emerging scientific evidence regarding toxic substances, and health outcomes in deployed and non-deployed cohorts. Additionally, active epidemiological surveillance and ongoing monitoring of military exposures in collaboration with the Department of Defense is ongoing. VA's involvement in surveillance, monitoring, and research covers a wide variety of areas. When a scientific review concludes that there is a statistically significant signal or possible association between military environment exposure and health outcomes, this may trigger an investigation that may lead to additional research or may be subject to an FRN and comment process required under section 202 of the PACT Act. Additional notices of this type will be published as VA reviews conditions and their possible association with military environmental exposures to provide health care, services, and benefits to Veterans entitled to them. VA has considered the issues presented by commenters and decided to conduct a scientific review of multiple myeloma and chronic and acute leukemias, taking into account the latest scientific classification schemes for blood cancers and scientific evidence regarding shared etiologies. VA will follow the procedures in 38 U.S.C. 1172–1174 for initiating and conducting assessments and formal evaluations. VA has designated a Technical Working Group (TWG) to assess cases of the toxic exposure of Veterans and their dependents pursuant to 38 U.S.C. 1172(c). The TWG may develop a recommendation for formal evaluation under 38 U.S.C. 1173, pursuant to 38 U.S.C. 1172(d). Once a formal evaluation begins, a recommendation to establish or modify a presumption of service connection must be submitted to the Secretary within 120 days per 38 U.S.C. 1173(d). Within 160 days of receiving the recommendation to establish or modify a presumption of service connection, the Secretary must determine whether a presumption is warranted per 38 U.S.C. 1174(a). This may include commencing rulemaking to establish or modify presumptions for some or all of the conditions formally evaluated and/or publishing notice in the FRN of any determination that establishment or modification of a presumption or presumptions are unwarranted for some or all of the conditions that were subject to the formal evaluation.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved and signed this document on April 17, 2024, 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.

Jeffrey M. Martin,

Assistant Director, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

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34 CFR Part 106
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 106

[Docket ID ED–2021–OCR–0166]

RIN 1870–AA16

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Final rule.

SUMMARY: The U.S. Department of Education (Department) amends the regulations implementing Title IX of the Education Amendments of 1972 (Title IX). The purpose of these amendments is to better align the Title IX regulatory requirements with Title IX's nondiscrimination mandate. These amendments clarify the scope and application of Title IX and the obligations of recipients of Federal financial assistance from the Department, including elementary schools, secondary schools, postsecondary institutions, and other recipients (referred to below as ''recipients'' or ''schools'') to provide an educational environment free from discrimination on the basis of sex, including through responding to incidents of sex discrimination. These final regulations will enable all recipients to meet their obligations to comply with Title IX while providing them with appropriate discretion and flexibility to account for variations in school size, student populations, and administrative structures.

DATES: These final regulations are effective August 1, 2024.

FOR FURTHER INFORMATION CONTACT: Randolph Wills, U.S. Department of Education, 400 Maryland Avenue SW, Fifth Floor, Washington, DC 20202. Telephone: (917) 284–1982. Email: *randolph.wills@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:

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Effective Date

As detailed more extensively below, the Department recognizes the practical necessity of allowing recipients of Federal financial assistance time to plan for implementing these final regulations. Taking into account the need for the time to plan, as well as consideration of public comments about an effective date as explained in the discussion of Effective Date and Retroactivity (Section VII.F), the Department has determined that these final regulations are effective August 1, 2024.

Executive Summary

1. Purpose of This Regulatory Action

Enacted in 1972, Title IX states that ''No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance,'' absent certain exceptions. 20 U.S.C. 1681.[1] The U.S. Department of Education (the ''Department'' or ''we'') has authority to issue rules effectuating this prohibition on sex discrimination consistent with the objectives of the statute. 20 U.S.C. 1682. The history of the Title IX regulations is described in the preamble to the 2020 amendments to the Title IX regulations. 85 FR 30026, 30028 (May 19, 2020) (hereinafter ''the 2020 amendments''); *see also* 87 FR 41390, 41393–95 (July 12, 2022). The 2020 amendments specify how a recipient[2] must respond to sexual harassment, and the preamble to the 2020 amendments acknowledged that the regulations issued under the 2020 amendments represented a partial change from the way the Department had enforced Title IX with respect to recipients' duties to respond to sexual harassment prior to the 2020 amendments. 85 FR 30068.

Based on an extensive review of the 2020 amendments, information including stakeholder feedback received prior to the issuance of the notice of proposed rulemaking (the ''July 2022 NPRM,'' 87 FR 41390 (July 12, 2022)), and consideration of public comments on the July 2022 NPRM, the Department has determined that amendments are required to fully effectuate Title IX's sex discrimination prohibition. Even if these amendments are not strictly required to effectuate the prohibition, the Department has, in the exercise of its discretion, determined that they further Title IX's prohibition on sex discrimination. The Department therefore issues these final regulations to provide greater clarity regarding: the definition of ''sex-based harassment''; the scope of sex discrimination, including recipients' obligations not to discriminate based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity; and recipients' obligations to provide an educational environment free from discrimination on the basis of sex. Additionally, these regulations aim to fulfill Title IX's protection for students, teachers, and other employees in federally funded elementary schools and secondary schools and postsecondary institutions against all forms of sex discrimination, including sex-based harassment and sexual violence. The final regulations will help to ensure that all students receive appropriate support when they experience sex discrimination and that recipients' procedures for investigating and resolving complaints of sex discrimination are fair to all involved. These final regulations also better account for the variety of recipients and education programs or activities covered by Title IX and provide discretion and flexibility for recipients to account for variations in school size, student populations, and administrative structures.

These regulations:

- Require recipients to adopt grievance procedures that provide for fair, prompt, and equitable resolution of complaints of sex discrimination and to take other necessary steps to provide an educational environment free from sex discrimination;
- Clarify that Title IX's prohibition on sex discrimination includes sex-based harassment in the form of quid pro quo harassment, hostile environment harassment, and four specific offenses (sexual assault, dating violence, domestic violence, and stalking); and
- Clarify that sex discrimination includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

2. Summary of the Major Provisions of This Regulatory Action

With regard to sex-based harassment, the final regulations:

- Define ''sex-based harassment'' as a form of sex discrimination that includes sexual harassment and harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity, that is quid pro quo harassment, hostile environment harassment, or one of four specific offenses referenced in the Jeanne Clery Disclosure of Campus Security Policy and Campus Crimes Statistics Act (''Clery Act'') as amended by the Violence Against Women Reauthorization Act of 2013;
- Provide and clarify definitions of various terms related to a recipient's obligations to address sex discrimination, including sex-based harassment;
- Clarify a recipient's required response to sex discrimination, including sex-based harassment, in its education program or activity;

[1] The definition of the term ''Federal financial assistance'' under the Department's Title IX regulations is not limited to monetary assistance, but encompasses various types of in-kind assistance, such as a grant or loan of real or personal property, or provision of the services of Federal personnel. *See* 34 CFR 106.2(g). Throughout this preamble, terms such as ''Federal funding,'' ''Federal funds,'' and ''federally funded'' are used to refer to ''Federal financial assistance,'' and are not meant to limit application of the statute or its implementing regulations to recipients of certain types of Federal financial assistance.

[2] Throughout this preamble, ''recipient'' is used to refer to a recipient of Federal financial assistance from the Department.

• Strengthen a recipient's obligations to provide prompt and equitable grievance procedures and to take other necessary steps when it receives a complaint of sex discrimination, including sex-based harassment; and

• Provide for additional requirements in grievance procedures at postsecondary institutions for complaints of sex-based harassment involving a student complainant (a student who is alleged to have been subjected to conduct that could constitute sex discrimination) or student respondent (a student who is alleged to have violated the recipient's prohibition on sex discrimination).

With regard to discrimination against individuals who are pregnant or parenting, the final regulations:

• Define the terms ''pregnancy or related conditions'' and ''parental status'';

• Clarify the prohibition on discrimination against students and applicants for admission and employees or applicants for employment on the basis of current, potential, or past pregnancy or related conditions; and

• Clarify a recipient's obligations to students and employees who are pregnant or experiencing pregnancy-related conditions.

In addition, the final regulations:

• Clarify and streamline administrative requirements with respect to designating a Title IX Coordinator, disseminating a nondiscrimination notice, adopting grievance procedures, and maintaining records;

• Specify that a recipient must train a range of relevant persons on the recipient's obligations under Title IX;

• Clarify that, except as permitted by certain provisions of Title IX or the regulations, a recipient must not carry out any otherwise permissible different treatment or separation on the basis of sex in a way that would cause more than de minimis harm, including by adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity; and

• Clarify a recipient's obligation to address retaliation.

Timing, Comments, and Changes

On July 12, 2022, the Department published the July 2022 NPRM in the **Federal Register** to amend regulations implementing Title IX. 87 FR 41390.

The Department invited the public to comment on all aspects of the proposed regulations, as well as the *Regulatory Impact Analysis.* The July 2022 NPRM also included several directed questions. 87 FR 41544. Comments in response to directed questions are addressed in this preamble in connection with the relevant regulatory section.

In response to our invitation in the July 2022 NPRM, we received more than 240,000 comments on the proposed regulations. The final regulations contain changes from the July 2022 NPRM, and these changes are fully explained throughout the discussion in this preamble. We discuss substantive issues raised in the comments under topical headings, and by the sections of the final regulations to which they pertain, including an analysis of the public comments and changes in the final regulations since the publication of the July 2022 NPRM. Generally, we do not address technical and other minor changes (such as renumbering paragraphs, adding a word, or typographical errors).

Throughout this preamble, the Department refers to Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688, 1689, as amended, as ''Title IX,'' to the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.,* as the ''IDEA,'' to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.,* as ''Section 504,'' to the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.,* as the ''ADA,'' to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.,* as ''Title VI,'' to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.,* as ''Title VII,'' to section 444 of the General Education Provisions Act (GEPA), 20 U.S.C. 1232g, which is commonly referred to as the Family Educational Rights and Privacy Act of 1974, as ''FERPA,'' to the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. 1320d *et seq.,* as ''HIPAA,'' to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. 1092(f), as the ''Clery Act,'' to the Violence Against Women Reauthorization Act of 2013, Public Law 113–4 (codified as amended throughout the U.S. code), as ''VAWA 2013,'' and to the Violence Against Women Act Reauthorization Act of 2022, Public Law 117–103 (codified as amended throughout the U.S. Code), as ''VAWA 2022.'' In 2013, the Clery Act was amended by VAWA 2013. *See* Public Law 113–4. In 2014, the Department amended the Clery Act regulations at 34 CFR 668.46 to implement the statutory changes to the Clery Act made by VAWA 2013. *See* 79 FR 62752 (Oct. 20, 2014). The regulations took effect on July 1, 2015. Throughout this preamble, references to the Clery Act mean the Clery Act as amended by VAWA 2013.

These final regulations interpret the Title IX statute consistent with the Department's authority under 20 U.S.C. 1682. Throughout the preamble, we refer to ''this part,'' meaning 34 CFR part 106. These regulations' prohibitions on sex discrimination are coextensive with the statute, and any use of ''and this part'' or ''or this part'' should be construed consistent with the fact that the final regulations interpret the statute. The Department has revised the regulatory text to clarify, as appropriate.

Throughout the preamble, the Department references statistics, data, research, and studies that commenters provided in response to the July 2022 NPRM. The Department's reference to these items, however, does not necessarily speak to their accuracy. The preamble also breaks up its discussion in several places as ''Comments,'' ''Discussion,'' and ''Changes.'' This structure is for readability, and the omission of a reference to a comment in the ''Comments'' section does not mean that a significant, relevant comment is not addressed in the ''Discussion'' section.

The final regulations define and apply the terms ''party,'' ''complainant,'' and ''respondent.'' In this preamble, ''complainant'' generally means a person who is alleged to have been subjected to conduct that could constitute sex discrimination, ''respondent'' means a person who is alleged to have violated the recipient's prohibition on sex discrimination, and ''party'' means a complainant or a respondent. *See* § 106.2. References in this preamble to a party, complainant, respondent, or other individual with respect to exercise of rights under Title IX should be understood to include situations in which a parent, guardian, or other authorized legal representative exercises a legal right to act on behalf of the individual. *See* § 106.6(g).

Many commenters referenced the impact of sex discrimination or the proposed regulations on individuals who belong to, or identify with, certain demographic groups, and used a variety of acronyms and phrases to describe such individuals. For consistency, throughout this preamble we generally use the term ''LGBTQI+'' to refer to people who are lesbian, gay, bisexual, transgender, queer, questioning, asexual, intersex, nonbinary, or describe their sex characteristics, sexual orientation, or gender identity in another similar way. When referring to some outside resources or past Department of Education, Office for Civil Rights (OCR) guidance documents,

this preamble also uses variations of the LGBTQI+ acronym to track the content of those documents, as appropriate.

In response to commenters who asked for clarification as to whether the definitions in § 106.2 apply to a term in a specific regulatory provision, some of the regulatory provisions specifically refer to a term ''as defined in § 106.2'' to provide additional clarity. Notwithstanding these points of additional clarification in certain regulatory provisions, the definitions in § 106.2 apply to the entirety of 34 CFR part 106. For consistency, references in this preamble are to the provisions as numbered in the final, and not the proposed, regulations. Citations to ''34 CFR 106.'' are citations to the Department's preexisting regulations and not these final regulations.

Analysis of Comments and Changes

An analysis of the public comments and changes in the final regulations since the publication of the July 2022 NPRM follows.

I. Provisions of General Applicability

A. Personal Stories

Numerous commenters shared personal stories with the Department. These comments have been organized into three categories, and the discussion of all of these comments follows.

1. Experiences Relating to Title IX Grievance Procedures

Comments: Numerous commenters shared with the Department experiences they have had as complainants or respondents, people supporting complainants or respondents, or persons or institutions involved in Title IX grievance procedures.

Relating to complainants, such personal experiences included the following:

- A wide variety of people from many backgrounds and identities shared their stories as individuals who experienced sexual harassment and assault, whether or not the incident became the subject of a Title IX complaint. A number of personal stories generally recounted sexual harassment and assault incidents impacting undergraduate and graduate students and university faculty at public and private postsecondary institutions.
- Other commenters shared stories as individuals who knew complainants and witnessed the sexual harassment and assault, its aftermath, and the Title IX grievance procedures. These commenters included family members, friends and peers of the complainants, student advocates, faculty and administrators, and individuals participating in the Title IX grievance procedures.
- Commenters described sexual harassment and assault by a wide variety of individuals. These included classmates, professors and faculty, student athletes, intimate partners and ex-partners, friends, and stalkers.
- Commenters described sexual harassment and assault, their decision to engage with the Title IX grievance procedures, and their experience with sexual harassment and assault from prior to and after Title IX was enacted, prior to and after the U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter: Sexual Violence (Apr. 4, 2011) (rescinded in 2017) (2011 Dear Colleague Letter on Sexual Violence); U.S. Dep't of Educ., Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014) (rescinded in 2017) (2014 Q&A on Sexual Violence), *https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf;* and U.S. Dep't of Educ., Office for Civil Rights, Questions and Answers on Campus Sexual Misconduct (Sept. 2017) (rescinded in 2020) (2017 Q&A on Campus Sexual Misconduct), and prior to and after the 2020 amendments, *https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.*
- The Department received comments from individuals who described a range of traumatic incidents, including inappropriate and harassing behaviors, unwanted touching, stalking, incidents of rape or attempted rape, and longer-term emotionally and sexually coercive or intimidating interactions.
- The Department received comments from individuals who did not report their experiences for various reasons, including because they feared that no one would believe them, did not know whom to report to or the process for reporting, felt frustrated by a lack of response, or did not want to relive the experience.
- The Department received comments from individuals about the many detrimental effects that sexual harassment and assault can have on complainants. Individuals described the physical, emotional, and mental impacts of sexual harassment and assault, including feeling afraid to attend their postsecondary institution and suffering mental health symptoms such as post-traumatic stress disorder (PTSD) and suicidality. Individuals also described the educational impacts of sexual harassment and assault, including the inability to complete class assignments, dropping classes, changing majors or leaving areas of study, transferring schools, or leaving school altogether.
- The Department received comments from complainants who, following the Title IX grievance procedures, felt that recipients did not hold respondents accountable, or who were reprimanded or faced repercussions for openly discussing their experiences and naming the respondents.
- The Department also received stories from individuals about the dynamics of sexual assault and harassment in which individuals in positions of authority, including professors, faculty, or staff, repeatedly harassed or assaulted individuals, sometimes with the recipient's knowledge, and without meaningful action by the recipient to prevent continued abuse or conduct investigations into wrongdoing.
- The Department received numerous comments from complainants who shared their views that the current Title IX system and its implementation by recipients is not protecting individuals from sexual harassment and assault or delivering justice for complainants and is instead perpetuating the harm. Commenters shared that they: had been failed by the system by being forced to relive their trauma through the Title IX grievance procedures, while being offered few protections; had faced a lack of resources for student complainants; and had encountered widespread systemic shortcomings and institutional negligence. Commenters stated that, in their experience, the Title IX grievance procedures put complainants in danger, disrupted their education, and allowed recipients to ignore their concerns, rather than work with complainants to address campus safety issues.
- The Department received comments from complainants about the importance of Title IX in investigating complaints of sexual assault and providing relief that may not be available in the criminal justice system, but who said the 2020 amendments failed them. Some commenters shared that the 2020 amendments fail to protect complainants because they require cross-examination for postsecondary institutions, the process can be very lengthy, and other factors, such as the definition of sexual harassment, make it harder for complainants to come forward. Other commenters shared that the Title IX grievance procedures allow for separately tracked investigations into the same individual, without complainants' knowledge, making it more difficult to show an individual's pattern of misconduct.
- The Department also received comments from complainants specific to how their schools handled the Title IX grievance procedures. Complainants

shared their experiences on interactions with Title IX offices that, they felt, were mismanaged, left them feeling alienated and silenced, and further harmed their ability to access their educational opportunities. The Department received comments about Title IX offices that did not inform complainants about available resources, interviewed complainants in an inappropriate manner, and pushed complainants toward informal resolutions, despite their stated wish to pursue a formal hearing. Some commenters shared that student and staff efforts to improve the Title IX grievance procedures on campus and enhance complainant resources were rebuffed by administrators. Some commenters shared that because of their school's handling of their Title IX investigation, they no longer felt safe or welcome in higher education and had either dropped out of college or changed their plans for graduate education or careers in academia.

- The Department received comments from complainants from student populations who already face challenges to their education, or face discrimination on campus, and about the specific burdens faced by those populations. Commenters who experience certain mental illnesses shared their particular susceptibility to coercive behaviors by their assailants, both during and after their assaults, and how their existing medical conditions made it harder both to be taken seriously by investigators and to recover enough to successfully engage in their educational experience. Other commenters, complainants who identify as LGBTQI+, shared that their Title IX investigators and school administrators did not take their complaints seriously and that the entire experience made them want to leave school.

Relating to respondents, commenters reported personal experiences that included the following:

- A variety of people shared their stories as respondents. Commenters included respondents who were postsecondary institution faculty and students, as well as friends, acquaintances, and family of respondents. The personal stories recounted the impact of Title IX investigations on the respondents when they were undergraduate and graduate students and university faculty at public and private postsecondary institutions.
- Other commenters shared the negative consequences that an allegation of sexual harassment and assault can have on respondents, whether or not they are formally disciplined or found responsible at the conclusion of the grievance procedures. Commenters shared how such allegations can negatively impact someone's life, leave them with mental anguish and a tarnished record, and negatively impact their educational future and career opportunities.
- The Department received some comments from individuals who expressed concern that the Title IX grievance procedures were generally unfair to respondents. Some commenters were concerned that investigators in certain Title IX investigations presume that the respondent was guilty, no matter the evidence.
- The Department also received comments from individuals who expressed concern that the Title IX grievance procedures allow for false accusations. Some commenters shared that they knew multiple respondents who were involved in situations in which the complainants had originally initiated physical intimacy to start a relationship and only brought complaints when that did not materialize. Others expressed their views that complainants sometimes do not tell the truth and make up accusations to resolve personal disputes. Others expressed frustration that what they viewed as normal sexual exploration was being misconstrued as sexual assault.
- The Department received comments from respondents who were forced to leave postsecondary institution faculty positions as part of settlements for investigations that they felt were unfair and based on misconstrued or fabricated facts. Commenters who were respondents said they felt coerced into signing settlement agreements because they did not have the emotional or financial capability to continue to defend themselves.

2. Experiences Relating to Pregnancy

Comments: Several commenters shared with the Department experiences they have had with respect to pregnancy.

Some commenters shared stories of students who experienced discrimination based on pregnancy or related conditions and lactation. One commenter shared the experience of someone who was excluded from school activities due to pregnancy and was required to attend a different school farther away, without transportation. The commenter noted that if the proposed regulations had been in place, the student would have understood her rights and more could have been done to protect her right to continue her education at the original school. One commenter mentioned a student who considered quitting school due to lack of an appropriate lactation space. The commenter referred to another student whose school denied lactation breaks entirely, causing the student to lose her milk supply. Another commenter shared a personal experience supporting a high school student whose academic honors designation was revoked because of rumors that she terminated a pregnancy. Some commenters stated that they were never informed of their rights as pregnant and parenting students under Title IX, including available supports for the healthcare needs of pregnant women. Some commenters described experiences of pregnancy-based harassment, noting that students who become pregnant are often subjected to unwanted sexual attention, shame, and even punishment. Other commenters supported strengthened protection for pregnant employees, sharing experiences of their own, or of friends or co-workers who experienced employment problems, such as a termination of employment due to difficulties related to pregnancy.

3. Experiences Relating to Sexual Orientation and Gender Identity

Comments: The Department received numerous comments in support of and in opposition to the July 2022 NPRM's clarification of the application of Title IX's prohibition on sex discrimination to discrimination based on sexual orientation and gender identity.

In support of the clarification that Title IX prohibits discrimination based on sexual orientation and gender identity, commenters shared personal experiences including the following:

- Commenters from more than 40 States in all regions of the United States and in communities across the political spectrum shared their experiences as members of the LGBTQI+ community, or as parents, teachers, and friends of LGBTQI+ individuals. They described bullying and harassment of students based on sexual orientation and gender identity that ranged from single interactions with peers to systemic concerns such as constant verbal harassment, bullying, and threats of physical violence that are often ignored or excused by recipients from early elementary school through graduate school.
  - Some parents expressed concern that recipients do not understand the importance of a safe educational environment. Other parents expressed gratitude for the life-changing impact schools that prevent and meaningfully address incidents of harassment and bullying have on LGBTQI+ students.

○ Teachers shared their experiences supporting LGBTQI+ students in educational environments that do not support or encourage all students, which they stated impacts the ability of LGBTQI+ students to thrive and academically succeed.

○ School counselors shared their experiences providing academic and mental health supports to LGBTQI+ students being bullied or experiencing harassment and discrimination. Counselors stressed that supportive adults and educational environments can save LGBTQI+ students' lives.

• LGBTQI+ students and their parents and teachers shared that harassment, bullying, and threats of physical violence leave students in constant fear, cause social anxiety and stress disorders, and too frequently result in suicidality. Some students who identify as LGBTQI+ and as part of a racial or ethnic minority group or as a student with a disability discussed feeling pressure to hide their identity, which led them to avoid reporting harassment or discrimination that occurs at school.

• A number of commenters living in districts or States where local government has discussed or enacted bills that limit the rights of LGBTQI+ people, shared how these actions negatively impact the mental well-being and academic experience of LGBTQI+ students.

• Many commenters shared experiences unique to nonbinary and transgender students.

○ Commenters who identified as nonbinary or transgender shared their experiences being threatened and physically attacked and explained the lasting anxiety and fear that those experiences cause in addition to the significant impact such experiences have on their ability to engage academically.

○ Transgender students shared being forced to use school facilities that do not align with their gender identity, feeling unsafe using the facilities, or not having access to gender neutral facilities.

○ Commenters asserted that a safe educational environment for nonbinary and transgender students is a matter of life or death. Many transgender students shared that they or their friends had attempted suicide because of the discrimination and harassment they had experienced.

○ Transgender students in school districts that they viewed as supportive shared the positive impact such schools have on their social, emotional, and academic well-being.

In opposition to clarification that Title IX prohibits discrimination based on sexual orientation and gender identity, commenters described personal experiences including the following:

• Many commenters asked that Title IX focus only on ensuring cisgender girls and women have equal access to education.

○ Two grandmothers shared their memories of being forced to fundraise for basic sports equipment and being told not to pursue certain careers because they were girls.

○ Another grandmother who worked with pregnant and parenting teens shared her experience witnessing these students face significant obstacles and prejudices. Both she and a minister who has worked with women who have experienced sex discrimination, including sexual assault, expressed concern that the proposed regulations would, in their view, harm many cisgender women and their futures.

○ Some commenters worried that the proposed regulations would negatively impact the developmental progress of their children.

• Some commenters expressed concern that the proposed regulations would negatively impact parents and families.

○ Commenters, including grandparents and parents, shared their families' experiences with different educational environments, and expressed general concern that the proposed regulations would, in their view, interfere in the personal lives of families.

○ Other commenters expressed concern that the proposed regulations would diminish the role of parents in helping children make decisions.

• Some commenters expressed concern that cisgender students experience discomfort at school when they are required to participate in activities and share facilities with transgender students.

Discussion: The Department appreciates the time and effort spent by commenters who shared their personal experiences. The Department thoughtfully and respectfully considered all of the personal experiences, including of the many individuals who: have experienced sex-based harassment and been complainants in Title IX grievance procedures; have been respondents in Title IX grievance procedures; have looked to their elementary schools, secondary schools, and postsecondary institutions for support following sex-based harassment and for prompt and equitable grievance procedures that are fair to all involved; have experienced pregnancy or related conditions; have worked with a parenting student; have experienced discrimination based on sexual orientation and gender identity; have a variety of viewpoints regarding sexual orientation and gender identity; and have supported or witnessed other individuals having such personal experiences.

Many of the stories shared in the comments echo and expand upon themes that the Department heard through the June 2021 nationwide virtual public hearing on Title IX (June 2021 Title IX Public Hearing) and in listening sessions and stakeholder meetings held in 2021 and 2022. As the Department explained in the July 2022 NPRM, the overarching goal of the proposed regulations was to ensure that no person experiences sex discrimination in education programs or activities that receive Federal financial assistance. *See* 87 FR 41396. The Department prepared the July 2022 NPRM with that goal in mind to assist recipients in implementing Title IX's nondiscrimination mandate fully and fairly in their educational environments, including with procedures for responding to complaints of sex discrimination that are prompt and equitable for all participants. *See id.* As a result of the robust public comment process, including from individuals personally affected by these issues, these final regulations even better reflect this goal.

Changes: Specific changes made to the proposed regulations are described in the applicable sections of this preamble.

B. Purpose

1. Section 106.1 Purpose

Comments: One commenter expressed general support for proposed § 106.1. Another commenter asked the Department to consider removing ''(with certain exceptions)'' from proposed § 106.1 to more forcefully state the purpose of Title IX. Another commenter urged the Department not to remove ''of the Education Amendments of 1972'' from current § 106.1 because there are other Federal laws named ''Title IX.''

Another commenter objected to the language in proposed § 106.1 that states ''whether or not such program or activity is offered or sponsored by an educational institution as defined in this part,'' arguing that this would cover conduct outside of the educational context and exceed the scope of Title IX.

Discussion: The Department declines the commenter's suggestion to remove the reference to Title IX's exceptions from § 106.1 because those exceptions are an important component of the statute. *See* 20 U.S.C. 1681(a)(1)–(9). The Department also declines the

commenter's suggestion to use Title IX's full name in this section. The term ''Title IX'' is defined in § 106.2 to include the original statute and subsequent amendments, which are also relevant to Title IX's purpose. Further, the risk is low that the public will confuse a reference to ''Title IX'' in the Department's Title IX regulations with another Federal law.

The Department disagrees with the commenter who objected to language in § 106.1 recognizing that Title IX applies to recipients other than educational institutions. This language has been in the purpose section of the regulations since the regulations were first issued in 1975 and reflects the fact that recipients that are not educational institutions (*e.g.,* libraries, hospitals) also offer education programs and activities, and those education programs and activities are covered by Title IX. *See* 20 U.S.C. 1681(a) (providing that Title IX's prohibition on sex discrimination applies to ''any education program or activity receiving Federal financial assistance''); 20 U.S.C. 1687 (defining ''program or activity'' to include ''a department, agency, special purpose district, or other instrumentality of a State or a local government''); *see also* U.S. Dep't of Health, Educ., & Welfare, Final Rule: Nondiscrimination on the Basis of Sex In Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 FR 24128, 24137 (June 4, 1975).

Changes: None.

C. Definitions [3]

1. Section 106.2 Definition of ''Administrative Law Judge''

Comments: Commenters generally supported the proposed definition of ''administrative law judge'' and said it would aid in consistent and effective enforcement of Title IX. One commenter interpreted the proposed definition of ''administrative law judge'' to mean that a hearing is required as part of a recipient's grievance procedures under the proposed regulations.

Discussion: The Department acknowledges commenters' support for the Department's proposed definition of ''administrative law judge.'' The Department believes one commenter may have misunderstood the definition as requiring a hearing for all Title IX grievance procedures. As explained in the July 2022 NPRM, this revised definition of ''administrative law judge'' specifically refers and applies to a hearing held under § 106.81, which pertains to the Department's efforts to secure a recipient's compliance with Title IX. *See* 87 FR 41399. A hearing under § 106.81 is distinct from a hearing that may be conducted as part of a recipient's Title IX grievance procedures under §§ 106.45 or 106.46, neither of which requires a live hearing or participation of an administrative law judge.

Changes: None.

2. Section 106.2 Definition of ''Complainant''

General Support

Comments: Commenters expressed a range of perspectives and varied reasons for supporting the proposed regulations' broadened definition of ''complainant,'' which would permit a complaint by someone who is not currently a student or employee as long as that person was participating or attempting to participate in a recipient's education program or activity at the time of the alleged discrimination. Some commenters said that the restrictions of the 2020 amendments, requiring a complainant to be participating or attempting to participate in the recipient's education program or activity at the time of filing a complaint rather than at the time of the alleged discrimination, made it more difficult for recipients to investigate, address, and stop sexual harassment, and forced recipients to dismiss Title IX complaints brought by prospective students, former students, and former employees who experienced sexual harassment under the recipient's education program or activity.

Commenters said there is no reason to exclude people from the protection of Title IX just because they left the school where the discrimination allegedly occurred. Commenters noted a variety of reasons that cause students to leave a school before filing a complaint, including to get mental or emotional support, to regain a sense of control, for fear of potential retaliation, for fear of losing support or recommendations from academic advisors, or simply because outside circumstances lead students to move in and out of educational programs over time. Commenters stated that allowing former students to make a complaint will encourage more reporting, prevent or deter future misconduct, and allow students to obtain closure and resolution and even return to school if the complaint is resolved. Commenters also asserted that the proposed definition would fill gaps left by the 2020 amendments and ensure schools are held accountable for their responses to sexual harassment. Some commenters appreciated that the proposed definition of ''complainant'' did not include the term ''victim,'' noting that omitting stigmatizing and harmful words from the regulations will promote reporting.

One commenter said that delayed reporting is so common in sexual assault and other gender-based violence cases that the requirement to dismiss complaints from former students has prevented recipients from addressing conduct that could affect the campus environment. One commenter said that survivors need to feel validated and cited research finding that 59 percent of survivors wait to disclose, and usually disclose after first talking with family or friends. Commenters relied on multiple news stories, studies, and court decisions to illustrate that sexual harassment can cause individuals to drop out of school or transfer, and that the ability to address alleged harassment is important, both for the individuals who experience harassment and to prevent broader harm.

Several commenters generally supported the proposed definition of ''complainant,'' but suggested additional clarification or modification. One group of commenters supported the right of persons to make a complaint as long as they were participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination, but requested that the Department provide guidance and clarification regarding how a recipient should proceed in such cases, particularly because the Department proposed eliminating § 106.45(b)(3)(ii) of the 2020 amendments, which allows for the dismissal of a complaint when ''specific circumstances'' prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. Another commenter recommended that the Department add language making it clear that postdoctoral trainees, fellows, and all other individuals training under recipient institutions can be complainants, whether as a student or an employee.

One commenter suggested that the Department make this provision retroactive to the extent possible because students who leave their schools prior to the effective date of these revised regulations should have a grace period to make a Title IX complaint under the new regulations.

[3] Section I.C, ''Definitions,'' and Section I.D, ''Other Definitions,'' do not address all the definitions in the final regulations because certain definitions are discussed in other sections. For example, the definition of ''confidential employee'' is discussed in Section II.B as part of a broader discussion of confidential employee requirements that includes discussion of § 106.44(d).

Discussion: With respect to a complaint brought by a former student or employee who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination, the recipient should proceed just as it would with all other complaints under the recipient's grievance procedures in accordance with § 106.45, and if applicable § 106.46. If, at the time the complaint is filed, however, the respondent is no longer participating in the recipient's education program or activity or is no longer employed by the recipient, the complaint may be dismissed under § 106.45(d)(1)(ii). As explained in the July 2022 NPRM, the Department proposed to remove § 106.45(b)(3)(ii) because the term ''specific circumstances'' under which complaints could be dismissed was vague and undefined, and the Department determined that it would be preferable to revise the dismissal standard to instead include several defined bases for discretionary dismissal. 87 FR 41478.

The Department declines to specify in the final regulations that a postdoctoral trainee or fellow may be a complainant. We note, however, that such an individual could fall into the definition of complainant as a student, employee, or other individual participating or attempting to participate in the recipient's education program or activity, particularly if—as the commenter suggests—they are training under a recipient postsecondary institution at the time of the alleged sex discrimination.

While the Department understands commenters' desire to ensure that former students who were subjected to sex discrimination prior to the effective date of these regulations can still pursue a complaint, the Department does not intend the final regulations to be enforced retroactively, as stated in the July 2022 NPRM. 87 FR 41398. Under Federal law, agencies may only issue regulations with retroactive effect if the authorizing statute expressly grants such authority. *See* 5 U.S.C. 551(4) (Administrative Procedure Act provision defining a ''rule'' as an agency action with ''future effect''); *see also Bowen* v. *Georgetown Univ. Hosp.,* 488 U.S. 204, 208 (1988) (''[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.''). Title IX contains no such express grant of authority. For more information about retroactivity, see the discussion of Effective Date and Retroactivity (Section VII.F).

Changes: At the end of paragraph (1) of the definition of ''complainant,'' after ''Title IX,'' the Department added the words ''or this part'' for the reasons discussed in the Background/Introduction, Executive Summary section of this preamble. For the same reasons, the Department also added ''or this part'' after the reference to Title IX in paragraph (2). The Department also has made a minor technical edit by replacing ''when the alleged sex discrimination occurred'' with ''at the time of the alleged sex discrimination'' in final § 106.45 (a)(2)(iv)(B).

General Opposition

Comments: Some commenters expressed general opposition to the definition of ''complainant'' in § 106.2, including on the grounds that it exceeds the Department's authority or does not align with Title IX and case law.

Some commenters asserted that the proposed definition of ''complainant'' was too broad, including because it applies to all sex discrimination and not just sexual harassment; because former students and employees allegedly do not face barriers to education and thus fall outside the scope of Title IX; and because including such individuals allegedly would allow them to make a complaint decades after leaving the institution, including opportunistic complaints about conduct that was not prohibited at the time it occurred. Commenters asserted that a lack of time limits for complainants would be burdensome for recipients, parties, and witnesses, result in complaints that are difficult to investigate, and likely lead to a waste of resources, abusive practices, and unfair or unsatisfactory outcomes that do not further Title IX's goal of addressing sexual harassment in education programs and activities, due in part to limitations on remedies a university can impose after a student is no longer enrolled. Some commenters questioned whether volunteers who experience sex discrimination would be able to bring a complaint subject to the grievance procedures and suggested that may inhibit the ability to recruit volunteers.

Some commenters anticipated that the volume of Title IX complaints would increase because of the proposed definition of ''complainant'' together with other proposed changes, such as the inclusion of discrimination based on gender identity as a form of sex discrimination, the allowance of allegations that involve off-campus conduct, the removal of the actual knowledge standard, and the requirement that a recipient's employees report allegations to the Title IX Coordinator even when there is no complainant or the individual who experiences sex discrimination does not wish to report it. One commenter suggested that if the Department is no longer going to require a complainant to be engaged in the education program or activity at the time the complaint is filed, it should make that requirement apply only prospectively.

Discussion: As the Supreme Court has recognized, the Department has regulatory authority under Title IX to issue regulations that the Department determines will best effectuate the purpose of Title IX, and to require recipients to take administrative action to effectuate the nondiscrimination mandate of Title IX. *Gebser* v. *Lago Vista Indep. Sch. Dist.,* 524 U.S. 274, 292 (1998). The Department disagrees that the definition of ''complainant'' is too broad. As the Department explained in the July 2022 NPRM, it is appropriate to apply the same definition of ''complainant'' to all forms of sex discrimination, not just sex-based harassment. 87 FR 41407–08. These final regulations are intended to effectuate the purpose of Title IX, which is to eliminate any ''discrimination on the basis of sex in any education program or activity receiving Federal financial assistance''—not just sex-based harassment. 34 CFR 106.1; 20 U.S.C. 1681(a); *see also* 87 FR 41393. Accordingly, consistent with the longstanding requirement that a recipient must have grievance procedures that provide for the ''prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by'' the Title IX regulations, 40 FR 24128, the final regulations also require a recipient to adopt grievance procedures that provide for the prompt and equitable resolution of all complaints of sex discrimination, not just sexual harassment, and to take other necessary steps to provide an educational environment free from sex discrimination, *see* 87 FR 41390. This requirement will help recipients fully and fairly implement Title IX's nondiscrimination mandate in their education programs or activities and is within the Department's authority to ensure compliance with the law.

The Department does not agree with commenters' contention that former students or employees fall outside the scope of Title IX because they no longer face barriers to participation in the recipient's education program or activity. Title IX protects all ''person[s]'' from sex discrimination, 20 U.S.C.

1681(a)(1), and the relief it affords is not limited to persons who are presently experiencing sex discrimination as long as the discrimination they allegedly experienced was within the scope of the statute's protections at the time it occurred. This means that former students and employees may seek relief under Title IX if they were previously ''excluded from participation in,'' ''denied the benefits of,'' or ''subjected to discrimination under any education program or activity receiving Federal financial assistance.''

Title IX also protects students, employees, and others who continue participating in the education program or activity from sex discrimination that may persist or may be remedied after the specific complainant no longer participates. Limiting a recipient's responsibility to address sex discrimination to those circumstances in which a complainant continues participating in the program or activity fails to ensure that others who continue to participate benefit from the nondiscrimination guarantee in Title IX. As other commenters noted, the revised definition of ''complainant'' could increase the reporting of sex discrimination because individuals struggle with the decision whether to report an incident at the time it happens or while they are still a student or employee, and the Department maintains that encouraging reporting is an important factor in ensuring that recipients can meet their Title IX nondiscrimination obligations. This definition of ''complainant'' is well within the scope of Title IX because it will help to ensure that a recipient operates its education program or activity free from sex discrimination.

The Department recognizes commenters' concerns that the definition of complainant together with other aspects of the final regulations, including new § 106.10 and changes to §§ 106.11 and 106.44, will likely result in an increase in Title IX complaints for some recipients and possible additional administrative costs for some recipients. However, it is the Department's position that ensuring a recipient fully addresses all sex discrimination occurring under its education program or activity, consistent with Title IX, is not optional, is of paramount importance, and properly accounts for financial costs to a recipient and for pecuniary and non-pecuniary costs to students who experience sex discrimination in a recipient's education program or activity. For more discussion of the Department's evaluation of the costs and burdens of the final regulations, see the *Regulatory Impact Analysis.*

The Department has carefully considered the commenters' concerns and disagrees that the change in the definition of ''complainant'' will invite new complaints decades after a student or employee has left a recipient institution alleging conduct that was not prohibited at the time it occurred. As stated in the July 2022 NPRM and in the discussion of Effective Date and Retroactivity (Section VII.F), the Department intends the final regulations to be enforced prospectively and not retroactively. 87 FR 41398. Therefore, if an individual who left a recipient institution makes a complaint requesting compliance solely with regulatory requirements that were not in effect at the time of the alleged conduct, the recipient would dismiss the complaint. Independently, a recipient may dismiss a complaint under § 106.45(d)(1)(ii) if the respondent is not participating in the education program or activity and is not employed by the recipient, or under § 106.45(d)(iv) if the allegations, even if proven, would not constitute sex discrimination under Title IX or this part.

For the reasons discussed here and above in the section on the Definition of Complainant: General Support, the Department also has determined that the benefits of allowing complaints by former students and employees who were subjected to sex discrimination while participating or attempting to participate in a recipient's education program or activity justifies the potential risk and investigative challenges of a complaint filed after someone leaves a recipient institution. As noted above, commenters reported that sex-based harassment can cause targeted students to drop out of school or transfer schools to get away from the discriminatory environment or remove themselves from a harmful or threatening situation; others may fear retaliation and thus not feel comfortable making a complaint until after they leave the institution. Commenters also noted that an employee who experiences harassment may leave their job or fear retaliation and refrain from reporting the harassment until they have taken a new job. Under such circumstances, it is important for the recipient to fulfill its Title IX obligations: to ensure that students and employees who want to return can do so free from sex discrimination; to prevent further harm and to ensure that a hostile environment does not persist for the remaining members of the school's community; and to investigate and properly address allegations of sex discrimination in its education program or activity.

Finally, the Department disagrees with commenters who suggested that covering volunteers in the definition of ''complainant'' will make it more difficult for recipients to recruit and retain volunteers. Title IX protects all ''person[s]'' from sex discrimination under a recipient's education program or activity, 20 U.S.C. 1681(a), and ensuring that volunteers can participate free from sex discrimination should aid in recruitment and retention of such resources, not hinder it.

Changes: None.

Participating or Attempting To Participate

Comments: Some commenters expressed support for the proposed definition of ''complainant,'' but asked the Department to define and provide examples of certain terms within the definition, including ''attempting to participate'' and ''participating or attempting to participate in the recipient's education program or activity.'' One commenter suggested that ''applying'' would be a clearer term.

Discussion: Whether someone is participating or attempting to participate in a recipient's education program or activity requires a fact-specific analysis to be made on a case-by-case basis. The Department explained in the July 2022 NPRM that under the proposed definition of ''complainant,'' someone who is not a student (or person authorized to act on behalf of a student) or an employee could still be a complainant if they were participating or attempting to participate in the recipient's education program or activity as, for example, a prospective student, or a guest speaker. 87 FR 41408. The participation requirement was added in the 2020 amendments. It is not meant to limit who can report sex discrimination or a recipient's obligation to respond promptly—such as by offering supportive measures and explaining the process for filing a complaint—but rather to prevent a recipient from being legally obligated to initiate its grievance procedures based on a complaint from a person having no relationship to the recipient. 87 FR 41409 (citing preamble to the 2020 amendments, 85 FR 30138, 30198). The definition of ''complainant'' in these final regulations shifts the focus of the analysis, however, from whether the participation or attempted participation occurred at the time the complaint was filed—as the 2020 amendments require—to the time of the alleged sex discrimination. *See* 87 FR 41410. The Department has concluded

that requiring participation or attempted participation at the time of the alleged discrimination is better aligned with Title IX's text and its goal of ensuring that a recipient operates its education program or activity free from sex discrimination because it addresses conduct that would have interfered with the complainant's ability to participate in the recipient's education program or activity. As the First Circuit explained in *Doe* v. *Brown University,* 896 F.3d 127, 132 & n.6, 133 (1st Cir. 2018), complainants are not limited to a university's enrolled students; they can include members of the public who ''are either taking part or trying to take part of a funding recipient institution's educational program or activity'' when they attend events such as campus tours, sporting events, and lectures, as long as the alleged discrimination relates to the individual's participation or attempted participation in such program or activity. The participation requirement is thus consistent with Federal appellate decisions, including one handed down since the issuance of the July 2022 NPRM, holding that the scope of Title IX's ''no person'' and ''subject to discrimination under'' language extends to persons who are not students or employees but who experience discriminatory treatment while participating, or at least attempting to participate, in a recipient's education program or activity. *See Snyder-Hill* v. *Ohio State Univ.,* 48 F.4th 686, 707–09 (6th Cir. 2022) (reversing district court's dismissal of Title IX claims by non-student plaintiffs who were allegedly subject to sexual abuse while attending or participating in sporting events, summer camp, or a tour of the school's athletics facilities), *reh'g denied,* 54 F.4th 963 (6th Cir. 2022), *cert. denied,* 143 S. Ct. 2659 (2023).

The Department does not agree that ''applying'' is a better way to describe ''attempting to participate'' because ''applying'' is too narrow in scope. Even someone who is not applying for admission to a recipient might be participating or attempting to participate in its education program or activity, such as a prospective student visiting a campus, a visiting student-athlete, or a guest speaker. *See* 87 FR 41408.

Changes: None.

Requests To Broaden Definition

Comments: Several commenters suggested broadening the definition of ''complainant,'' including by removing the distinction between students, employees, and other persons and by including all campus visitors whether or not they are participating or attempting to participate in a recipient's education program or activity at the time of the alleged sex discrimination. With respect to removing the participation requirement for visitors, commenters said that if the goal is to prevent recurrence of discrimination, a recipient still has the responsibility to address misconduct when a visitor to a recipient's campus is sexually assaulted by a student, even if the visitor may not be participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination. Commenters also proposed eliminating the participation or attempted participation requirement altogether. One commenter suggested simply covering ''a student, employee, or other person alleged to have been subjected to unlawful sex discrimination under Title IX,'' and noted that ''conduct'' may not be the correct term to use because Title IX can be violated by commission of an act but also by omission, or a failure to act.

Discussion: The Department declines to further broaden the definition of ''complainant'' beyond changing the frame of reference from participation at the time of the complaint to the time of the alleged discrimination. Consistent with case law on this issue, it is appropriate to distinguish between individuals who have a clear connection to the recipient (students and employees), and other individuals. The Department purposefully limited the individuals who can be complainants to those who are participating or attempting to participate in the recipient's education program or activity at the time of the alleged discrimination because the Department does not understand Title IX as imposing a duty on a recipient to address conduct that could constitute sex discrimination when that conduct could not have ''excluded'' the individual from ''participating in'' or denied them the benefits of a recipient's education program or activity. 20 U.S.C. 1681(a). As the First Circuit has explained, this language means that a ''person must suffer unjust or prejudicial treatment on the basis of sex while participating, or at least attempting to participate, in the funding recipient's education program or activity.'' *Brown Univ.,* 896 F.3d at 131. As discussed above, a visitor could be a complainant, but that will be a fact-based determination that will depend, for example, on the reason for the visit and what the individual was doing at the time of the alleged discrimination.

Finally, the Department agrees that Title IX can be violated not only by commission of an act but also by a failure to act. No change is needed, though, because the phrase ''conduct that could constitute sex discrimination'' includes both a recipient's actions and its inaction in derogation of its Title IX obligations. *See, e.g.,* 87 FR 41423 (stating that ''[t]he proposed regulations also recognize that remedies may be appropriate when the recipient's own action or inaction in response to an allegation of sex discrimination resulted in a distinct Title IX violation'').

Changes: None.

3. Section 106.2 Definition of ''Complaint''

General Support

Comments: Some commenters supported the proposed expansion of ''complaint'' to include complaints made orally or in writing and with or without a signature, and further supported removing the requirement from the 2020 amendments that a formal complaint be submitted before a recipient can investigate or offer informal resolution options. In support of removing the formal complaint requirement, some commenters pointed out the challenges it posed for certain students and their families because of age, disability, or ability to write or communicate. Some commenters asserted that the formal complaint requirement is arbitrary and overly prescriptive and allows a recipient to disregard valid complaints that do not conform exactly to the specific complaint requirements. Other commenters shared that even postsecondary students are hesitant to submit formal complaints, in part out of fear of retaliation due to the level of detail required, and stated that deterring complaints of sex-based harassment contravenes the purpose of Title IX.

Some commenters appreciated that the proposed definition of ''complaint'' would offer more flexibility that will streamline the complaint process, empower students, and better serve the purpose and intent of Title IX. Some commenters pointed out that the proposed definition of ''complaint'' will provide more opportunities for students with disabilities or who need alternative forms of communication to make complaints.

Some commenters asked for clarification on what constitutes a ''request to the recipient'' to initiate grievance procedures, citing the risk of confusion and liability to recipients without further clarification, and a need for more information in order to train staff and ensure that employees

understand their responsibilities. Some commenters expressed concern that a complainant may not realize they have to ask the recipient to initiate the grievance procedures, and requested clarification on whether a complainant must specifically use the phrase ''initiate the recipient's grievance procedures'' or whether a complainant can use alternative language to prompt the recipient to initiate the grievance procedures, such as ''start an investigation'' or ''look into this matter of sex discrimination.'' One commenter asked whether only asking questions about the grievance procedures would trigger an investigation.

One commenter who commended the proposed removal of the formal complaint requirement suggested that the Department require some form of written documentation of the complaint, short of the formal complaint requirement, to commence an investigation and provide clarity for both students and recipients.

One commenter who supported the proposed definition of ''complaint'' requested that the regulations explicitly state that oral or written complaints from students with disabilities may be made through adaptive communication formats such as sign language, physical gestures, drawings, or communicating through an aide or caregiver, citing these formats as critical for non-verbal students or students with other communication challenges.

One commenter suggested that the proposed definition of complaint use the term ''verbal'' instead of ''oral,'' noting that ''verbal'' is more precise.

Discussion: The Department acknowledges commenters' support for the proposed revision of the definition of ''complaint.'' The Department shares commenters' concerns that the proposed definition might be confusing to recipients or complainants because a recipient might interpret the proposed definition to mean that, to make a complaint, the complainant must specifically ask the recipient to ''initiate'' its ''grievance procedures'' and might think the complainant needs to reference § 106.45. The Department recognizes that a complainant may not be familiar with those terms or know what they mean, even though the complainant may want the recipient to investigate and determine whether sex discrimination occurred. The Department therefore has modified the proposed definition of a Title IX ''complaint'' to be an oral or written communication to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged sex discrimination under Title IX and the relevant implementing regulations. Accordingly, a complainant need not use any particular ''magic words''—such as the phrase ''initiate the recipient's grievance procedures''—in order to trigger a recipient's obligation to investigate the matter. To be clear, by saying that a communication constitutes a complaint when it ''objectively'' can be understood as a request to investigate and make a determination, the Department means it can be understood as such by a reasonable person. This is a fact-specific determination, but in general amounts to more than a student's general questions about grievance procedures.

The Department also declines to require some form of written documentation of the complaint, short of the formal complaint requirement, to commence an investigation. The Department notes that § 106.8(f) of these final regulations includes recordkeeping obligations such that the recipient will have to maintain (1) for each complaint of sex discrimination, records documenting the informal resolution process or the grievance procedures and the resulting outcome, and (2) for each notification that the Title IX Coordinator receives of information about conduct that reasonably may constitute sex discrimination under Title IX or the implementing regulations, records documenting the actions the recipient took to meet its obligations under § 106.44. Exactly how to document the information the recipient receives and the steps the recipient takes in response is appropriately left up to each recipient.

The Department appreciates the suggestion to specify in the regulatory text that a recipient is required to facilitate communication with a complainant using adaptive formats as required to accommodate their needs, but the Department does not think that such a change is necessary. The phrase ''oral or written'' is broad enough to include complaints made using most adaptive communication formats, and it would be unreasonable for a recipient to refuse to consider a complaint made, for example, using sign language. Further, if a complainant has a disability, that individual retains full rights under Section 504 and the ADA, as applicable.

In addition, the Department declines to change the word ''oral'' to ''verbal.'' The primary definition of ''verbal'' is relating to or consisting of words, which sometimes is understood as spoken and other times as written. In contrast, the primary definition of ''oral'' is uttered by the mouth or in words and is understood to be spoken. *See Verbal,* Merriam-Webster Dictionary, *https://www.merriam-webster.com/dictionary/verbal* (last visited Mar. 12, 2024); *Oral,* Merriam-Webster Dictionary, *https://www.merriam-webster.com/dictionary/oral* (last visited Mar. 12, 2024). Therefore, the Department believes the term ''oral'' is more consistent with the intended meaning.

Changes: The Department has revised the definition of ''complaint'' in § 106.2 to be an oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX and this part.

General Opposition

Comments: Some commenters opposed allowing oral complaints, asserting that the proposed definition of ''complaint'' exceeds the Department's statutory authority and is inconsistent with Title IX and case law.

Some commenters questioned the integrity of oral complaints, equated them with hearsay, and asserted that they could lead to incomplete or incorrect complaints and mishandled investigations. Some commenters argued that a written accounting of allegations requires a level of certainty regarding the nature and scope of the allegations, allows a recipient to make informed preliminary assessments on whether and how to proceed, and enables a recipient to assess the complainant's credibility and consistency over time. Some commenters asserted that the writing and signature requirements under the 2020 amendments should be retained because they require deliberation and informed action, including considering the consequences of filing a complaint.

Some commenters asserted that the proposed definition of ''complaint'' would contradict the definition that OCR uses for enforcement purposes, noting that OCR requires individuals submitting complaints to OCR to submit a written statement and does not consider oral allegations that are not reduced to writing to be a complaint.

Discussion: Contrary to commenters' assertions, the definition of ''complaint'' in § 106.2 does not exceed the scope of the Department's congressionally delegated authority under Title IX. Title IX states that ''[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.'' 28 U.S.C. 1681(a). The Supreme Court has recognized that the Department has authority under

Title IX to issue regulations that the Department determines will best effectuate the purpose of Title IX, and to require a recipient to take administrative action to effectuate the nondiscrimination mandate of Title IX. *See, e.g., Gebser,* 524 U.S. at 292. The final regulations, including the definition of ''complaint'' in § 106.2, govern how a recipient responds to allegations of sex discrimination in its education program or activity and were promulgated to effectuate the purposes of Title IX. They will help recipients fully and fairly implement Title IX's nondiscrimination mandate in their education programs or activities.

The Department disagrees with the assertion that the integrity of a Title IX investigation or complaint depends on whether a recipient requires the complaint to be in writing. There are a number of procedural protections built into the grievance procedure requirements in § 106.45, and if applicable § 106.46, which are designed to protect the integrity of a recipient's investigation and determination and to ensure a fair process for all parties, such as the requirements that a recipient provide the parties with an equal opportunity to access the evidence or an accurate description of the evidence (and if the recipient provides a description, the parties may request and then must receive access to the underlying evidence) and have an impartial decisionmaker resolve complaints. *See* 87 FR 41485; § 106.45(f)(4)(i), (b)(2). While a written complaint may help establish the boundaries of an investigation, it is neither necessary nor sufficient for doing so, and each recipient is responsible for following its grievance procedures and taking any additional steps it deems necessary to ensure its investigation and determination are sound. In addition, allowing complaints to be made orally is necessary for a recipient to ensure it is learning of and addressing all sex discrimination in its education program or activity, so any potentially increased burden on recipients is justified by the benefits of fulfilling Title IX's nondiscrimination mandate.

The Department also disagrees with the suggestion that a complainant will only carefully consider the consequences of making a complaint if the complaint is written. Some commenters appeared to assume that if complaints are easier to make, some would be made hastily, allegedly increasing the risk they are without merit and therefore unreasonably burdening respondents even if ultimately they are found to be baseless. But the effectiveness of Title IX is better advanced if the requirements for making a complaint are not overly technical or difficult, and if before any disciplinary action is taken, a recipient has the obligation to investigate the conduct alleged. The Department has learned from decades of enforcing Title IX that persons who experience sex discrimination often do not bring complaints for many reasons, including the difficulty of making a complaint. These final regulations help reduce this barrier for complainants, and the Department has no reason to believe that people who make complaints—orally or in writing—will do so hastily. Therefore, the Department declines to require that all complaints of sex discrimination be made in writing.

In addition, the Department acknowledges that Section 101 of OCR's Case Processing Manual (July 18, 2022) (Case Processing Manual), *https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf,* specifies that complaints filed with OCR must be in writing. However, there is a distinction between an administrative complaint asking a Federal regulatory agency to investigate allegations that a recipient failed to comply with its obligations and a complaint made to a recipient to fulfill its obligation in the first instance. A complaint to OCR starts the administrative process of a Federal agency, with potentially recipient-wide financial and operational consequences, as compared to the process of addressing complaints involving individual students or employees, which may require time-sensitive responses and which recipients handle every day in a broad range of contexts, including but not limited to Title IX. In addition, students and employees have an ongoing institutional relationship with the recipient that they do not have with OCR.

Changes: None.

Rights of Respondents

Comments: Some commenters opposed allowing oral complaints, asserting that a written complaint is vital to ensuring a respondent's rights and should be required to initiate the recipient's grievance procedures and impose discipline that could take away a respondent's right to pursue their education.

Other commenters similarly argued that a formal complaint is essential to upholding respondents' due process rights. They asserted that only written complaints provide the respondent with notice of the particulars of the allegations against them as required under proposed § 106.45(c)(1), and they asserted that oral complaints are often hard to decipher and leave a recipient unable to provide the respondent with notice sufficient to respond to the allegations against them.

Discussion: The Department agrees that to ensure a fair resolution of complaints, a recipient must provide a respondent with notice of the allegations against them sufficient for them to respond, which is required under these final regulations. However, the Department maintains that requiring a formal, written complaint is not essential to ensuring a respondent receives sufficient notice of the allegations. Under final § 106.45(c), whether a complaint is made orally or in writing, the recipient is responsible upon initiation of its grievance procedures for providing sufficient notice of the allegations to the parties to allow them to respond to the allegations. And for complaints of sex-based harassment involving student complainants or student respondents at postsecondary institutions, written notice is required by § 106.46(c). As discussed throughout this preamble and in the July 2022 NPRM, the requirements for grievance procedures under § 106.45 establish the basic elements of a fair process. *See, e.g.,* 87 FR 41461. They also comport with the requirements set out in *Goss* v. *Lopez,* 419 U.S. 565, 579, 581 (1975). *See* 87 FR 41473 (explaining that at a minimum, *Goss* requires a recipient to provide a student facing up to a 10-day suspension with notice of the allegations against them and an opportunity to present their account of what happened). For further explanation of how the final regulations comply with due process and fundamental fairness requirements, see the discussion of Due Process Generally (Section II.C).

Changes: None.

Rights of Complainants

Comments: Some commenters opposed removal of a written complaint requirement because they felt it could create confusion and ambiguity about when to initiate grievance procedures, leading recipients to act either prematurely or not promptly enough. Those concerned about premature action asserted that requiring written complaints supports complainant autonomy because it gives the complainant the power to decide whether to proceed, and asserted that by contrast, under the 2020 amendments, there was little chance that an overzealous Title IX Coordinator would mischaracterize a complainant's intent and respond prematurely.

Commenters concerned about a recipient's delayed response said that the proposed definition of complaint was overbroad and vague, and that allowing oral complaints might create confusion for students, families, Title IX Coordinators, and other staff about when to initiate the grievance procedures. These commenters said that a written complaint eliminates this confusion by creating a bright-line rule for initiating an investigation.

Other commenters stated that a written complaint benefits the complainant because it serves as direct evidence that a complaint was made and helps the complainant hold a recipient accountable for properly investigating and resolving allegations of sex discrimination. Some commenters similarly pointed out that a recipient could choose not to investigate an oral complaint or could deny that an oral complaint was ever made, and the complainant would be unable to prove that a complaint was made due to the lack of a written record. Some commenters requested that the Department require all recipient employees to be trained on how to document an oral report, to avoid disputes that may arise as to whether the complainant really intended to initiate the grievance procedures. Commenters indicated that a misunderstanding might harm a complainant when a recipient notifies a respondent of a complaint that the complainant never intended.

One commenter predicted that the proposed definition of ''complaint'' would require a complainant to watch what they say to the Title IX Coordinator or any other recipient employee to ensure that their request for advice or information is not perceived as a complaint, which would compromise the Title IX Coordinator's intended role as a trusted source to discuss allegations and supportive measures before deciding to proceed under the grievance procedures.

Discussion: With respect to complainant autonomy, the Department agrees with commenters that it is important for a recipient to initiate the grievance procedures when requested by a complainant, and for a recipient not to initiate the grievance procedures if a complainant is not ready or does not want to initiate them, except in the limited circumstances in which the Title IX Coordinator determines that the conduct as alleged presents an imminent and serious threat to the health or safety of a complainant or other person or prevents the recipient from ensuring equal access based on sex to its education program or activity under § 106.44(f)(1)(v). However, the Department does not think that the answer is to require complaints to be made in writing, particularly given the benefits of the added flexibility, which many commenters acknowledged will help streamline the complaint process and better effectuate Title IX by facilitating a recipient's awareness of, and appropriate response to, sex discrimination in its education program or activity. In addition, as the Department noted in the July 2022 NPRM, during the June 2021 Title IX Public Hearing, as well as in meetings and listening sessions, several stakeholders stated that the onerous signature and writing requirements of the 2020 amendments discouraged individuals from making complaints. 87 FR 41409. Even if the writing and signature requirements of the 2020 amendments may have reduced the risk of premature or delayed action on the part of a recipient, the cost was a cumbersome process that created a barrier for potential complainants to effectively assert their rights under Title IX. The Department's view, informed by stakeholder input before the July 2022 NPRM and feedback from commenters in response, is that additional flexibility is needed for all complaints of sex discrimination to ensure that a recipient is aware of, and can respond appropriately to, sex discrimination in its education program or activity. The Department has carefully weighed the costs and benefits of including both oral and written requests in the definition of ''complaint,'' and has determined that the benefits of including both options justify the costs.

The Department also maintains that the revised definition of ''complaint,'' which incorporates a ''reasonable person'' standard, will help to mitigate commenters' concerns about the risk of misunderstanding. As explained earlier, the Department has revised the definition in the final regulations in response to commenter input and to ensure clarity. Under the revised definition of ''complaint,'' whether oral or written, if the request can be objectively understood as a request for the recipient to investigate and make a determination about alleged sex discrimination under Title IX, then the recipient must interpret it as a request to initiate the grievance procedures. In addition, the Department notes that under § 106.44(f)(1)(iii), upon being notified of conduct that reasonably may constitute sex discrimination under Title IX, the Title IX Coordinator must notify a complainant, or the individual who reported the conduct if the complainant is unknown, of the grievance procedures under § 106.45, and if applicable § 106.46, and the informal resolution process under § 106.44(k) if available and appropriate. The Department anticipates that during such conversations, once the Title IX Coordinator has explained the grievance procedures, they will confirm whether the individual reporting the alleged discrimination does in fact want the recipient to conduct an investigation to make a determination regarding their allegations. Whether the answer is in the affirmative or the negative, nothing in the final regulations would preclude the Title IX Coordinator from memorializing in writing the outcome of that conversation to help avoid any possible confusion about agreed upon next steps. And although these regulations do not require a complaint to be in writing, nothing in these regulations prevents a complainant from memorializing their oral complaint in writing or confirming in writing that the recipient received their complaint. Moreover, as described above, these final regulations at § 106.8(f) contain specific recordkeeping requirements for each complaint of sex discrimination and each notification the Title IX Coordinator receives regarding conduct that reasonably may constitute sex discrimination. In addition, the required procedural protections of the grievance procedures and the recordkeeping obligations in § 106.8(f) will help to ensure that a recipient has sufficient information to initiate the grievance procedures.

Regarding training for recipient employees on keeping track of oral allegations, the Department declines to specify any more than what is required by the final regulations at § 106.8(d). Section 106.8(d)(4) requires that the Title IX Coordinator and any designees be trained on a number of specific topics and receive any other training necessary to coordinate the recipient's compliance with Title IX. The latter is a matter for each recipient's discretion. Section 106.8(d) strikes the appropriate balance between requiring training on topics the Department considers necessary to promote a recipient's compliance with these final regulations, while leaving flexibility for a recipient to choose the content and substance of any additional training its employees may need.

The Department does not share the commenter's concern that allowing oral complaints will compromise a Title IX Coordinator's ability to discuss allegations and supportive measures. The Title IX Coordinator is responsible for coordinating the recipient's

compliance with its Title IX obligations, including by providing information to a complainant about the grievance procedures, and offering and coordinating supportive measures. The Title IX Coordinator's role is not to serve as a confidential advisor to the complainant or any other party. It is appropriate for a potential complainant to carefully explain to a Title IX Coordinator what they are alleging, and for the Title IX Coordinator to carefully confirm both what is being alleged and whether the complainant intends to initiate the grievance procedures.

With respect to other recipient employees, the Department notes that the final regulations require employees who are not confidential employees to notify the Title IX Coordinator of any information they have about conduct that reasonably may constitute sex discrimination under Title IX, or, as applicable, to provide a potential complainant with contact information for the Title IX Coordinator and information about how to report sex discrimination under Title IX. *See* § 106.44(c). Therefore, a potential complainant who wants confidential support has the discretion to seek out a confidential employee, if provided by the recipient. Even if the information a potential complainant provides to a non-confidential employee is reported to the Title IX Coordinator, it will only prompt a complaint without the complainant's permission if the Title IX Coordinator determines, after considering at a minimum the factors in § 106.44(f)(1)(v), that the conduct as alleged presents an imminent and serious threat to the health or safety of the potential complainant or other person or prevents the recipient from ensuring equal access based on sex to its education program or activity. The question of whether a conversation with a recipient employee who is not the Title IX Coordinator will constitute a ''request to the recipient'' is addressed in the discussions of § 106.44(a) and (c).

Changes: As noted earlier in this section, the final regulations at § 106.2 define ''complaint'' as an oral or written request to the recipient that objectively can be understood as a request to investigate and make a determination about alleged discrimination under Title IX and this part.

Effect on Recipients

Comments: Some commenters suggested that the proposed regulations should require neither ''oral'' nor ''written'' complaints and instead should give a recipient discretion as to the format of complaints it will accept under its own policies, which may include written confirmation from the complainant that they intend to proceed with grievance procedures. One commenter said that it was unclear whether the proposed regulations would require a recipient to accept an oral complaint or whether a recipient can require a written complaint.

Some commenters asserted that the investigation of ''informal'' complaints is expensive and takes time away from classroom instruction, and that, for example, these costs outweigh the value of giving women equal education opportunity. One commenter asserted that the proposed definition would unreasonably increase the number of complaints and impede the ability of a recipient to address allegations expeditiously.

A group of commenters posited that the proposed definition of ''complaint'' could increase litigation risks for recipients. For example, they said if a complainant talks to a professor about misconduct they experienced and the professor fails to notify the Title IX Coordinator or document that the conversation occurred, and the complainant says they made a complaint but the respondent says there is no evidence of a complaint, the recipient could face legal challenges from both parties. Some commenters explained that complaints should have to be written and signed as protection for the recipient, saying, for example, that a formal signed complaint requirement can provide cover to a recipient when a complainant did not clearly request initiation of the grievance procedures and later alleged that their oral report should have been treated as a complaint.

One commenter asked the Department to confirm that under § 106.47, OCR will not deem a recipient to have violated Title IX solely because it would have reached a different determination under § 106.45, including the recipient's determination whether allegations constitute a ''complaint'' under § 106.2.

One commenter asserted that it is unclear what would trigger the initiation of the grievance procedures and that a recipient may have thousands of employees and a decentralized organizational structure, such that they encourage or authorize employees to respond partially or fully to perceived sex discrimination in the moment. The commenter recommended that the Department take a practical approach regarding what constitutes a complaint to preserve flexibility and allow significant discretion.

Discussion: The Department appreciates the variety of perspectives shared by commenters and has carefully considered the possible effects on recipients of allowing complaints to be made orally or in writing. The Department does not think it is appropriate to grant recipients the discretion to deny a complaint because it was not submitted in writing. The goal of the revised definition of ''complaint'' is to provide added flexibility to the complaint process for complainants, a revision the Department adopted in response to concerns from stakeholders and commenters that the formal complaint requirements of the 2020 amendments were overly prescriptive, including the requirement that a complaint be in the form of a signed document, allowed recipients to disregard complaints based on technicalities, and discouraged complaints, contrary to the purpose and intent of Title IX.

In addition, the Department does not agree with the contention that the costs of investigating ''informal'' complaints outweigh the benefits of the final regulations, including the value of providing equal educational opportunities for all individuals based on sex, or with the assertion that removing the formal complaint requirement will lead to an unreasonable increase in the number of complaints and a delay in addressing the allegations expeditiously. Under Title IX, a recipient is obligated to evaluate conduct that reasonably may constitute discrimination on the basis of sex and ensure redress if it occurs because Congress required the provision of equal opportunity to anyone who wants to participate in a federally funded education program or activity. While it is likely that the overall number of sex discrimination complaints will increase somewhat once complaints no longer have to be in writing and signed, any increased burden will not be unreasonable for a number of reasons.

First, encouraging reporting and facilitating complaints of sex discrimination is a critical part of a recipient's duty to effectuate Title IX's nondiscrimination mandate. As a condition of receiving Federal funds, a recipient agrees to operate its education program or activity free from sex discrimination; doing so requires knowing about possible discrimination and investigating it to determine the need for remedy, if any. Second, a recipient already has an obligation to address sex discrimination in its education program or activity, even without a formal complaint, *see* § 106.31, and under the 2020 amendments a recipient with actual knowledge of possible sexual

harassment (which can come from oral reports) is required to offer supportive measures to a complainant, with or without a formal complaint, *see* 34 CFR 106.44(a). Third, even if there are more complaints overall, increased flexibility in the grievance procedures provided by § 106.45, and if applicable § 106.46, will help ensure that burdens on recipients are not unreasonable. For more information regarding the changes to the grievance procedures requirements, see the discussion of Framework for Grievance Procedures for Complaints of Sex Discrimination (Section II.C) and discussion of the Grievance Procedures for the Prompt and Equitable Resolution of Complaints of Sex Discrimination (Section II.D). Fourth, allowing some flexibility regarding how to make a complaint does not mean that people who have not experienced sex-based harassment or other sex discrimination will make complaints; rather, it means that those who believe they have experienced sex-based discrimination have an additional option to report it. The Department is not aware of evidence to suggest that oral complaints are more likely to be unmeritorious or even frivolous. If everyone who experienced sex discrimination did make a complaint, that would likely make it easier for recipients to redress that discrimination and prevent its recurrence. After careful consideration, the Department has decided that the benefit of improving flexibility regarding how individuals may make a complaint justifies the possibility that the number of complaints may increase. A more detailed discussion and analysis of the costs and benefits of these final regulations is included in the *Regulatory Impact Analysis.*

The Department acknowledges recipients' concerns that oral complaints will lead to increased litigation, but these concerns are speculative and the risk of increased litigation, if any, is justified because, as explained in greater detail above, mandating that complaints be made in writing discourages individuals from making complaints, in contravention of the purpose of Title IX to eliminate all discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. 20 U.S.C. 1681(a); 34 CFR 106.1. While it might be helpful for employees other than the Title IX Coordinator, such as professors, to keep careful notes or commit oral allegations to writing, the Department declines to require that they do so or to mandate that all employees receive specific training on recordkeeping as explained more fully in the discussion of § 106.8(d). These final regulations at § 106.8(f) already contain specific recordkeeping requirements for each complaint of sex discrimination and each notification the Title IX Coordinator receives of information about conduct that reasonably may constitute sex discrimination.

The Department wishes to clarify that § 106.47 applies only to determinations regarding whether sex-based harassment occurred under § 106.45, and if applicable § 106.46. It provides that the Assistant Secretary will not deem a recipient to have violated the regulations solely because the Assistant Secretary would have made a different determination than the recipient did under § 106.45, and if applicable § 106.46, based on an independent weighing of the evidence in a particular complaint alleging sex-based harassment. The Department maintains the position taken in the 2020 amendments that the intent of § 106.47 (then numbered § 106.44(b)(2)) is to convey that OCR will not substitute its judgment for the judgment of the recipient's decisionmaker regarding the weighing of relevant and not otherwise impermissible evidence in a particular case. *See* 85 FR 30221. However, nothing in § 106.47 prevents OCR from holding a recipient accountable for noncompliance with any provision of the final regulations, including its determination whether a complainant's communication with the recipient constitutes a complaint under the definition in § 106.2.

Finally, a recipient would only be required to initiate grievance procedures consistent with § 106.45 when a written or oral report meets the standards for a ''complaint'' in § 106.2. Thus, while the Department understands commenters' concern that § 106.45 might impede the ability of employees to address conduct in a timely manner or exercise judgment, the Department has determined that the structure of the grievance procedures under the final regulations provides a workable framework that addresses those concerns and allows a recipient to develop and implement a process for prompt and equitable response.

Changes: None.

4. Section 106.2 Definition of ''Disciplinary Sanctions''

Comments: Several commenters suggested modifications to the definition of ''disciplinary sanctions.'' One commenter asked the Department to modify the definition to clarify that it is not intended to prevent a recipient from considering a respondent's cumulative conduct history when imposing sanctions. Another commenter requested that the Department remove the term ''disciplinary'' and use only ''sanctions'' because ''disciplinary sanctions'' suggests sanctions are limited to students and employees and may be misunderstood to exclude third parties. One commenter requested that the Department clarify whether there are specific requirements for disciplinary sanctions that apply to elementary schools and secondary schools.

Discussion: The Department appreciates commenters' suggestions regarding modifications to the definition of ''disciplinary sanctions.'' The definition of ''disciplinary sanctions'' clarifies that a disciplinary sanction is a consequence imposed on a respondent only after a determination that the respondent has violated the recipient's prohibition on sex discrimination. It does not specify what consequences a recipient can or must impose on a respondent or what factors to consider when determining what disciplinary sanction to impose. As the Department explained in the 2020 amendments, the Department has determined that administrative enforcement of Title IX does not require overriding a recipient's discretion to make decisions regarding disciplinary sanctions or prescribing how a recipient should determine a disciplinary sanction. *See* 85 FR 30274. The definition of ''disciplinary sanctions'' focuses on ensuring that respondents are not disciplined for engaging in sex discrimination unless a fair process has determined responsibility, while respecting a recipient's discretion to make disciplinary decisions under their own policies and codes of conduct. For these reasons, the Department declines to modify the definition of ''disciplinary sanctions'' to state that it is not intended to prevent a recipient from considering a respondent's cumulative conduct history when imposing sanctions.

The Department also declines to remove the term ''disciplinary'' from ''disciplinary sanctions.'' The regulations use ''disciplinary sanctions'' because of the disciplinary nature of the action taken by the recipient, and the Department has determined that this phrase is more specific and accurate than the word ''sanctions.'' The definition of ''respondent'' in these final regulations, and the related discussion of the definition of ''respondent'' in the July 2022 NPRM, make clear that any person, including third parties, may be considered a respondent subject to disciplinary sanctions. 87 FR 41420. For more information, see the discussion in the preamble to the 2020 amendments, 85 FR 30488. A recent Federal appellate

decision in *Hall* v. *Millersville University* supports the Department's position that a ''respondent'' may include a third party. 22 F.4th 397, 405–06 (3d Cir. 2022) (finding that the university could be liable under Title IX for its deliberate indifference to a non-student's conduct).

Finally, the Department's definition of ''disciplinary sanctions'' applies to all recipients, including elementary schools and secondary schools, and does not set forth specific requirements for disciplinary sanctions at any level. The process for imposing disciplinary sanctions—for all recipients—is set forth in more detail in § 106.45(h). The Department appreciates the opportunity to clarify that ''disciplinary sanctions'' refers to consequences imposed on a respondent following a determination under Title IX that the respondent violated the recipient's prohibition on sex discrimination. Nothing in these regulations addresses conduct that does not reasonably constitute sex discrimination. For this reason, the Department has added ''under Title IX'' to the definition of ''disciplinary sanctions'' in the final regulations. These regulations also do not preclude routine classroom management or the application of separate codes of conduct, including to conduct that has been determined through grievance procedures not to be sex discrimination or to conduct that would be prohibited regardless of whether sex discrimination occurred. *See, e.g.,* 85 FR 30182.

Changes: The Department has added ''under Title IX'' to the definition of ''disciplinary sanctions.''

5. Section 106.2 Definitions of ''Elementary School'' and ''Secondary School''

Comments: Commenters generally supported the proposed definitions of ''elementary school'' and ''secondary school'' and said the definitions would clarify Title IX's coverage and aid in consistent and effective enforcement of Title IX.

Discussion: The Department acknowledges commenters' support for the proposed definitions of ''elementary school'' and ''secondary school.''

Changes: None.

6. Section 106.2 Definition of ''Postsecondary Institution''

Comments: Some commenters generally supported the proposed definition of ''postsecondary institution'' and said it would aid in consistent and effective enforcement of Title IX.

Other commenters, without specifying how or providing additional details, stated that they believed the proposed definition contained unnecessary details and was an attempt to micromanage and create an extrajudicial system.

One commenter asked the Department to clarify whether the term ''postsecondary institution'' means that the proposed regulations do not apply to elementary schools and secondary schools.

Discussion: The Department acknowledges commenters' support for the definition of ''postsecondary institution.''

The Department disagrees with the commenters' view that the definition is too detailed. The Department's revisions help streamline and simplify the definition. As explained in the July 2022 NPRM, the Department proposed to remove the specific references to §§ 106.44 and 106.45 from the definition of ''postsecondary institution'' because the definition applies to all of part 106. *See* 87 FR 41400. As explained, the Department also made necessary revisions to clarify that the definition includes an institution of vocational education that serves postsecondary students because an institution of vocational education could serve either secondary school students or postsecondary students. *See id.*

The commenters did not specify how the definition of ''postsecondary institution'' would micromanage or create an extrajudicial system, but in any event, the definition is limited to explaining what constitutes a postsecondary institution and is intended to provide clarity for recipients. The Department also cannot conceive how these definitions would micromanage or create an extrajudicial system.

Finally, the Department clarifies that the final regulations apply to all recipients of Federal financial assistance, including elementary schools and secondary schools. Because there are certain provisions of the final regulations that explicitly only apply to postsecondary institutions (*e.g.,* § 106.46), however, the Department maintains the definition of ''postsecondary institution'' provides necessary clarification for recipients.

Changes: None.

7. Section 106.2 Definition of Prohibited ''Sex-Based Harassment''

General Support and Opposition

Comments: Commenters provided a variety of reasons for supporting the proposed definition of ''sex-based harassment,'' including that it aligns with congressional intent and ensures that Federal funds are not used to support discrimination; it encourages students to report sex-based harassment; and it is consistent with the Department's longstanding enforcement practice. These commenters also stated that the 2020 amendments narrowed the definition of ''sexual harassment,'' making it more difficult for potential complainants to assert their rights.

One commenter asserted that the Department's rulemaking authority does not extend to the proposed definition of ''sex-based harassment,'' claiming that *Gebser* grants the Department the authority to issue only ''prophylactic rules,'' not to define discrimination.

Some commenters asserted the Department failed to justify the need to revise the definition, having previously stated that it wanted to provide recipients with consistency and simplicity in the definition of ''sexual harassment'' under Title IX.

Another commenter asked the Department to clarify that sex discrimination refers to any discrimination based on sex, whereas sex-based harassment is a subset of sex discrimination. Some commenters asked how the definition of ''sex-based harassment'' would apply in specific situations, such as to elementary school students, who often do not have the maturity or comprehension to understand what the term means, and to postsecondary institution employers in a State where there are specific requirements for workplace harassment.

Discussion: As explained further below, the Department is adopting a final definition that modifies the proposed definition in certain respects but retains the core elements of the proposed definition. The Department maintains that the final definition of ''sex-based harassment'' better fulfills Title IX's prohibition on sex discrimination in education programs or activities that receive Federal financial assistance, is consistent with relevant judicial precedent, accounts for the legitimate interests of recipients and parties, and aligns with congressional intent and the Department's longstanding interpretation of Title IX and resulting enforcement practice prior to the 2020 amendments.

The Department agrees with the commenter that *Gebser* is relevant for considering the distinctions between administrative enforcement and civil damages actions, but disagrees with the commenter's characterization of *Gebser* as precluding the Department from including a definition of ''sex-based harassment'' in regulations implementing Title IX. The definition of ''sex-based harassment'' establishes standards the Department and recipients

use to implement and enforce Title IX effectively, which, as explained in the discussions of §§ 106.44 and 106.45(a)(1), the Department is statutorily authorized and directed to accomplish.

Contrary to the commenter's characterization, the *Gebser* Court wrote: ''Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate, 20 U.S.C. 1682, even if those requirements do not purport to represent a definition of discrimination under the statute.'' 524 U.S. at 292. Nothing in this statement precludes the Department from setting out a definition of ''sex-based harassment'' in the exercise of this statutory authority. We observe, moreover, that a definition of ''sexual harassment'' has been part of the Title IX regulations since 2020. The Department did not propose in the July 2022 NPRM, nor does the Department undertake now, to regulate conduct that does not constitute sex discrimination. The final regulations simply define ''sex-based harassment,'' which is a form of sex discrimination. The commenter's view would appear to disallow the definition of ''sex-based harassment'' in the final regulations or any other definition.

Consistent with Title IX's text and the Department's authority to implement the statute, as well as OCR's enforcement experience and case law interpreting the statute, the Department is providing greater clarity for recipients about steps they must take to ensure that no person is subjected to sex discrimination in their education programs and activities. Providing a clear definition of ''sex-based harassment'' in the final regulations will help recipients better identify discriminatory conduct when it occurs, and will help them better understand their obligations to address sex discrimination under the statute.

The Department has adequately justified the need for a revised definition. As explained in the July 2022 NPRM, the Department identified the need for a new definition of ''sex-based harassment'' based on an extensive review of the 2020 amendments, in addition to live and written comments received during the June 2021 Title IX Public Hearing, numerous listening sessions and meetings with stakeholders conducted by the Office for Civil Rights in 2021 and 2022, and the 2022 meetings held under Executive Order 12866. *See* 87 FR 41390, 41392. The Department heard significant feedback from students, parents, recipients, advocates, and other concerned stakeholders that the 2020 amendments do not adequately clarify or specify the scope of sex discrimination prohibited by Title IX, and that the current definition of ''sexual harassment'' does not fully implement Title IX's mandate. *See* 87 FR 41392, 41396. The updated definition in the final regulations is intended to address those identified and well-documented gaps.

The Department clarifies that sex discrimination refers to any discrimination based on sex, including, but not limited to, sex-based harassment, and has modified the proposed definition of ''sex-based harassment'' to clearly state that sex-based harassment is a form of sex discrimination.

With respect to the comments regarding specific applications of the definition of ''sex-based harassment'' in elementary school settings or in specific States, the Department notes that the definition of ''sex-based harassment'' in the final regulations applies to all recipients and that, as stated in § 106.6(b), the obligation to comply with Title IX is not obviated or alleviated by any State or local law or other requirement that conflicts with Title IX or this part. That said, the Department maintains that State workplace harassment laws can generally be applied in ways that do not create conflicts. The Department also notes that Title IX's prohibition on sex discrimination applies to all recipients and in all States. The final regulations take into account differences in the age and maturity of students in various educational settings, allowing recipients to adapt the regulations as appropriate to fulfill their Title IX obligations. The Department will take into account these types of differences and recipient flexibility on a case-by-case basis when addressing any complaints and applying the definition of ''sex-based harassment.''

Changes: The Department has revised the definition of ''sex-based harassment'' to state explicitly that sex-based harassment is a form of sex discrimination.

Data Related to Sex-Based Harassment

Comments: Some commenters referred the Department to data and other information showing the prevalence of sex-based harassment in postsecondary institutions and elementary schools and secondary schools. For example, some commenters referenced data that they said showed the prevalence of sex-based harassment among specific populations, including Asian American and Native Hawaiian/Pacific Islander women; LGBTQI+ students; Black women and girls; and students with disabilities. One commenter noted that individuals may experience multiple overlapping forms of discrimination, including sex-based harassment. Some commenters referred the Department to data and other information that they said showed sex-based harassment is underreported and why. Some commenters referred the Department to data and other information that they said showed the negative impact that sex-based harassment has on education, including causing survivors to drop out of school, miss class and extracurricular activities, suffer increased absences, experience decreases in GPA, lose scholarships or financial aid, have lower self-esteem, and suffer higher levels of depression and suicidality.

Discussion: The Department acknowledges the data and information referred to by commenters with regard to the prevalence of sex-based harassment of students and employees in postsecondary institutions and in elementary schools and secondary schools. The final regulations hold a recipient accountable for responding to sex-based harassment, including quid pro quo harassment, hostile environment harassment, sexual assault, dating violence, domestic violence, and stalking, consistent with Title IX's broad prohibition on sex discrimination.

Further, the Department acknowledges the data and information referred to by commenters regarding the impact of sex-based harassment on specific populations in significant numbers. The final regulations hold recipients accountable for responding to sex-based harassment for all populations consistent with Title IX's broad prohibition on sex discrimination. The Department agrees with commenters' observation that individuals may experience multiple and overlapping forms of discrimination. Congress has chosen to address different forms of discrimination through different statutes, and these final regulations implement only Title IX's prohibition on discrimination on the basis of sex. In addition to their obligations under Title IX, recipients have an obligation not to discriminate on numerous other grounds under the civil rights laws enforced by OCR,[4] as well as under Federal civil rights laws enforced by the U.S. Department of Justice and other

[4] For example, in addition to Title IX, OCR also enforces Title VI, Section 504, Title II of the ADA, the Age Discrimination Act of 1975, and the Boy Scouts of America Equal Access Act.

Federal agencies. The Department believes that an improved response to incidents of sex-based harassment benefits individuals whose experience of sex-based harassment overlaps with other forms of discrimination.

The Department shares the commenters' concerns that sex-based harassment is underreported. Title IX requires a recipient to operate its education program or activity in a manner that is free from sex discrimination, and, for the reasons described elsewhere in this preamble, the definition of ''sex-based harassment'' in the final regulations, among other changes, will remove certain barriers to reporting. Because sex-based harassment causes serious harm to those impacted, as several commenters discussed, the final regulations clarify that a recipient must respond to all forms of harassment on the basis of sex in a manner consistent with Title IX's broad prohibition on sex discrimination in education programs or activities that receive Federal financial assistance. *See, e.g.,* §§ 106.2 (definition of ''sex-based harassment''), 106.44 (required response to sex discrimination), 106.45 (grievance procedures for the prompt and equitable resolution of sex discrimination).

Changes: None.

Sex-Based Harassment—Burden and Cost (§ 106.2)

Comments: Some commenters were concerned that the proposed definition of hostile environment sex-based harassment, as compared to the 2020 amendments, would require a recipient to address more complaints through its Title IX grievance procedures and lead to more lawsuits, which would impose a greater burden and more expenses on a recipient and take time and resources away from more serious claims. One of these commenters also noted that, especially at smaller postsecondary institutions, this would detract from efforts to address sexual assault and quid pro quo harassment, which the commenter felt should be the priority under Title IX. One commenter expressed concern about the impact the definition of ''sex-based harassment'' would have on Title IX Coordinators, which together with other provisions in the proposed regulations, the commenter asserted, would require Title IX Coordinators to monitor and police potentially offensive conduct, including speech.

Discussion: In the July 2022 NPRM, the Department acknowledged that recipients would be required to address more complaints under these final regulations and projected a 10 percent increase in complaint investigations compared to the number conducted under the 2020 amendments. 87 FR 41550. As explained in the *Regulatory Impact Analysis,* commenters did not provide data necessitating a change to the Department's 10 percent estimate. The Department maintains that the definition of ''sex-based harassment'' will more fully implement Congress's nondiscrimination requirement in Title IX. The Department considered several alternatives to the final definition of ''sex-based harassment,'' including maintaining the definition of ''sexual harassment'' from the 2020 amendments and different wording options for the definition of hostile environment sex-based harassment, but concluded that none captured the benefits of this final definition and state of the law. The Department also considers and explains the impact of the final regulations on small entities, including small recipients, in the discussion of the *Regulatory Flexibility Act.* There the Department acknowledges commenters' concerns that the final regulations, including the definition of ''sex-based harassment,'' likely will increase the number of Title IX cases and investigations that small entities will be required to address. Similar to the projection in the *Regulatory Impact Analysis,* the Department projects a 10 percent increase in complaints for small entities. The Department disagrees with commenters who forecast a significantly greater increase and the commenters provided no data in support of their assertion.

The Department also disagrees with the commenters' assertion that several provisions in the final regulations, including the definition of ''sex-based harassment,'' would mean that Title IX Coordinators must monitor and limit any conduct in the form of speech that could be considered potentially offensive—even if that speech is constitutionally protected. The Title IX Coordinator requirements in § 106.44(f) do not impose an obligation on a recipient's Title IX Coordinator to respond to any conduct or speech other than that which reasonably may constitute sex discrimination. Further, as discussed elsewhere in this preamble, the final regulations do not alter § 106.6(d), which states that nothing in the Title IX regulations requires a recipient to restrict any rights that would otherwise be protected from government action by the U.S. Constitution, including the First Amendment. We also underscore that none of the amendments to the regulations changes or is intended to change the commitment of the Department, through these regulations and OCR's administrative enforcement, to fulfill the Department's obligations in a manner that is fully consistent with the First Amendment and other guarantees of the U.S. Constitution. For additional discussion of the First Amendment, see the Hostile Environment Sex-Based Harassment—First Amendment Considerations section below.

For all recipients, to the extent the Department's projected 10 percent increase in complaints and related increase in use of a recipient's grievance procedures results from the change in the definition of ''sex-based harassment,'' the Department determined that the related costs from such an increase are justified by the benefits of ensuring effective implementation of a recipient's statutory obligation that its education program or activity be free from sex discrimination. The Department also notes that other changes in the regulations, such as affording recipients the discretion to use a single-investigator model and removing the requirement to hold a live hearing in all cases, *see, e.g.,* §§ 106.45(b)(2) and 106.46(f)(1), provide recipients, including small entities, with greater flexibility in conducting their grievance procedures, as some commenters have also recognized. The Department's view, therefore, is that evaluating the final regulations' changes as a whole is important for accurately assessing the extent to which, if at all, the final regulations will increase costs or burdens for recipients.

Finally, the Department disagrees with commenters' assertions that the increase in complaints of sex-based harassment will detract from recipients' efforts to address sexual assault and quid pro quo harassment, which some commenters stated should be prioritized under Title IX. The Department believes that the additional flexibility for recipients provided in the final regulations, including with respect to the grievance procedure requirements, will allow recipients to address all types of conduct covered under the definition of ''sex-based harassment.''

Changes: None.

Sex-Based Harassment—Introductory Text and Scope (§ 106.2)

Comments: Some commenters supported the proposed definition of ''sex-based harassment'' because its coverage of harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity would

better align with State laws and recipient codes of conduct and eliminate confusion. Commenters stated that such harassment is no less harmful than other forms of sex-based harassment.

Some commenters suggested the Department remove the reference to § 106.10 in the introductory text to the definition of ''sex-based harassment'' and instead specify all of the bases identified in § 106.10 to avoid confusion. One commenter asked the Department to clarify whether the three categories of harassment (*i.e.,* quid pro quo, hostile environment, and specific offenses) were intended to modify only ''other conduct on the basis of sex'' or instead to modify ''sexual harassment, harassment on the bases described in § 106.10, and other conduct on the basis of sex.'' One commenter suggested that the Department remove the reference to ''sexual harassment'' in the introductory sentence of the proposed definition of ''sex-based harassment'' or clarify what additional forms of sexual harassment would not be covered by the three categories in the proposed definition. Another commenter asked what the term ''harassment'' means and whether it includes nonverbal, verbal, or written actions.

One commenter expressed concern that the proposed definition of ''sex-based harassment'' would cover speech or conduct that was not based on sex and asserted that if harassment does not occur because of a person's sex, it is not sex-based harassment under Title IX, regardless of how offensive it is.

Several commenters posed specific examples of conduct and asked whether they would constitute sex-based harassment under the proposed definition.

Discussion: The Department appreciates the range of opinions expressed regarding the introductory text and scope of sex-based harassment. The Department believes that these final regulations best comport with the text of Title IX, the case law interpreting Title IX, and Title IX's nondiscrimination mandate.

The Department agrees with the commenter who asserted that conduct that falls within the definition of ''sex-based harassment'' must be based on sex. Adhering to the statutory language, the definition clearly states that the conduct prohibited must be ''on the basis of sex,'' and includes sexual harassment and harassment on the bases described in § 106.10. As recognized in the preamble to the 2020 amendments, ''on the basis of sex'' does not require that the conduct be sexual in nature. *See* 85 FR 30146. The Department appreciates commenters' suggestions but declines to remove the reference to § 106.10 in the definition of ''sex-based harassment,'' as the reference refers clearly to the scope of discrimination on the basis of sex and thus is not likely to cause confusion.

As discussed in the July 2022 NPRM, Title IX's broad prohibition on sex discrimination encompasses, at a minimum, discrimination against an individual based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. *See* 87 FR 41531–32. All of these classifications depend, at least in part, on consideration of a person's sex. *See id.* The final regulations clarify the scope of harassment covered and add language to the regulatory text that was in the preamble to the 2020 amendments.

In response to comments about ''other conduct on the basis of sex,'' some language regarding other harassment is necessary to maintain consistency with § 106.10, which—by using the word ''includes''—indicates that there could be other kinds of sex discrimination besides the specific bases listed. To alleviate confusion, the Department has changed ''other conduct on the basis of sex'' to ''other harassment on the basis of sex'' and moved the language earlier in the introductory sentence to tie it more directly to § 106.10. The Department clarifies that the three categories of harassment in § 106.2 of the final regulations modify ''sexual harassment and other harassment on the basis of sex, including on the bases described in § 106.10,'' such that to constitute prohibited sex-based harassment, the sexual harassment or harassment on the bases described in § 106.10 must satisfy one or more of the three categories (*i.e.,* quid pro quo, hostile environment, or specific offenses). The Department's position is that it is not necessary to further define the term harassment because the definition of ''sex-based harassment,'' including the three categories of harassment, is sufficiently clear. The Department confirms that, as discussed in the July 2022 NPRM, acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex are within the purview of Title IX and may constitute sex-based harassment provided they meet the requirements of the definition. *See* 87 FR 41411, 41533. The Department has held this view for more than two decades. *See* 85 FR 30034–36, 30179; U.S. Dep't of Educ., Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 FR 12034, 12038–39 (Mar. 13, 1997) (revised in 2001) (1997 Sexual Harassment Guidance), *https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.* The Department also notes that as discussed in the section below on Hostile Environment Sex-Based Harassment—Online Harassment (§ 106.2), this covered conduct could occur online, in addition to in person.

The Department declines to remove the reference to ''sexual harassment'' in the introductory sentence because it is useful to explicitly state in the definition of ''sex-based harassment'' that it includes not only (1) sexual harassment, which is conduct of a sexual nature, but also (2) other forms of harassment that are not or may not be ''sexual'' but that are nonetheless based on sex, such as harassment based on pregnancy, gender identity, or sex stereotypes. The term ''sexual harassment'' as used in the definition refers to conduct that constitutes quid pro quo harassment, hostile environment harassment, or a specific offense listed in the definition of ''sex-based harassment.'' As explained in prior OCR guidance, sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. *See, e.g.,* U.S. Dep't of Educ., Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, noticed at 66 FR 5512 (Jan. 19, 2001) (rescinded upon effective date of 2020 amendments, Aug. 14, 2020) (2001 Revised Sexual Harassment Guidance), *https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.* Other forms of harassment that are not or may not be ''sexual'' can also constitute hostile environment harassment. With respect to the hypothetical sex-based harassment scenarios presented by commenters, the Department declines to make definitive statements about examples, due to the necessarily fact-specific nature of the analysis. At the same time, we note that further explanation of the content of the final regulations is provided in the discussions below.

The Department disagrees that the definition of ''sex-based harassment'' in the final regulations covers speech or conduct that is not based on sex. To the extent the comments raise concerns under the First Amendment, those comments are addressed in the section below dedicated to Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2).

Changes: The Department has revised the definition of ''sex-based

harassment'' to state that sex-based harassment is a form of sex discrimination. The Department has also changed ''other conduct on the basis of sex'' to ''other harassment on the basis of sex'' and moved the language to earlier in the introductory sentence. The introductory language in the definition now states that sex-based harassment prohibited by this part ''means sexual harassment and other harassment on the basis of sex, including on the bases described in § 106.10.''

Sex-Based Harassment—Vagueness and Overbreadth (§ 106.2)

Comments: Some commenters opposed the proposed definition of ''sex-based harassment'' because they felt it would be too expansive and overbroad or too vague, which they believed could lead to false allegations. These commenters noted that the definition must clearly define the scope of prohibited conduct.

Other commenters specifically expressed vagueness and overbreadth concerns in the context of hostile environment sex-based harassment. For example, some commenters were concerned that key terms were undefined, which the commenters said would cause postsecondary institutions to restrict protected speech. The commenters did not state what key terms should be defined. Other commenters were concerned that the totality of the circumstances analysis in hostile environment sex-based harassment would make it difficult for students and employees to know what conduct was covered and could lead to overly broad policies.

One commenter asserted that precise definitions are required in the postsecondary education setting, even if they would not be required in a workplace setting, because of academic freedom. Another commenter argued that, although the July 2022 NPRM stated that the ''offensiveness of a particular expression as perceived by some persons, standing alone, would not be a legally sufficient basis to establish a hostile environment'' under Title IX, the preamble is vague about where the Department would draw the line between speech protected under the First Amendment and hostile environment sex-based harassment under Title IX, and thus a recipient would be incentivized to treat speech that is close to the line as a Title IX violation.

One commenter suggested that OCR's previously issued guidance on Title IX and sexual harassment was too broad.[5] Another commenter asserted that some individuals may not know what conduct is prohibited if they are only told that objectively and subjectively offensive conduct is prohibited. Some commenters said the subjective standard's vagueness would deny respondents due process and lead to meritless investigations and inconsistent enforcement across recipients. Some commenters said that the term ''limits'' is vague and overly broad.

Discussion: The Department disagrees that the definition of ''sex-based harassment'' is too expansive and overbroad or too vague and does not clearly define the scope of prohibited conduct. Title IX broadly prohibits sex discrimination, and it is well-settled that harassment is a form of discrimination. *See, e.g., Davis* v. *Monroe Cnty. Bd. of Educ.,* 526 U.S. 629, 649–50 (1999) (citing *Gebser,* 524 U.S. at 281; *Franklin* v. *Gwinnett Cnty. Pub. Schs.,* 503 U.S. 60, 74–75 (1992)). While the definition differs from the standard courts apply to damages claims in private litigation, for decades prior to the 2020 amendments the Department applied a similar definition in administrative enforcement efforts to give complete effect to Title IX. *See, e.g.,* 2001 Revised Sexual Harassment Guidance. The definition also closely tracks longstanding case law defining sexual harassment, which courts have had no difficulty interpreting. *See, e.g., Harris* v. *Forklift Sys., Inc.,* 510 U.S. 17 (1993). With respect to comments regarding the purported vagueness of the definition and the lack of clearly defined conduct, the Department notes that the Eighth Circuit recently considered a ''void for vagueness'' challenge to a university sexual harassment policy with a similar definition: the policy prohibited conduct that ''create[d] a hostile environment by being sufficiently severe or pervasive and objectively offensive that it interfere[d] with, limit[ed] or denie[d] the ability of an individual to participate in or benefit from educational programs or activities.'' *Rowles* v. *Curators of Univ. of Mo.,* 983 F.3d 345, 352 (8th Cir. 2020) (quoting the policy). The Eighth Circuit rejected the plaintiff's vagueness challenge, explaining that the policy ''provide[d] adequate notice of what conduct is prohibited'' and used language with ''common usage and understanding.'' *Id.* at 356, 358. The court specifically noted that qualifiers such as ''objective''—similar to the requirement in the final definition that conduct creating a hostile environment be ''objectively offensive,'' *see* § 106.2—''provide adequate notice in [the] context'' of university harassment policies. *Rowles,* 983 F.3d at 356; *see also Koeppel* v. *Romano,* 252 F. Supp. 3d 1310, 1327 (M.D. Fla. 2017) (''inclusion of the objective and subjective standard'' in harassment policy made it sufficiently clear that ''a person of ordinary intelligence [could understand] what conduct [was] prohibited''), *aff'd sub nom. Doe* v. *Valencia Coll.,* 903 F.3d 1220 (11th Cir. 2018); *Vanderhurst* v. *Colo. Mountain Coll. Dist.,* 16 F. Supp. 2d 1297, 1305–06 (D. Colo. 1998) (harassment policy's use of terms like ''considered offensive by others'' and ''unwanted sexually oriented conversation'' allowed ''ordinary people [to] understand what conduct [was] prohibited''). The case law thus supports the Department's view that the final definition is not inappropriately vague and clearly defines the scope of prohibited conduct.

The Department similarly disagrees with commenters who asserted that the proposed definition of hostile environment sex-based harassment is overbroad or vague. The Department notes that commenters did not specify which terms they wanted the Department to define but did state that it was unclear how a recipient would draw the line between speech protected under the First Amendment and sex-based harassment, and how to analyze offensiveness. As explained in the discussion below of Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2), the Department has carefully defined hostile environment sex-based harassment with the First Amendment in mind by requiring that it be unwelcome, sex-based, and subjectively and objectively offensive, as well as so severe or pervasive that the conduct results in a limitation or denial of a person's ability to participate in or benefit from the recipient's education program or activity. The definition is aimed at discriminatory conduct—conduct that is unwelcome as well as sex-based, and that has an impact far greater than being bothersome or merely offensive. Moreover, even when a rule aimed at offensive conduct sweeps in speech, the rule does not necessarily become vague or overbroad. For example, as noted above in *Rowles,* the court rejected plaintiff's claim that the

[5] The commenter cited, for example, U.S. Dep't of Educ., Office for Civil Rights, Sexual Harassment: It's Not Academic, at 3–4 (2008), *https://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf.*

policy at issue, which targeted offensive conduct, was ''void for vagueness'' as applied to his ''protected 'amorous speech.' '' 983 F.3d at 357–58. The court reached a similar conclusion with respect to overbreadth. Although the policy at issue had been applied to the plaintiff's speech, it did not target speech as such; rather it ''prohibit[ed] conduct'' that was ''defined and narrowed using language with common usage and understanding.'' *Id.* at 358. The plaintiff thus failed to establish that the policy had ''a real and substantial effect on protected speech.'' *Id.*[6] *Rowles* accordingly supports the conclusion that policies that define hostile environment sex-based harassment similar to the definition of hostile environment sex-based harassment in these final regulations do not violate the First Amendment merely because they may, in some circumstances, be applied to speech.

Other case law also supports this conclusion. For example, several commenters cited *DeJohn* v. *Temple University,* 537 F.3d 301 (3d Cir. 2008), for the proposition that the definition of hostile environment sex-based harassment in the proposed regulations would be too broad or vague. And to be sure, the court in *DeJohn* did conclude that the University's specific policy was overbroad. *Id.* at 320. Yet the court also explained that, had the policy's application to conduct been appropriately narrowed, it could have survived First Amendment scrutiny. The court explained that ''[a]bsent any requirement akin to a showing of severity or pervasiveness—that is, a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual's work—the policy provides no shelter for core protected speech.'' *Id.* at 317–18. Likewise, ''unless harassment is qualified with a standard akin to a severe or pervasive requirement, a harassment policy may suppress core protected speech.'' *Id.* at 320. The Department's definition of hostile environment sex-based harassment adopts exactly the guardrails that *DeJohn* suggested are necessary—it applies only to conduct that, among other things, is ''objectively and subjectively'' offensive and is ''severe or pervasive.'' And indeed, courts applying *DeJohn* have specifically concluded that the inclusion of such guardrails narrows a harassment policy sufficiently to withstand overbreadth and vagueness challenges. *See Koeppel,* 252 F. Supp. 3d at 1326 (''[The policy's] limiting language is precisely the type of language that the Third Circuit suggested would 'provide shelter for core protected speech.' Because Valencia's policy provides language that sufficiently shelters protected speech, the Court finds that the policy is not unconstitutionally overbroad.'' (citation omitted)); *id.* at 1327 (''Based on the inclusion of the objective and subjective standard, the Court finds that Valencia's sexual harassment policy sufficiently explains to a person of ordinary intelligence what conduct is prohibited.''); *Marshall* v. *Ohio Univ.,* No. 2:15–CV–775, 2015 WL 1179955, at *6 (S.D. Ohio Mar. 13, 2015) (distinguishing *DeJohn* and rejecting vagueness and overbreadth challenges to a policy that ''require[d] an individual's actions to be objectively and subjectively severe or pervasive so as to cause, or be intended to cause, an intimidating, hostile, or offensive work, academic, or living environment''). For additional discussion of the First Amendment, see the section below on Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2).

With respect to false allegations, the Department takes this concern seriously. Importantly, the final regulations incorporate safeguards against false allegations. For example, the final regulations require that a recipient evaluate complaints of sex-based harassment based on all relevant not otherwise impermissible evidence, *see* § 106.45(b)(6) and (7), require a recipient to provide each party with an equal opportunity to access the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible, or an accurate description of the evidence (and if the recipient provides a description, the parties may request and then must receive access to the underlying evidence), *see* § 106.45(f)(4), and require a recipient to provide a process to question parties and witnesses to assess the party's or witness's credibility when credibility is in dispute and relevant to evaluating one or more allegations of sex discrimination, *see* § 106.45(g). The grievance procedures also provide steps to mitigate the harm a falsely accused respondent may experience while participating in the grievance procedures, such as requiring reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient's grievance procedures. *See* § 106.45(b)(5). Finally, nothing in the final regulations prohibits a recipient from disciplining individuals who make false statements, provided that the discipline is not imposed based solely on the recipient's determination whether sex discrimination occurred. *See* § 106.45(h)(5).

In response to a commenter's suggestion that OCR's previously issued guidance on Title IX and sexual conduct was too broad, we note that although the definition of hostile environment sex-based harassment aligns more closely with the longstanding interpretation of Title IX in OCR's prior guidance, these final regulations, including the definition of hostile environment sex-based harassment, do not simply track the language in OCR's prior guidance. For example, the definition of hostile environment sex-based harassment in the final regulations is more specific because it explicitly requires that the unwelcome sex-based conduct be subjectively and objectively offensive and so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity, and it enumerates the factors that a recipient must, at a minimum, consider in determining whether a hostile environment has been created. Prior guidance, although similar, did not so clearly lay out specific factors to be considered. *See, e.g.,* 1997 Sexual Harassment Guidance, 2001 Revised Sexual Harassment Guidance. In addition, as discussed below in Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2), although the First Amendment may in certain circumstances constrain the manner in which a recipient responds to discriminatory harassment in the form of speech, recipients have ample other means at their disposal to remedy a hostile environment, and recipients remain free under the final regulations to determine whether discipline is the appropriate response to sex-based harassment, and if so, what form that discipline should take.

The Department disagrees that the definition of hostile environment sex-based harassment is too vague to provide adequate notice of prohibited conduct for certain individuals. The

[6] The court reached this conclusion even though the policy was broader than the standard for private actions for money damages for student-to-student sexual harassment that the Supreme Court articulated in *Davis,* 526 U.S. 629. *See Rowles,* 983 F.3d at 352 (policy covered ''severe or pervasive'' conduct that ''interfere[d] with, limit[ed] or denie[d]'' ability to participate). Indeed, despite this difference, the court cited *Davis* as support for the proposition that the policy was sufficiently narrow to withstand constitutional challenge. *Id.* at 358–59. The case thus supports the Department's view—described in more detail below—that the definition of sex-based harassment in the final regulations need not match the standard for private damages actions articulated in *Davis.*

subjective and objective standards have long been used by courts, as discussed in the section below on Hostile Environment Sex-based Harassment—Subjectively and Objectively Offensive (§ 106.2), and by OCR in enforcing the civil rights laws. *See* 2001 Revised Sexual Harassment Guidance, at 5; U.S. Dep't of Educ., Office for Civil Rights, Notice of Investigative Guidance, Racial Incidents and Harassment Against Students at Educational Institutions, 59 FR 11448, 11449 (Mar. 10, 1994) (1994 Racial Harassment Guidance), *https://www.govinfo.gov/content/pkg/FR-1994-03-10/pdf/FR-1994-03-10.pdf* (also available at *https://www2.ed.gov/about/offices/list/ocr/docs/race394.html*). Title IX protects all persons and recipients have an obligation to conduct their grievance procedures free from discrimination and bias. The final regulations also include provisions to ensure a recipient complies with its obligations under Title IX, Title VI, Section 504, the ADA, and the IDEA. *See, e.g.,* §§ 106.8(e), 106.44(g)(6)(i).

Changes: None.

Quid Pro Quo Sex-Based Harassment (§ 106.2)

Comments: Some commenters supported the proposed definition of quid pro quo sex-based harassment because it would return to the Department's longstanding enforcement practice that predated the 2020 amendments and include employees and other persons authorized by the recipient to provide an aid, benefit, or service, such as teaching assistants or volunteer coaches, and would include both explicit and implicit conditioning of an aid, benefit, or service on sexual conduct.

One commenter urged the Department to remove ''unwelcome'' from the proposed definition of quid pro quo sex-based harassment, stating that the definition should cover all situations when an education aid, benefit, or service is conditioned on sexual conduct without needing to determine whether or not the sexual conduct was unwelcome.

Other commenters asked the Department to clarify who is an ''other person authorized by the recipient'' in the definition of quid pro quo sex-based harassment. One commenter said that student leaders of clubs and captains of sports teams should be included as potential authorized persons. Another commenter queried whether the Department intended to limit ''aid, benefit, or service'' to academics. Another commenter asked the Department to clarify whether board members or other persons involved in the recipient's governance or similar activities are ''authorized'' by the recipient to provide an aid, benefit, or service, regardless of whether they are paid.

One commenter urged the Department to clarify that agents and employees can engage in quid pro quo sex-based harassment regardless of whether they are actually authorized by the recipient to provide an aid, benefit, or service as part of the recipient's education program or activity. Another commenter recommended the Department clarify that a threat of detriment is covered by the proposed definition of quid pro quo sex-based harassment regardless of whether the threat is carried out.

Discussion: The Department acknowledges the commenters' support of the definition of quid pro quo sex-based harassment, which covers any employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity. The Department also acknowledges the commenter's support for the inclusion of both explicit and implied conditioning of such aid, benefit, or service on a person's participation in sexual conduct, and confirms that implied conditioning is covered by the definition of quid pro quo sex-based harassment.

The Department appreciates the commenter's suggestion to remove ''unwelcome'' from the proposed definition of quid pro quo sex-based harassment but declines to do so because the unwelcomeness of conduct is a well-established component of harassment law. *See, e.g., Doe* v. *Mercy Catholic Med. Ctr.,* 850 F.3d 545, 565 (3d Cir. 2017) (stating that ''unwelcome sexual advances, requests for sexual favors, or other verbal or physical actions of a sexual nature constitute quid pro quo harassment'' if certain conditions are met); *Koeppel,* 252 F. Supp. 3d at 1326, 1327 n.3 (policy prohibiting certain ''unwelcome'' advances was neither vague nor overbroad); *cf.* 29 CFR 1604.11(a) (Title VII regulations prohibiting certain ''[u]nwelcome sexual advances''). The Department notes that quid pro quo sex-based harassment involves an abuse of authority that is generally unwelcome. Additionally, as explained in the July 2022 NPRM, acquiescence to the conduct or the failure to complain, resist, or object to the conduct does not mean that the conduct was welcome, and the fact that a person may have accepted the conduct does not mean they welcome it. *See* 87 FR 41411–12.

The Department acknowledges the commenters' requests for clarification regarding who is an ''other person authorized by the recipient'' in the definition of quid pro quo sex-based harassment. The Department declines to list student leaders or students generally as potential authorized persons in the definition of quid pro quo sex-based harassment because students are the intended beneficiaries of aid, benefits, or services of the recipient's education program or activity. If a student did ever occupy a position as some ''other person authorized by the recipient to provide an aid, benefit, or service,'' then the student would fall under the definition as it is in these final regulations. The Department clarifies here that the example of quid pro quo harassment provided in the July 2022 NPRM, of a graduate student who conditioned a student's grade on sexual conduct, was not intended to limit coverage of such harassment to an academic aid, benefit, or service. *See* 87 FR 41412. Title IX covers all aspects of the recipient's education program or activity, including extracurricular activities. Moreover, quid pro quo sex-based harassment covers harassment by members of a recipient's leadership, including board members, paid or unpaid, to the extent those individuals are authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity.

The Department also clarifies that quid pro quo sex-based harassment can include situations in which an employee, agent, or other person authorized by the recipient purports to provide and condition an aid, benefit, or service under the recipient's education program or activity on a person's participation in unwelcome sexual conduct, even if that person is unable to provide that aid, benefit, or service. In addition, the threat of a detriment falls within the definition of quid pro quo sex-based harassment, whether or not the threat is actually carried out because a threat to, for example, award a poor grade unless a person participates in unwelcome sexual conduct, is a condition placed on the provision of the student's education, which is a service of the recipient.

Changes: None.

Hostile Environment Sex-Based Harassment—General (§ 106.2)

Comments: A number of commenters supported the proposed definition of hostile environment sex-based harassment because it would align with definitions of sexual and other forms of harassment in other Federal and State civil rights laws, including Title VII. The commenters believed this would

reduce confusion and provide consistency for students and employees.

Some commenters supported the proposed definition of hostile environment sex-based harassment because it would empower survivors to seek supportive measures and report sex-based harassment, reduce the stigma around reporting and seeking assistance, and provide greater clarity to students and administrators. Some commenters stated that, by contrast, the definition of ''sexual harassment'' in the 2020 amendments has deterred complainants from reporting sexual harassment because it sets a high standard that is viewed as difficult to meet.[7]

One commenter asked the Department to explain why the proposed definition of hostile environment sex-based harassment is consistent with the statutory authority granted to the Department under Title IX and should be granted deference.

Discussion: The Department agrees that the definition of ''sexual harassment'' in the 2020 amendments failed to fully effectuate Title IX's prohibition on sex discrimination. The Department believes the final definition will allow the Department to more fully enforce Title IX's nondiscrimination mandate because the definition covers a range of sex-based misconduct consistent with Title IX's broad language, will better align with the definitions of harassment in other civil rights laws, and will reduce confusion.

The Department also disagrees with the commenters' characterizations of OCR's prior guidance and underscores that prior guidance made clear OCR's commitment to interpreting Title IX consistent with the First Amendment. ''OCR has consistently maintained that the statutes that it enforces are intended to protect students from invidious discrimination, not to regulate the content of speech.'' U.S. Dep't of Educ., Office for Civil Rights, First Amendment Dear Colleague Letter (July 28, 2003) (2003 First Amendment Dear Colleague Letter), *https://www2.ed.gov/about/offices/list/ocr/firstamend.html; see also* 2001 Revised Sexual Harassment Guidance, at 22–23; 2014 Q&A on Sexual Violence, at 43–44. As discussed more fully in the July 2022 NPRM, nothing in the Title IX regulations requires a recipient to restrict any rights otherwise protected by the First Amendment, and OCR has expressed this view repeatedly in prior guidance. *See* 87 FR 41415. For additional discussion of the First Amendment, see the below discussion of Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2).

With respect to the Department's authority to adopt a definition of hostile environment sex-based harassment, we refer to our extensive explanation in the July 2022 NPRM. 87 FR 41393–94, 41410, 41413–14. The Department further notes that Congress empowered and directed the Department, and other Federal agencies, to issue regulations that effectuate Title IX. 20 U.S.C. 1682. The Department also observes that when Congress enacted Title IX in 1972, it imposed a broad prohibition on discrimination based on sex in education programs and activities that receive Federal financial assistance and since then has declined on multiple occasions to limit the scope of Title IX.[8] Title IX's plain language prohibits any discrimination on the basis of sex in a recipient's education program or activity and the Department maintains that, in the administrative enforcement context, Title IX must function as a strong and comprehensive measure to effectively address sex discrimination. *See generally* 118 Cong. Rec. 5803–58 (1972) (statement of Sen. Bayh); *see also N. Haven Bd. of Educ.* v. *Bell,* 456 U.S. 512, 521 (1982) (''There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.' '').

We further discuss the Department's authority to define ''sex-based harassment'' in the below section on Hostile Environment Sex-Based Harassment—the *Davis* standard.

Changes: None.

Hostile Environment Sex-Based Harassment—the *Davis* Standard (§ 106.2)

Background: In *Davis,* the Supreme Court held that a private action under Title IX for money damages against a school for student-to-student harassment will lie only if the harassment is ''so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.'' 526 U.S. at 633. For purposes of this subsection, the Department refers to the requirement that harassment be so ''severe, pervasive, and objectively offensive'' that it effectively bars access to an educational opportunity or benefit as the ''*Davis* standard.''

Comments: A group of commenters supported the Department's proposed definition of hostile environment sex-based harassment as compatible with *Davis.* Citing *Gebser,* 524 U.S. at 286–87, 292, these commenters further noted that the Supreme Court has recognized the Department's regulatory authority to implement Title IX's nondiscrimination mandate, even if the resulting regulations do not use the same legal standards that give rise to a claim for money damages in private actions.

Some commenters opposed the proposed definition of hostile environment sex-based harassment because it deviates from the *Davis* standard. Some commenters stated that the Department failed to specifically address either how the proposed definition of hostile environment sex-based harassment is consistent with *Davis* or adequately explain why the Department departed from the *Davis* standard. In addition, a group of commenters argued that the Department should not depart from the *Davis* standard because the Supreme Court held that Title IX covers misconduct by recipients, not teachers or students. As well, this group of commenters stated that courts have used the *Davis* standard to award (or evaluate) injunctive relief, not merely damages, in private party suits.

One commenter stated that OCR has previously rejected the idea that a different definition for harassment applies in private lawsuits for monetary damages as compared to OCR's administrative enforcement in the 2001 Revised Sexual Harassment Guidance.

One commenter argued that requiring a recipient to apply the Title VII workplace standard to students in administrative enforcement of Title IX would burden the recipient, create conflicts between Title IX's application in the courts compared to the administrative context, and lead to unpredictable applications of the law. Some commenters urged the Department to maintain the definition of ''sexual harassment'' in the 2020 amendments, including the reference to unwelcome conduct that is both severe and pervasive.

Other commenters stated that the proposed regulations would allow a recipient to benefit from the *Davis* standard if it was sued for monetary damages under Title IX but would

[7] The commenters cited Heather Hollingsworth, *Campus Sex Assault Rules Fall Short, Prompting Overhaul Call* Associated Press, June 16, 2022, *https://apnews.com/article/politics-sports-donald-trump-education-5ae8d4c03863cf98072e810c5de37048* (the University of Michigan reported that their number of Title IX complaints dropped from over 1,300 in 2019 to 56 in 2021 and Title IX complaints at the University of Nevada, Las Vegas dropped from 204 in 2019 to 12 in 2021 and the number of cases that met the criteria for formal investigation fell from 27 to 0).

[8] For example, Congress passed the Civil Rights Restoration Act in 1987, 20 U.S.C. 1687, to clarify the definition of ''program or activity'' in Title IX, and Congress has also rejected multiple amendments to exempt revenue producing sports from Title IX.

subject individual students and employees to what they asserted is a lower standard. The commenters further asserted that the potential loss of Federal funding in the context of administrative enforcement would put more pressure on administrators to punish student expression than the threat of losing a lawsuit. Additionally, a group of commenters asserted that, in light of the differences in ages of the students and the purposes of education across institutions, and because it would be reasonable for a school to refrain from disciplinary action that school officials believe would violate the Constitution, a recipient should have flexibility to make its own disciplinary decisions.

One commenter maintained that the *Davis* standard adequately protects survivors of student-to-student harassment and stated that plaintiffs have successfully used the *Davis* standard to hold a recipient liable for its deliberate indifference to student-to-student harassment.

Discussion: The Department appreciates the range of opinions regarding the consistency of the proposed regulations with the Supreme Court's decision in *Davis.* After reviewing applicable law, the public comments received, and the Department's experience enforcing Title IX with regard to harassment, the Department agrees with commenters who supported the Department's proposed definition of hostile environment sex-based harassment. The final definition of hostile environment sex-based harassment is consistent with the *Davis* standard because, like the *Davis* standard, the definition requires a contextual consideration of the totality of the circumstances to determine whether harassment impacted a complainant's or plaintiff's educational benefits, and only accounts for conduct that is so serious that it implicates a person's access to the recipient's education program or activity. Also, as discussed in the section below on Hostile Environment Sex-Based Harassment—Subjectively and Objectively Offensive (§ 106.2), the Department added the word ''offensive,'' which also appears in the *Davis* standard, to the final definition. The Department's final definition is not identical to *Davis,* however, because the Department also believes a broader standard is appropriate to enforce Title IX's prohibition on sex discrimination in the administrative context, in which educational access is the goal and private damages are not at issue. To that end, the final regulations require that harassing conduct be ''subjectively and objectively offensive'' and ''severe *or* pervasive,'' rather than the *Davis* standard's ''severe, pervasive, *and* objectively offensive.'' As described further below, the final definition follows the text of Title IX, falls well within the Department's authority to implement the statute, squares with the Department's enforcement experience, and is compatible with *Davis* as well as other relevant precedent.

The Department disagrees with commenters that the Department's regulatory definition of hostile environment sex-based harassment must be identical to the *Davis* standard. The Court in *Davis* did not set forth any definition of hostile environment sex-based harassment—it articulated the circumstances under which sexual harassment is sufficiently serious to create institutional liability for private damages when a recipient is deliberately indifferent to it. 526 U.S. at 639 (examining ''whether a district's failure to respond to student-on-student harassment in its schools can support a private suit for money damages''). Indeed, the *Davis* Court specifically indicated that the question of whether student-to-student harassment could be ''discrimination'' for purposes of Title IX was not the issue in the case. The Court explained that the defendants did not ''support an argument that student-on-student harassment cannot rise to the level of 'discrimination' for purposes of Title IX,'' and contrasted that question with the issue in the case, which concerned the standard for damages liability under Title IX for such harassment. *Id.* Moreover, the *Davis* Court explicitly stated that it was addressing the relevant scope of discrimination ''in the context of a private damages action'' when articulating that in such contexts, the sexual harassment must be ''severe, pervasive, and objectively offensive.'' *Id.* at 649–50. Similarly, the *Gebser* Court was especially concerned about the possibility of requiring a school to pay money damages for harassment that exceeded its level of Federal funding, not about the scope of prohibited harassment generally. *See* 524 U.S. at 289–90 (discussing Title IX's administrative enforcement proceedings including the opportunity for a recipient to take corrective measures, and observing, in part, that ''an award of damages in a particular case might well exceed a recipient's level of federal funding''). The Supreme Court has noted that the words of an opinion must be evaluated in a ''particular context,'' and readers must determine the ''particular work'' those words do. *Nat'l Pork Producers Council* v. *Ross,* 598 U.S. 356, 374 (2023). So, although the Court in *Davis* used the phrase ''severe, pervasive, and objectively offensive,'' the opinion as a whole makes clear that the Court was describing only the standards applicable to the ''particular context'' of a private action for damages—not the standard applicable to administrative enforcement. The standard adopted by the Court was intended, in part, to do the ''particular work'' of imposing a high bar specifically for private damages claims. *Davis,* 526 U.S. at 652–53.

The *Gebser* Court recognized the authority of Federal agencies such as the Department to ''promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate'' even in circumstances that would not give rise to a claim for monetary damages. 524 U.S. at 292. *Davis* itself emphasizes the point about the Department's authority to issue rules for administrative enforcement. After observing that Congress ''entrusted'' Federal agencies to ''promulgate rules, regulations, and orders to enforce the objectives'' of Title IX, *Davis,* 526 U.S. at 638, the Court repeatedly and approvingly cited the Department's then-recently published guidance regarding sexual harassment, *see id.* at 647–48, 651 (citing 1997 Sexual Harassment Guidance, 62 FR 12039–42). That guidance specifically stated that schools could be found to violate Title IX if the relevant harassment ''was sufficiently severe, persistent, or pervasive to create a hostile environment.'' 62 FR 12040. The guidance thus articulated a broader standard for prohibited harassment than the standard the Court articulated in *Davis* for purposes of private damages liability. And rather than calling into question the validity of that guidance, the Court in *Davis* relied on it. The Court in *Davis* also cited approvingly the Department's racial harassment guidance interpreting Title VI, *see Davis,* 526 U.S. at 648–49 (citing 1994 Racial Harassment Guidance, 59 FR 11449), which, like the Department's 1997 Sexual Harassment Guidance and 2001 Revised Sexual Harassment Guidance, explained that a hostile environment may exist if the relevant harassment was ''severe, pervasive or persistent.'' 59 FR 11449. *Davis* thus implicitly acknowledges the different standards that may govern private claims as compared to administrative enforcement. In addition, the Department is not aware of any court that restricted the Department from applying the prior longstanding definition of hostile environment sexual

harassment in the administrative enforcement context. The Department thus disagrees with the claim that the definition of hostile environment sex-based harassment in the final regulations must be identical to the *Davis* standard—particularly given that the Department's definition was developed to ensure that a recipient operates its education program or activity in a manner that is fully consistent with Title IX, and the *Davis* standard was developed with attention to the challenges associated with imposing money damages on a school district in a private civil action related to student-to-student conduct.[9]

Gebser and *Davis* thus align with the Department's long-held view that its administrative enforcement standard need not be identical to the standard for monetary damages in private litigation. The Department made its view clear in the July 2022 NPRM and elsewhere in this preamble. *See* 87 FR 41413–14. In the preamble to the 2020 amendments, the Department similarly stated that it has regulatory authority to select conditions and a liability standard different from those used in *Davis* because the Department has authority to issue regulations that require recipients to take administrative actions to effectuate Title IX's nondiscrimination mandate.[10] 85 FR 30033. The Department also noted that the definition of ''sexual harassment'' in the 2020 amendments did ''not simply codify the *Gebser/Davis* framework'' and instead it ''reasonably expand[ed] the definition[ ] of sexual harassment'' to tailor it to the administrative enforcement context. *Id.* The Department also reiterated in the preamble to the 2020 amendments that the Court in *Davis* did not opine as to what the appropriate definition of sexual harassment must or should be for the Department's administrative enforcement. *Id.*

The Department acknowledges that some courts have applied the *Davis* standard when deciding whether to grant injunctive relief in addition to damages, but that does not change the fact that the *Davis* standard was developed in the context of determining whether a school district's failure to respond to student-to-student harassment makes the school district liable for monetary damages and that the Department is not bound by that standard in the administrative enforcement context. The cases cited by commenters do not establish that the final regulations exceed the boundaries of Title IX and the Department's authority to effectuate the statute. *Davis, Gebser,* and the reasoning offered in this preamble are more persuasive grounds for determining the content of the final regulations. Indeed, courts have recently confirmed that the Department may use *Davis* and *Gebser* as the ''appropriate starting point for administrative enforcement of Title IX,'' and then ''adapt[ ] . . . that framework to hold recipients responsible for *more* than what the *Gebser/Davis* framework alone would require.'' *Victim Rts. L. Ctr.* v. *Cardona,* 552 F. Supp. 3d 104, 129–30 (D. Mass. 2021) (quotation marks omitted) (emphasis added); *accord New York* v. *U.S. Dep't of Educ.,* 477 F. Supp. 3d 279, 297 (S.D.N.Y. 2020) (holding that it was reasonable for the Department to conclude it ''was not required to adopt the definition of sexual harassment in the *Gebser/Davis* framework''). Consistent with that judicial guidance, the Department's definition of hostile environment harassment covers more than that described in *Davis* alone.

The Department disagrees with commenters who maintained that distinctive standards for money damages and administrative enforcement will be unduly burdensome, confusing, or otherwise improper given the 2020 amendments or other Department statements. The *Davis* standard has been in place for Title IX civil actions seeking monetary damages since 1999—well over twenty years—but the Department has never adopted that precise standard for the Department's Title IX administrative enforcement actions. The Department is not aware of any persuasive evidence that recipients were unable to understand the difference between the administrative enforcement and civil damages contexts during the period prior to or since the 2020 amendments. Nor has OCR's experience in enforcing Title IX during that period provided a basis to conclude that any differences between the administrative enforcement and civil damages contexts were barriers to effective implementation of Title IX's nondiscrimination requirement, or that the Department's approach to enforcement infringed on protected speech rights. It is OCR's experience that when recipients' responses to sex-based harassment fail to comply with Title IX, such failure is not because the recipient is unable to understand the differences between the administrative enforcement and civil damages contexts, but rather because the recipient failed to respond promptly and effectively to known sex-based harassment.

The Department also appreciates the commenters' concern that a recipient might impose a sanction on a student or employee for violating its policy against sex discrimination, while the recipient might not be held liable for money damages in a private civil action if it did not impose such a sanction. But the Department is not convinced the commenters identified a logical inconsistency between discipline for those who engage in harassment and the absence of damages against a recipient for responding to such harassment. A recipient must take action to address sex-based harassment, which may include taking disciplinary action against a respondent, regardless of whether the complainant may be entitled to monetary damages due to the recipient's deliberately indifferent response. That a recipient may not be liable in damages for a student's or employee's harassment does not provide a reason to conclude that the harassing student or employee is immune from disciplinary action under Title IX or any other applicable provision.

Nothing in the comments, the 2020 amendments, or previous Department guidance documents dissuades the Department from concluding in these final regulations that distinguishing between damages and administrative enforcement standards is a lawful and well-reasoned approach to effectuating Title IX.

Given the differences between the two contexts, there is ample justification for the Department to apply a different standard to the type of conduct to which a recipient must respond than to conduct for which a private party may seek damages as a result of a recipient's failure to respond. Requiring conduct to be ''severe and pervasive'' in private actions for damages requires a broad showing—of intensity and breadth—before a recipient can be held monetarily liable. Such a high barrier is not necessary or appropriate in the

[9] *See Davis,* 526 U.S. at 639 (describing the Court's focus on the specific issue of damages in private civil actions); *Gebser,* 524 U.S. at 283 (''In this case, moreover, petitioners seek not just to establish a Title IX violation but to recover *damages* based on theories of *respondeat superior* and constructive notice. It is that aspect of their action, in our view, that is most critical to resolving the case.'' (emphasis in original)); *Gebser,* 524 U.S. at 292 (recognizing the distinction between administrative enforcement and civil liability).

[10] Although the Department's administrative enforcement proceedings differ in many ways from private lawsuits for money damages, the Department does not mean to suggest that administratively imposed remedial actions can never have financial consequences. *See* 85 FR 30414–15 (''Remedial action required of a recipient for violating Title IX or these final regulations may therefore include any action consistent with 20 U.S.C. 1682, and may include equitable and injunctive actions as well as financial compensation to victims of discrimination or regulatory violations, as necessary under the specific facts of a case.'').

administrative context, in which the goal is to ensure access to education.

Because evaluation of harassing conduct depends on the surrounding circumstances, the Department believes it is appropriate to recognize that conduct that is either pervasive or severe may create a hostile environment that limits or denies a person's educational access. Under the final definition of hostile environment sex-based harassment, a recipient must still make an individualized determination as to whether certain conduct constitutes prohibited sex-based harassment and may conclude, for example, that certain conduct between employees is not prohibited while the same conduct between students or between a student and an employee is prohibited. As explained in the section below discussing Hostile Environment Sex-Based Harassment—Factors to be Considered (§ 106.2), whether unwelcome sex-based conduct has created a hostile environment is determined based on the totality of the circumstances. The final regulations thus call for a recipient to consider the ages, roles, and other relevant characteristics of the parties involved, including whether they are students or employees, in making the determination. Based on the specific circumstances in which a particular incident arises, a single serious incident—even if not pervasive—may be so severe as to create a hostile environment. And based on the specific circumstances in which it occurs, pervasive conduct—even if no single occurrence of the conduct, taken in isolation, is severe—may likewise create a hostile environment.

Moreover, in the context of administrative enforcement, a recipient must be given notice and an opportunity to come into compliance before the termination of funding. 20 U.S.C. 1682. Indeed, the Department's administrative enforcement investigations generally result in agreements with the recipient to take action that would bring them into compliance. Thus, if the Department receives a complaint about severe or pervasive harassment, and its investigation confirms the allegations in that complaint, the Department will bring this conduct to the attention of the recipient, and to discuss and determine appropriate corrective measures with the recipient's input. These protective guardrails and opportunity for the recipient to take corrective measures do not apply in the context of private lawsuits for damages; accordingly, a higher bar (*i.e.,* severe and pervasive) may be appropriate in that context. The definition of hostile environment sex-based harassment in the final regulations takes account of the differences between these two contexts and is consistent with the Department's responsibility to administratively enforce Title IX's strong and comprehensive prohibition on sex discrimination. *See generally* 118 Cong. Rec. 5803–12 (1972) (statement of Sen. Bayh).

Regarding one commenter's concerns about applying Title VII workplace standards to students, as explained in the preamble to the July 2022 NPRM, the Department recognizes the differences between educational and workplace environments. *See* 87 FR 41415–16. Although the final definition of hostile environment sex-based harassment aligns closely with the definition of hostile environment sexual harassment under Title VII, the Department did not simply adopt the Title VII definition and instead appropriately crafted the definition for use in education programs or activities governed by Title IX. There are substantial administrative and compliance benefits associated with greater alignment, given that the vast majority of recipients must comply with both Title IX and Title VII. Even considering the benefits of more closely aligning the Title IX and Title VII standards, however, the Department reiterates that the most fundamental consideration is that the final definition of hostile environment sex-based harassment will better enable the Department to implement Title IX's prohibition on sex discrimination. *See* 87 FR 41415. The Department's commitment to the effective implementation of Title IX is the essential and principal reason for the final regulations. Most importantly, then, the definition of hostile environment sex-based harassment aligns with Congress's commitment in Title IX that no person shall be subjected to sex discrimination under an education program or activity that receives Federal financial assistance.

Regarding some commenters' characterization of the Department's definition of hostile environment sex-based harassment as a ''lower standard'' than the Supreme Court set out in *Davis,* the Department reemphasizes that the Court in *Davis* did not define hostile environment sexual harassment and that the definition of hostile environment sex-based harassment in these final regulations requires satisfaction of several elements before a hostile environment is established, including that the sex-based conduct be both subjectively and objectively offensive. Thus, the conduct in question must be (1) unwelcome, (2) sex-based, (3) subjectively and objectively offensive, as well as (4) so severe or pervasive (5) that it results in a limitation or denial of a person's ability to participate in or benefit from the recipient's education program or activity. The changes to the definition of ''sexual harassment'' in the 2020 amendments are important to the effective implementation of Title IX, the Department determined, but the degree of difference from the *Davis* standard should not be overstated.

The Department is not persuaded by comments arguing that a recipient is equally or more likely to (unlawfully) discipline students because of fear of Federal funding loss than because of fear of damages litigation by private parties. The Department's decades of enforcement experience have not established a convincing basis for that conclusion. In addition, the Department is not persuaded by comments asserting that a recipient will be more driven to impose, and a respondent more likely to face, unfair or unlawful discipline under the Department's definition of hostile environment sex-based harassment than under the *Davis* standard. First, as set out in the July 2022 NPRM and in the discussion of §§ 106.45 and 106.46 in this preamble, the final regulations require a recipient to adopt grievance procedures that include many procedural protections to effectuate investigations, and evidence-based determinations, that are designed to ensure a fair process for all parties, including, for example, equitable treatment and an equal opportunity to access to relevant evidence, and the objective evaluation of all relevant and not otherwise impermissible evidence prior to determination. *See* 87 FR 41461–63; *see also* discussion of Framework for Grievance Procedures for Complaints of Sex Discrimination (II.C). Further, as discussed more fully in the section below on Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2), the final regulations maintain the language in § 106.6(d) that nothing in the Title IX regulations requires a recipient to restrict any rights that would otherwise be protected from government action by the First Amendment. The Department also maintains that the grievance procedure requirements in these final regulations, combined with the acknowledgement that recipients must not infringe on any First Amendment rights, including in the imposition of discipline, provide protections that—like the *Davis* standard—will ensure respondents do not face unfair discipline. *See Davis,*

526 U.S. at 648 (rejecting the argument that the Court's opinion would require '''expulsion of every student accused of misconduct''').

As for commenters' concern that the Department's enforcement of the definition of ''sex-based harassment'' might somehow prompt schools to violate the First Amendment's protection of speech, the Department acknowledges that, in the preamble to the 2020 amendments, the Department stated that adopting a definition of ''sexual harassment'' closely aligned with the *Davis* standard ''helps ensure that Title IX is enforced consistent with the First Amendment.'' 85 FR 30033. The standard in the final regulations is also sufficiently closely aligned with *Davis* for purposes of ensuring that Title IX is enforced consistent with the First Amendment. The Department is not persuaded by the commenters' interpretation of Supreme Court precedent to conclude otherwise or by the commenters' characterizations of the relevant considerations in setting an appropriate standard for hostile environment sex-based harassment to effectuate Title IX. Moreover, the Department notes again that § 106.6(d) assures that nothing in these regulations requires a recipient to take action that conflicts with the U.S. Constitution, including the First Amendment. Further, the Department repeats the statement from the July 2022 NPRM that a recipient must formulate, interpret, and apply its rules in a manner that respects the legal rights of students and employees when taking action to end sex-based harassment that creates a hostile environment. *See* 87 FR 41415.

The final regulations enable broad protection against sex discrimination in federally funded education programs and activities while respecting individual constitutional rights. For example, although the First Amendment may in certain circumstances constrain the manner in which a recipient responds to discriminatory harassment in the form of speech, recipients have ample other means at their disposal to remedy a hostile environment. For additional discussion, see the section below on First Amendment Considerations. Recipients can—consistent with the Due Process Clause—impose discipline, where appropriate and not inconsistent with the First Amendment, by following the various procedures designed to protect respondents in grievance procedures. For further explanation, see the discussions of the grievance procedure requirements in §§ 106.45 and 106.46.

The Department agrees with commenters insofar as they assert that the *Davis* standard reconciles protected speech and actionable discrimination, but the Department disagrees that the *Davis* standard is the only such standard or was set out by the Court as such. Adopting such a position would seem to rule out the Title VII standard for hostile environment harassment even as to employees in workplaces. Relatedly, while the Department agrees with the commenter who stated that the *Davis* standard protects some complainants whom the commenter describes as survivors of student-to-student harassment, the *Davis* standard does not encompass the full meaning of Congress's prohibition on sex discrimination. As discussed above, the *Davis* Court was not addressing the full scope of Title IX's protection, only the standard under which a private party could seek damages against a recipient in a civil action for student-to-student sex-based harassment under Title IX. *See, e.g.,* 526 U.S. at 639, 649–50.

The Department recognizes that some recipients have adopted harassment policies that have been successfully challenged on First Amendment grounds and that, in some of those cases, courts have invoked *Davis* in reaching their conclusions. *See, e.g., Speech First, Inc.* v. *Cartwright,* 32 F.4th 1110 (11th Cir. 2022). The policies at issue in those cases, however, do not contain the definition of ''sex-based harassment'' set out in these final regulations and instead were broader and less protective of speech.[11]

[11] For example, the policy at issue in *Speech First* stated that discriminatory harassment ''may take many forms, including verbal acts, name-calling, graphic or written statements (via the use of cell phones or the internet), or other conduct that may be humiliating or physically threatening.'' 609 F. Supp. 3d at 1114. The policy's definition of hostile environment harassment did not reference offensiveness, which is in the definition of hostile environment sex-based harassment in these final regulations. It defined hostile environment harassment as ''harassment that is so severe or pervasive that it unreasonably interferes with, limits, deprives, or alters the terms or conditions of education (*e.g.,* admission, academic standing, grades, assignment), employment (*e.g.,* hiring, advancement, assignment), or participation in a program or activity (*e.g.,* campus housing), when viewed from a subjective and objective perspective.'' *Id.* at 1114–15. The court specifically noted that the terms ''unreasonably'' and ''alter,'' neither of which appear in the definition of hostile environment sex-based harassment in the final regulations, were amorphous and imprecise. *Id.* at 1121. The court also noted that the university's policy prohibited students not only from committing the specified acts, but also from condoning, encouraging, or even failing to intervene to stop them. *Id.* at 1115 (internal quotation marks omitted). The definition of hostile environment harassment in these final regulations does not discuss condoning, encouraging, or failing to intervene. Further, the court noted that the university's student code of conduct stated that the discriminatory harassment policy, among other policies, ''should be read broadly and [is] not designed to define prohibited conduct in exhaustive terms.'' *Id.* at 1121 (internal quotation marks omitted).

Moreover, the cases cited by commenters do not represent the universe of relevant cases in which courts have addressed First Amendment challenges to recipient policies prohibiting harassment. In other cases, courts have upheld recipient prohibitions on harassment against First Amendment challenges. *See, e.g., Rowles,* 983 F.3d at 358–59; *Koeppel,* 252 F. Supp. 3d at 1326; *Marshall,* 2015 WL 1179955, at *6–7. Also, with respect to elementary schools and secondary schools, the Supreme Court has recognized that school regulation of student speech may be appropriate to prohibit ''serious or severe bullying or harassment targeting particular individuals,'' in addition to ''threats aimed at teachers or other students.'' *Mahanoy Area Sch. Dist.* v. *B.L.,* 141 S. Ct. 2038, 2045 (2021). We offer further discussion of the First Amendment in the section on Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2) below.

Changes: As explained in the section below on Hostile Environment Sex-Based Harassment—Subjectively and Objectively Offensive (§ 106.2), the Department has revised the definition of ''sex-based harassment'' to add the word ''offensive'' to the subjective and objective standard for establishing hostile environment sex-based harassment.

Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2)

Comments: These comments have been organized into 12 categories, and the discussion of all of these comments follows.

Support for Enforcing Title IX Protections Consistent With the First Amendment

A group of commenters stated that the proposed definition of hostile environment sex-based harassment would effectively enforce Title IX's protections while ensuring consistency with the First Amendment by requiring a totality of the circumstances approach to assessing and evaluating the conduct from both a subjective and objective perspective to ensure the conduct constitutes harassment and is not only speech. Some commenters appreciated the Department's commitment to freedom of speech and academic freedom and the Department's intention to maintain the First Amendment

language in § 106.6(d) in the 2020 amendments.

One commenter stated that the ''severe or pervasive'' standard in the definition of hostile environment sex-based harassment recognizes that the government may limit some protected speech in the educational context to preserve its interest in ensuring equal access to education.

Prohibiting or Chilling Speech

Other commenters were concerned that the proposed definition of hostile environment sex-based harassment would prohibit or chill speech that is protected under the First Amendment. For example, some commenters feared that the proposed definition would strip individuals of their freedom of speech, assembly, press, and religion and disagreed with the Department's contention that the proposed definition would not cover protected speech.

Some commenters expressed concern about the potential for self-censorship and referenced what they said were high rates of self-censorship at postsecondary institutions. One commenter supported maintaining the definition of ''sexual harassment'' in the 2020 amendments because the commenter said it ensures verbal conduct is not punished in a way that chills speech or restricts academic freedom. The commenter noted that the Department stated in the preamble to the 2020 amendments that the Department found evidence that recipients' anti-harassment policies infringed on speech protected under the First Amendment and encouraged students and faculty to avoid debate and controversial ideas. *See* 85 FR 30154.

A group of commenters stated that the Department cannot compel schools to suppress speech in a manner that would otherwise violate the First Amendment even in private schools where the First Amendment does not apply.

One commenter opposed the proposed definition of hostile environment sex-based harassment because they believed that allegations of sex discrimination would trigger burdensome supportive measures against respondents, and thus students and employees would be forced to avoid any speech that could be perceived as violating the proposed regulations in order to avoid being subjected to such measures.

Reporting, Tracking, and Investigating

Some commenters expressed concern that nearly all classroom discussions about sex-related topics would involve statements that may constitute sex discrimination and would be subject to the reporting requirements under proposed § 106.44(c), which would chill free speech of students and employees and lead to investigations. Some commenters were concerned that postsecondary institutions would use Title IX as an excuse to take adverse action against faculty whose research includes controversial positions.

The Davis Standard and the First Amendment

Similar to the comments discussed above in the section on Hostile Environment Sex-Based Harassment—the *Davis* Standard (§ 106.2), some commenters argued that departing from the *Davis* standard would violate the First Amendment. Some commenters stated that the proposed definition of hostile environment sex-based harassment has already been criticized by the U.S. Court of Appeals for the Eleventh Circuit in *Speech First,* 32 F.4th at 1113, which involves a challenge to a postsecondary institution's policy that used language the commenters asserted is similar to the proposed definition. The commenters also asserted that other courts have looked unfavorably on this definition within the context of postsecondary institutions' anti-harassment policies. These commenters argued that the only way for the Department to avoid invalidation by a court is to use a definition of hostile environment sex-based harassment that includes all of the elements of the *Davis* standard.

Academic Freedom

Some commenters were concerned that the proposed definition of hostile environment sex-based harassment would not adequately protect academic freedom, asserting that the proposed definition would restrict a recipient from allowing faculty and students at postsecondary institutions to have a constructive dialogue and freely exchange ideas. One commenter was concerned that students would be deterred from making sex-based comments, which the commenter asserted would stop postsecondary students from having the types of conversations from which they might learn the most. Another commenter recommended that the Department amend § 106.6(d), which the Department did not propose to amend, to reference academic freedom.

Content-Based and Viewpoint-Based Regulation

Some commenters objected to the proposed definition of hostile environment sex-based harassment because they asserted it would impose invalid content- and viewpoint-based restrictions on protected speech and unconstitutionally compel speech on matters of public debate.

Compelled Speech

Some commenters objected to the language in the July 2022 NPRM stating that even though ''the First Amendment may prohibit a recipient from restricting the rights of students to express opinions about one sex that may be considered derogatory, the recipient can affirm its own commitment to nondiscrimination based on sex and take steps to ensure that competing views are heard.'' 87 FR 41415. One commenter referenced court decisions holding that freedom of speech includes the right to speak freely and to refrain from speaking at all.

Speech Related to Abortion

The Department also received comments regarding speech related to abortion. Some commenters were concerned that the proposed definition of hostile environment sex-based harassment would silence speech and viewpoints of students opposed to abortion rights. Other commenters were concerned that students protesting abortion rights would be found responsible for creating a hostile environment or retaliated against by other individuals in the recipient's education program or activity for allegedly creating a hostile environment under the proposed definition of hostile environment sex-based harassment.

One commenter asked the Department to clearly state in the proposed regulations that a recipient would not be compelled to promote abortion and that speech, organizations, events, and speakers that oppose abortion rights would not be considered in violation of Title IX.

Religious Liberty

Some commenters asserted that the proposed definition of hostile environment sex-based harassment conflicted with the First Amendment's guarantee of religious liberty. One commenter was concerned that the proposed regulations would threaten freedom of expression and academic inquiry at religiously affiliated schools and for professors and students whose areas of teaching and study are related to morality or religion. The commenter stated that requiring students and employees to conform to the Department's views on these issues related to sexual orientation, gender identity, and termination of pregnancy would violate the First Amendment, burden those who hold disfavored

views including views informed by deeply held religious convictions and those who teach about these topics, and lead students and professors to refrain from espousing their beliefs because of the personal risk associated with doing so.

Some commenters asked the Department to ensure that the final regulations not require or encourage a recipient to punish religious exercise and speech, including by amending the proposed regulations to state that they do not require an individual or recipient to endorse or suppress views in a way that violates their sincerely held religious beliefs.

Freedom of Association

Some commenters stated that freedom of association protects the right to exclude others based upon the group's messaging. One commenter was concerned that under the proposed definition of hostile environment sex-based harassment, an LGBTQI+ student group could be forced to allow non-LGBTQI+ students to join or lead the group and urged the Department to maintain the definition of ''sexual harassment'' from the 2020 amendments. Another commenter said that even if student groups benefit from Federal funding provided to their postsecondary institutions, such funding does not transform the actions of these groups into State action.

Supremacy of the First Amendment and Statutory Interpretation

One commenter was concerned about the proposed removal of some references to the primacy of the First Amendment that were in the 2020 amendments and the reduced discussion of the First Amendment in the July 2022 NPRM. The commenter urged the Department to explicitly clarify the ''supremacy of constitutional concerns'' when they conflict with Title IX to avoid recipients being forced to expend resources on litigation.

Another commenter argued the Department violated the Administrative Procedure Act because, in the July 2022 NPRM, the Department did not engage meaningfully with the First Amendment analysis in the preamble to the 2020 amendments. This commenter asserted that the Department must provide a reasoned explanation for why it disregarded the facts and circumstances that the Department considered in the 2020 amendments and explain why it now takes an opposing view.

Private Recipients and Free Speech

One commenter expressed concern that the proposed regulations do not make allowances for State laws that extend free speech rights to students at private schools and that proposed § 106.6(b) would preempt such laws. Another commenter recommended that the Department extend § 106.6(d) to reach private recipients.

Discussion: The Department appreciates the commenters' thoughtful views on the First Amendment implications of the proposed definition of hostile environment sex-based harassment. The Department is fully committed to the freedom of speech, the freedom of association, religious liberty, and academic freedom. The Department reaffirms the importance of the free exchange of ideas in educational settings and particularly in postsecondary institutions, consistent with the First Amendment. Indeed, a free exchange of different ideas is essential to high quality education. Nothing in the Title IX regulations restricts any rights that would otherwise be protected from government action by the First Amendment. *See* 34 CFR 106.6(d).

Consistent with those commitments, and after a thorough review of the 2020 amendments and information received prior to, during, and after the issuance of the July 2022 NPRM, the Department is convinced that the definition of hostile environment sex-based harassment in the final regulations does not infringe the constitutional rights of students, employees, and all others. The Department therefore agrees with those commenters who concluded that the proposed definition of hostile environment sex-based harassment would provide more protection from discrimination than the 2020 amendments and fully effectuate Title IX's nondiscrimination mandate, while still respecting the First Amendment rights of students, employees, and all others.

The Department acknowledges that there can be tension between laws and policies that target harassment and the freedom of speech protected by the First Amendment. *See, e.g., Saxe* v. *State Coll. Area Sch. Dist.,* 240 F.3d 200, 206–07 (3d Cir. 2001). The Department nonetheless believes that the final regulations appropriately protect the rights guaranteed under the First Amendment. First, as explained above in Hostile Environment Sex-Based Harassment—the *Davis* standard (§ 106.2), the final regulations maintain the language from § 106.6(d) in the 2020 amendments that nothing in the Title IX regulations requires a recipient to restrict any rights that would otherwise be protected from government action by the First Amendment. Second, the Department reiterates the statement from the July 2022 NPRM that a recipient must formulate, interpret, and apply its rules in a manner that respects the legal rights of students and employees when taking action to end sex-based harassment that creates a hostile environment. *See* 87 FR 41415. The Department maintains that although the First Amendment may in certain circumstances constrain the manner in which a recipient responds to sex-based harassment in the form of speech, recipients have ample other means at their disposal to remedy a hostile environment, and recipients remain free under the final regulations to determine whether discipline is the appropriate response to sex-based harassment, and if so, what form that discipline should take.

The Department further notes that the government's compelling interest in preventing discrimination is well established. *See, e.g., Saxe,* 240 F.3d at 209 (''preventing discrimination in the workplace—and in the schools—is not only a legitimate, but a compelling, government interest'' (citing *Bd. of Dirs. of Rotary Internat'l* v. *Rotary Club of Duarte,* 481 U.S. 537, 549 (1987))). And the Supreme Court has specifically recognized the government's ''compelling interest in eradicating discrimination'' on the basis of sex. *Roberts* v. *U.S. Jaycees,* 468 U.S. 609, 623–24 (1984) (explaining that the goal of eliminating sex discrimination and assuring equal access to publicly available goods and services is ''unrelated to the suppression of expression'' and ''plainly serves compelling state interests of the highest order'').

Although sex-based harassment policies may implicate the First Amendment, the definition of hostile environment sex-based harassment in the final regulations is narrowly tailored to advance the Department's compelling interest in eliminating discrimination on the basis of sex. Indeed, in response to concerns commenters raised regarding the First Amendment implications of the proposed definition, the Department has revised the definition to retain the 2020 amendments' reference to offensiveness. Thus, the definition in the final regulations covers only sex-based conduct that is unwelcome, both subjectively and objectively offensive, and so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity.

The Department acknowledges that ''[l]oosely worded'' anti-harassment

laws may be in tension with the First Amendment, *see Saxe,* 240 F.3d at 207, but the Department's definition of hostile environment sex-based harassment is not. Unlike the policy that was invalidated in *Saxe,* which (among other things) covered speech that merely had the ''purpose'' of interfering with a person's education performance, *see id.* at 210, the Department's definition of hostile environment sex-based harassment is narrowly tailored to advance the compelling interest in eliminating discrimination on the basis of sex because it requires that the harassment have the actual effect of limiting or denying a person's ability to participate in or benefit from a recipient's education program or activity. *Accord, e.g., Robinson* v. *Jacksonville Shipyards, Inc.,* 760 F. Supp. 1486, 1536 (M.D. Fla. 1991) (concluding that application of Title VII to proscribe hostile environment harassment was narrowly tailored to advance a compelling government interest).

Other case law likewise indicates that some prohibitions on harassment that are directed at speech that materially and substantially disrupts school activities are consistent with the First Amendment. The Supreme Court in *Tinker* v. *Des Moines Independent Community School District* stated that schools may discipline speech that would ''impinge upon the rights of other students'' or substantially disrupt school activities. 393 U.S. 503, 509 (1969). The Department maintains that the type of conduct prohibited by the definition of hostile environment sex-based harassment in the final regulations ''invades the rights of others'' to receive an education free from sex discrimination and therefore is ''not immunized by the constitutional guarantee of freedom of speech.'' *Id* at 513. Other cases from the elementary school and secondary school context have expressed similar conclusions. *See, e.g., Parents Defending Educ.* v. *Linn Mar Cmty. Sch. Dist.,* 83 F.4th 658 (8th Cir. 2023) (distinguishing between harassing speech that involves an invasion of the rights of others with speech that is merely ''disrespectful''); *Harper* v. *Poway Unified Sch. Dist.,* 445 F.3d. 1166, 1185 (9th Cir. 2006) (''although *Tinker* does not allow schools to restrict the non-invasive, non-disruptive expression of political viewpoints, it does permit school authorities to restrict 'one particular opinion' if the expression would 'impinge upon the rights of other students' or substantially disrupt school activities'' (citation omitted)); *Parents Defending Educ.* v. *Olentangy Loc. Sch. Dist.,* No. 23-cv-01595, 2023 WL 4848509, at *2 (S.D. Ohio July 28, 2023) (policies prohibiting students from engaging in harassment ''fit squarely within this carve-out to schoolchildren's First Amendment rights: they prohibit only speech that gives rise to fears of physical or psychological harm, materially affect student performance, substantially disrupt the operation of the school, or create a hostile educational environment''); *L.M.* v. *Town of Middleborough,* No. 23-cv-11111, 2023 WL 4053023, at *6 (D. Mass. June 26, 2023) (schools can prohibit speech that is in ''collision with the rights of others to be secure and be let alone'', and listing cases).

Separate from the narrow-tailoring inquiry, some courts have concluded that appropriately delineated anti-harassment laws encompass only speech that is unprotected by the First Amendment. *See, e.g., Aguilar* v. *Avis Rent A Car Sys., Inc.,* 21 Cal. 4th 121, 137 (1999) (explaining that ''harassing speech that is sufficiently severe or pervasive to constitute employment discrimination is not constitutionally protected''). To be sure, the Department agrees that—as courts have recently and repeatedly stated—''[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause.'' *United States* v. *Yung,* 37 F.4th 70, 78 (3d Cir. 2022) (quoting *Saxe,* 240 F.3d at 204). Nonetheless, courts have concluded, for various reasons, that certain forms of harassing speech do indeed lack First Amendment protection. Some courts have concluded that certain forms of purely verbal harassment constitute ''speech acts'' that are entirely outside the scope of the First Amendment. This explanation applies most naturally to quid pro quo harassment. *See, e.g., Saxe,* 240 F.3d at 208 (''a supervisor's statement 'sleep with me or you're fired' may be proscribed'' because, despite ''the purely verbal quality of such a threat, it surely is no more 'speech' for First Amendment purposes than the robber's demand 'your money or your life' ''). In a similar fashion, but using different terminology, courts have sometimes treated harassment as a form of conduct, thus leaving it outside the scope of the First Amendment even when the harassment was accomplished through speech. *See, e.g., Thorne* v. *Bailey,* 846 F.2d 241, 243 (4th Cir. 1988) (repeated and insulting telephone calls constituted a ''course of conduct'' that was ''not protected speech'' (citing *State* v. *Thorne,* 175 W. Va. 452, 454, 333 S.E.2d 817, 819 (1985))); *State* v. *Richards,* 127 Idaho 31, 36 (Ct. App. 1995) (speech uttered with ''particular purpose to inflict mental discomfort on another . . . is not protected speech, but conduct that legitimately may be proscribed''); *Robinson,* 760 F. Supp. at 1535 (''pictures and verbal harassment are not protected speech because they act as discriminatory conduct'').

Still other courts have concluded that the Supreme Court's captive-audience doctrine justifies prohibitions on hostile environment harassment, even when they reach speech. *See, e.g., Aguilar,* 21 Cal. 4th at 159 (Werdegar, J., concurring) (''The Supreme Court has in a number of cases recognized that when an audience has no reasonable way to escape hearing an unwelcome message, greater restrictions on a speaker's freedom of expression may be tolerated.'' (citing, among other cases, *Frisby* v. *Schultz,* 487 U.S. 474 (1988))). The ''status [of a victim] as forced recipients of [a harasser's] speech'' thus ''lends support to the conclusion that restrictions on [the harasser's] speech are constitutionally permissible.'' *Id.* at 162; *see also, e.g., Rodriguez* v. *Maricopa Cnty. Cmty. Coll. Dist.,* 605 F.3d 703, 710 (9th Cir. 2010) (stating in dicta that ''racial insults or sexual advances directed at particular individuals in the workplace may be prohibited'' because they '' 'intrude upon the targeted listener' '' and '' 'do so in an especially offensive way' '' (quoting *Frisby,* 487 U.S. at 486 (alteration omitted))). And indeed, in the Department's experience, many students subject to hostile environment harassment lack reasonable ways to avoid the harasser because of the difficulties inherent in transferring to a different school or taking similar measures.

The Department does not mean to suggest that any of the above-described rationales is the single correct explanation for why courts have concluded that some prohibitions on harassment are either sufficiently narrow to withstand First Amendment scrutiny or sweep in only certain forms of harassment that are not protected by the First Amendment. But whatever the underlying doctrinal theory, it is clear from the case law that narrowly drawn anti-harassment laws are permissible. The Court's three decades-old decision in *Harris* is perhaps most clear on this issue. The harassment at issue in that case took the form of pure speech, and both the parties and amici raised First Amendment objections to the application of Title VII to that speech. *See, e.g.,* Reply Brief of Petitioner, *Harris,* 510 U.S. 17 (No. 92–1168), 1993 WL 632335, at *10–11 (arguing that

there is no First Amendment concern when Title VII is applied only to speech that is ''sufficiently severe or pervasive to alter the conditions of the victim's employment''). The Court concluded—without acknowledging any First Amendment concern—that Title VII could be applied to the speech. *See Harris,* 510 U.S. at 23. Had the Court determined that there were potential First Amendment concerns at issue in this case, the Court had the opportunity to address them and adjust its conclusion accordingly, but it did not. The Department agrees that the First Amendment allows for proscription of a narrow category of speech that, based on the totality of the circumstances, constitutes hostile environment sex-based harassment. *Accord, e.g., Aguilar,* 21 Cal. 4th at 137 (relying on *Harris* to uphold a proscription on hostile environment harassment). Because the Department's definition of hostile environment sex-based harassment in the final regulations is, in the relevant ways, consistent with the scope of the proscription of hostile environment harassment at issue in *Harris;* because § 106.6(d) continues to state that nothing in the Department's Title IX regulations requires a recipient to restrict rights otherwise protected under the First Amendment; and because the Department continues to recognize that a recipient must formulate, interpret, and apply its regulations in a manner that respects the legal rights of students and employees when taking action to end sex-based harassment that creates a hostile environment, the final regulations are fully consistent with the First Amendment. Moreover, as explained elsewhere in this section, although a recipient must respond to speech that creates a hostile environment based on sex, depending on the facts and context, the First Amendment may constrain or limit the manner in which a recipient responds to discriminatory harassment in the form of speech (*e.g.,* by using means other than disciplinary action to end and remedy the hostile environment) without obviating the recipient's obligation for its response to be effective.

The Department is not persuaded by the commenters' constitutional concerns about the final regulations' definition of hostile environment sex-based harassment. A number of commenters relied on *Speech First,* which held that a public university's ''discriminatory harassment'' policy should have been preliminarily enjoined. 32 F.4th at 1110. The court emphasized a range of considerations regarding the policy's breadth, including that the policy extended to conduct based on ''a long list of characteristics'' such as political affiliation, religion, non-religion, and genetic information; that it reached ''other conduct that may be humiliating,'' not only ''verbal acts, name-calling, [and] graphic or written statements''; that it applied to conduct that, among other effects, ''unreasonably . . . alters'' another student's ''participation in a university program or activity''; and it prohibited students ''not only from committing the specified acts, but also from '[c]ondoning,' 'encouraging,' or even 'failing to intervene' to stop them.'' *Id.* at 1115; *see also id.* at 1121 (adding that the student code of conduct indicated that the policy ''should be read broadly'' and was ''not designed to define prohibited conduct in exhaustive terms'' (internal quotation marks omitted)). Although the university policy under review did reference harassment that is severe or pervasive, *see id.* at 1114–15, that one feature, as highlighted, was not the court's focus. The definition of hostile environment sex-based harassment adopted in these final regulations is far different. The definition is narrower, clearer, and tailored to harms that have long been covered by hostile environment laws. Among other differences, the definition in the final regulations proscribes only certain conduct that ''limits or denies'' a person's ability to participate in a recipient's education program or activity, rather than any conduct that might ''alter'' such participation. In addition, the court in *Speech First* faulted the policy at issue for sweeping in conduct that ''may be humiliating,'' 32 F.4th at 1125, but the definition in the final regulations requires that conduct actually be both subjectively and objectively offensive.[12]

Similar to the commenters who cited *Speech First* to support their concerns, one commenter asserted that the court in *Perlot* v. *Green,* 609 F. Supp. 3d 1106 (D. Idaho 2022), looked unfavorably at a postsecondary institution's harassment policy that the commenter asserted applied a definition of sexual harassment similar to the proposed definition. But the court in *Perlot* did not question the university's definition of hostile environment sex-based harassment. *Id.* at 1120–21. The issue in the *Perlot* case was that plaintiffs had been issued no-contact orders for conduct that did not ''appear[] to be so 'severe, pervasive, and objectively offensive' as to hamper Jane Doe's access to her University education,'' and the school did not seem to be arguing otherwise. *Id.* at 1120.

Although some commenters fear that the proposed definition of hostile environment sex-based harassment would require postsecondary institutions to enact unconstitutional content- and viewpoint-based restrictions on protected speech, that fear is ungrounded. The final regulations do not, in any way, require postsecondary institutions to enact constitutionally impermissible content- and viewpoint-based restrictions and as explained elsewhere, the Department has narrowly tailored the definition of hostile environment sex-based harassment to advance a compelling government interest unrelated to the suppression of speech. Further, § 106.6(d) continues to provide that nothing in the final regulations limits any rights that would otherwise be protected by the First Amendment. The Department also disagrees with the suggestion that the final regulations' definition of hostile environment sex-based harassment itself discriminates based on viewpoint. The final regulations neither silence any particular view nor compel anyone to adopt any particular view on any issue. In contrast to the anti-discrimination policy in *Speech First,* 32 F.4th at 1126, the final regulations' definition of hostile environment sex-based harassment applies to conduct that is unwelcome, subjectively and objectively offensive, and so severe or pervasive that it limits or denies participation in or benefit from an education program or activity, regardless of the view a person expresses or the perspective the person takes when engaging in that conduct. Although the court in *Speech First,* 32 F.4th at 1126, suggested the policy at issue in that case should be considered viewpoint-based, the definition of sex-based hostile environment harassment in the final regulations is different from that policy. In contrast to the anti-discrimination policy in *Speech First,* the final regulations' definition of hostile environment sex-based harassment applies to conduct that is unwelcome, subjectively and objectively offensive, and so severe or pervasive that it limits or denies participation in or benefit from an education program or

[12] The case cited by one commenter, *Cohen* v. *San Bernardino Valley College,* 92 F.3d 968 (9th Cir. 1996), is similarly distinguishable. The policy at issue there, among other differences from the definition in these final regulations, prohibited conduct that had the mere ''purpose'' of creating an offensive ''learning environment''—not just the actual effect of limiting or denying access to an educational benefit or opportunity. *Id.* at 971. The court also expressly left open the question of whether a more carefully worded policy would be consistent with the First Amendment. *Id.* at 972.

activity, regardless of the view a person expresses or the perspective the person takes when engaging in that conduct. As one court reviewing a school harassment policy recently put it, the ''crux is whether the ban applies equally to individuals on either side of a given debate.'' *Olentangy Loc. Sch. Dist. Bd. of Educ.,* 2023 WL 4848509, at *16.

To be clear, the final regulations' definition of hostile environment sex-based harassment does not establish an open-ended, discretionary inquiry. The final regulations only prohibit conduct that meets all the elements listed above—that the conduct is unwelcome, sex-based, subjectively and objectively offensive, and also so severe or pervasive that the conduct limits or denies a person's ability to participate in or benefit from the recipient's education program or activity. The final regulations' reference to the totality of the circumstances derives from these very specific and required elements and is meant to ensure that no element or relevant factual consideration is ignored. Moreover, the final regulations, as discussed further below, enumerate long-established factors that are relevant in this context, including the degree to which the conduct affected the complainant's ability to access the recipient's education program or activity; the type, frequency, and duration of the conduct; the parties' ages, roles within the program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct; the location of the conduct and the context in which the conduct occurred; and other established instances of sex-based harassment in the recipient's education program or activity. As discussed further below, the Department is not persuaded by the commenters' arguments for excluding any of these considerations.

Moreover, the Department disagrees with suggestions made by commenters that multiple constraining elements in regulations, or directives to ensure the consideration of multiple relevant facts, like the totality of the circumstances analysis in the final definition of hostile environment sex-based harassment, make those regulations vague or otherwise constitutionally problematic. As discussed elsewhere, the definition of hostile environment sex-based harassment requires consideration of the totality of the circumstances in determining whether a person has been subjected to a hostile environment, which aims to ensure that recipients consider context when determining whether each element is met, to avoid inappropriately sweeping in conduct or speech that does not actually create a hostile environment under the circumstances. For additional discussion see the section above on Sex-Based Harassment—Vagueness and Overbreadth.

To the extent commenters suggest that no regulation of educational or work environments may validly reach communication that otherwise qualifies as prohibited harassment, that position cannot be squared with decades of law on hostile environments under Title VI, Title VII, Title IX, Section 504, and other Federal or State statutes, nor does it leave room for either the 2020 amendments or these final regulations. The Department rejects that suggestion. The Department notes that, as discussed elsewhere in this preamble, the Supreme Court in both *Harris* and *Davis* upheld similar proscriptions on hostile environment harassment without raising any First Amendment concerns. Indeed, the dissent in *Davis* raised First Amendment issues, 526 U.S. at 667 (Kennedy, J., dissenting), yet the majority apparently viewed schools' authority to proscribe harassment as so uncontroversial that a response to the First Amendment issue was unwarranted.

The Department also strongly disagrees with claims that students will be, in the words of some commenters, subjected to ''federally mandated censorship,'' a ''civility code,'' or a ''speech ban,'' or that the regulations will essentially prohibit ''hate speech,'' ''stifle the 'marketplace of ideas' on campuses,'' or enable people to ''weaponize'' Title IX against those with whom they disagree on political, religious, and social issues. There is no basis for those claims in the text of the proposed or final regulations or our explanation of it. The Department also notes a commenter's assertion that some recipients may adopt policies that unduly restrict students' expression, but, given that the final regulations contain no such requirement, and in light of § 106.6(d), the Department does not anticipate that recipients will do so. Similarly, the Department notes some commenters' concerns about campus speech codes. But there is nothing in either the proposed or final regulations that requires adoption or implementation of such a code. Likewise, the Department acknowledges concerns that the final regulations' definition of hostile environment sex-based harassment may chill speech and could lead to investigations and adverse actions against certain faculty members. But these concerns are speculative because there is no credible threat that the Department will enforce these final regulations so as to require restrictions on speech that would violate the First Amendment. The Department has clearly stated in § 106.6(d) that nothing in the Title IX regulations restricts any rights that would otherwise be protected from government action by the First Amendment. The Department will offer technical assistance, as appropriate, to promote compliance with these final regulations, including how to appropriately apply the definition of hostile environment sex-based harassment so as not to infringe on First Amendment rights.

The Department rejects a commenter's contention that the definition of hostile environment sex-based harassment will somehow lead to more incidents of other forms of sex-based harassment such as ''violence and other hateful conduct.'' The commenter offered no sound basis for that prediction, and the Department is aware of none. The Department is not aware that there was any increase in other discriminatory conduct following the release of prior Department guidance on sexual harassment and sexual violence, including the 2001 Revised Sexual Harassment Guidance or 2011 Dear Colleague Letter on Sexual Violence, or since the Equal Employment Opportunity Commission's (EEOC) regulations on sexual harassment, 29 CFR 1604.11, went into effect.

The Department disagrees that the final regulations improperly compel speech by recipients, including speech related to sexual orientation, gender identity, or abortion. The Department has long acknowledged that, although not required to do so, schools may denounce students' derogatory statements, including derogatory statements that create a hostile environment. *See* 2001 Revised Sexual Harassment Guidance, at 22. When a school chooses to voice its disagreement with student speech, it exercises its own First Amendment rights, *cf. Rumsfeld* v. *F. for Acad. & Institutional Rts., Inc.,* 547 U.S. 47 (2006), and contributes to the diversity of voices on campus. Thus, responding to a hostile environment in such a fashion is fully consistent with the First Amendment. Further, while the final regulations require that recipients respond to sex-based harassment, the final regulations do not dictate that a recipient take any specific disciplinary action in response to sex-based harassment, and any such action a recipient may take must account for and comply with the First Amendment. *See* 34 CFR 106.6(d). A recipient thus can effectively address sex-based hostile environment harassment in ways that

do not implicate or burden the First Amendment rights of students, employees, or others.

The Department does not prejudge or comment on whether specific cases or factual scenarios comply with Title IX prior to conducting an investigation and evaluating the relevant facts and circumstances. The Department notes again that the regulations focus on Title IX's protection from discrimination based on sex, and they do not single out for prohibition any specific view on sexual orientation, gender identity, or any other topic mentioned by commenters. As § 106.6(d) makes clear, and as the Department reaffirms, recipients cannot use Title IX to limit the free exercise of religion or protected speech or expression, or otherwise restrict any other rights guaranteed against government action by the U.S. Constitution. Recipients must fulfill their obligations in a manner that is fully consistent with the First Amendment and other guarantees of the Constitution of the United States. *See* 34 CFR 106.6(d).

The Department acknowledges commenters' efforts to identify situations in which they believe recipients improperly implemented the Title IX regulations in a manner that may have infringed the free expression rights of a student or faculty member or that could constitute hostile environment sex-based harassment and potentially lead to an investigation. The Department will continue to enforce the Title IX regulations as promulgated and address improper implementation of the Title IX regulations through the Department's complaint process and the provision of technical assistance. The Department cannot comment on the identified situations or hypotheticals without conducting a fact-specific investigation. Moreover, in accordance with § 106.6(d), nothing in the regulations would require a recipient to restrict any rights that would otherwise be protected by the First Amendment.

Regarding commenters' concern that professors may have stopped teaching certain subjects that students may find offensive or that they have left teaching altogether, we note that nothing in the Title IX regulations restricts the academic freedom of faculty members. The regulatory limitation on the Department regarding curricular materials under Title IX remains unchanged: ''Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.'' 34 CFR 106.42. Further, the determination whether a hostile environment exists is inherently fact-based, and the Department considers the academic setting of a person's conduct to be highly relevant. Conduct that may very well amount to harassment in other settings may not amount to harassment if engaged in appropriately in the academic setting, especially in the context of postsecondary academic discourse. In light of this, the Department does not believe it is necessary to revise § 106.6(d) to explicitly protect academic freedom.

Regarding commenters' concerns related to religious liberty and the freedom of association, the Department notes that as stated above and reflected in § 106.6(d), the Title IX regulations do not require recipients to restrict any rights that would otherwise be protected from government action by the First Amendment, including the freedom of speech, the free exercise of religion, and the freedom of association. The final regulations implement Title IX's protection from discrimination based on sex while also respecting the First Amendment rights of students, staff, and other individuals. In response to commenters who expressed concern about the final regulations' effect on religiously affiliated recipients, the Department emphasizes that both the statute at 20 U.S.C. 1681(a)(3) and § 106.12 of the current regulations—which the Department is not changing—provide that educational institutions controlled by a religious organization are not subject to Title IX or to Title IX regulations to the extent application of the statute or the regulations would not be consistent with the religious tenets of the controlling religious organization. The final regulations adopted here set out requirements to fulfill Congress's commitment that no person shall be subject to exclusion, denial of benefits, or discrimination based on sex in a recipient's education program or activity. In addition, the Department notes that Title IV of the Civil Rights Act of 1964, which is enforced by the Department of Justice's Civil Rights Division, authorizes the Department of Justice to address complaints alleging religious discrimination by public schools and higher education institutions.

In response to a commenter's concern regarding the membership practices of student groups, the Department notes that to the extent Title IX prohibits student groups from discriminating on the basis of sex, including sexual orientation and gender identity, those groups may, consistent with Title IX and other applicable laws, impose membership criteria not related to sex that promote the student group's mission (for example, requiring that members have a legitimate good faith interest in the group's mission). The Department agrees with a commenter's statement that even if student groups benefit from Federal funding provided to their postsecondary institutions, such funding does not turn the actions of these groups into State action.

In response to a commenter's concern that the Department removed two of three references to the primacy of the First Amendment that were in the 2020 amendments, the Department notes that the commenter did not specify what references were deleted. The Department emphasizes, however, that the removal of any references to the primacy of the First Amendment from the 2020 amendments was not intended to reduce or signal lesser First Amendment protections under these final regulations and reiterates that, consistent with § 106.6(d), nothing in these final regulations requires a recipient to restrict any rights protected by the First Amendment. Although the First Amendment may in certain circumstances affect the manner in which a recipient responds to discriminatory harassment in the form of speech, recipients have ample other means at their disposal to remedy a hostile environment and recipients remain free under the final regulations to determine whether discipline is the appropriate response to sex-based harassment, and if so, what form that discipline should take.

Regarding the commenter who argued that the Department's July 2022 NPRM insufficiently addressed First Amendment protections and thus failed to adequately explain the change in position from the 2020 amendments, the Department notes that the July 2022 NPRM discussed the First Amendment as part of the Department's explanation for the revised definition of ''sex-based harassment.'' 87 FR 41414–15. Among other things, the Department explained that it views the proposed definition as sufficiently narrow so as not to encroach on any constitutional rights and emphasized that applying the definition would require consideration of a respondent's First Amendment rights. An NPRM must provide ''sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully,'' *U.S. Telecom Ass'n* v. *FCC,* 825 F.3d 674, 700 (D.C. Cir. 2016) (internal quotation marks omitted), and the Department's explanation in the July 2022 NPRM, including the discussion of the First Amendment, satisfies this standard.

Regarding commenters' arguments that an administrative agency should not interpret laws in a manner that

could cause First Amendment issues and, therefore, the definition of hostile-environment sex-based harassment exceeds the Department's statutory authority, there are no such constitutional concerns here because as explained in this section, the final regulations are consistent with established case law regarding harassment and the First Amendment. The Department also notes that agencies are not stripped of the power to issue regulations merely because those regulations may intersect with the First Amendment. *See, e.g., Cablevision Sys. Corp.* v. *FCC,* 649 F.3d 695, 709 (D.C. Cir. 2011); *Republican Nat'l Comm.* v. *Fed. Election Comm'n,* 76 F.3d 400, 409 (D.C. Cir. 1996). Here, for example, these final regulations are both reasonable and consistent with the relevant case law addressing hostile environment harassment in the First Amendment context.

Regarding the application of § 106.6(d) to private recipients, the Department notes that § 106.6(d) applies to all recipients of Federal financial assistance, including private recipients, and thus, nothing in these final regulations requires a private recipient to restrict any rights that would otherwise be protected from government action by the First Amendment. This is consistent with OCR's longstanding position in the administrative enforcement of Title IX that the Title IX regulations ''should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses'' and that ''OCR interprets [the Title IX] regulations consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles.'' 2003 First Amendment Dear Colleague Letter. Accordingly, nothing in Title IX or these final regulations would preempt a State law that governs speech protected by the First Amendment, including as applied to a private recipient. However, a recipient's obligation to comply with Title IX and these final regulations is not obviated or alleviated by a conflicting State law that governs speech that is not protected by the First Amendment. For more discussion of the application of the preemption provision at § 106.6(b), see the discussion of § 106.6(b). Although the Department will not compel private recipients to restrict conduct that would otherwise be protected under the First Amendment, the Department declines the commenter's suggestion to revise § 106.6(d) to require that all recipients abide by the U.S. Constitution. Requiring non-State actors to comply with the Constitution would be outside of the Department's authority.

Changes: As explained in the section below on Hostile Environment Sex-Based Harassment—Subjectively and Objectively Offensive (§ 106.2), the Department has revised the definition of ''sex-based harassment'' to add the word ''offensive'' to the subjective and objective standard in hostile environment sex-based harassment.

Hostile Environment Sex-Based Harassment—Severe or Pervasive (§ 106.2)

Comments: Some commenters supported the severe or pervasive standard because it is more consistent with Title VII; would allow a recipient to address conduct that is severe but not pervasive, or vice versa; and would allow for a more prompt and effective response when a student experiences a hostile environment. Commenters also asserted that the definition of ''sexual harassment'' in the 2020 amendments set too high a bar for when a recipient can address sexual harassment under Title IX.

One commenter questioned how a recipient would measure whether the conduct was sufficiently severe or pervasive.

Discussion: The Department appreciates the variety of views expressed by the commenters regarding the adoption of the severe or pervasive standard in the definition of hostile environment sex-based harassment. The Department has determined that the final regulations support a more uniform approach to hostile environment harassment, which is a concept embedded in numerous civil rights laws, including Title VII. *See, e.g., Harris,* 510 U.S. 17; 29 CFR 1604.11. Although the final regulations do not simply track prior OCR guidance, the final regulations do align more closely, as compared with the 2020 amendments, with OCR's longstanding interpretation of Title IX articulated in prior guidance. *See, e.g.,* 2001 Revised Sexual Harassment Guidance. They also align with enforcement practice prior to the 2020 amendments. The final regulations do not set a higher standard for sex-based harassment than for other forms of harassment, such as harassment on the basis of race, color, national origin, or disability. The Department agrees with commenters that the definition of hostile environment sex-based harassment will allow for a more prompt and effective response when a student experiences a hostile environment.

The Department acknowledges the commenters' support for the definition of hostile environment sex-based harassment because it will address conduct that is severe but not pervasive, and conduct that is pervasive but not severe. The Department emphasizes, however, that the severe or pervasive standard is but one element of the definition of hostile environment sex-based harassment as discussed throughout this section. The definition of ''sex-based harassment'' in the final regulations recognizes that isolated comments would generally not meet the definition of hostile environment sex-based harassment.

Regarding one commenter's question about how a recipient would measure conduct to determine whether it is sufficiently severe or pervasive, the Department clarifies that sex-based conduct meets the ''severe or pervasive'' standard of sex-based harassment if it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity. See the discussion below for more detailed explanation of when conduct ''limits or denies'' a person's ability to participate in or benefit from a recipient's education program or activity. To emphasize that the severity or pervasiveness inquiry is necessarily linked to a person's access to an education program or activity, the Department has replaced ''sufficiently'' with ''so'' in the final regulations.

The applicable regulations, this preamble, and other sources of hostile environment harassment law all inform how a recipient should determine whether conduct is severe or pervasive. The final regulations—particularly in § 106.45, and if applicable § 106.46—set out the requirements for a recipient's gathering and evaluation of evidence from parties and witnesses, and the standard by which the persuasiveness of that evidence is to be evaluated. In addition, and as indicated elsewhere in this preamble, one stray remark does not satisfy the level of pervasiveness to which the regulations refer. The Department reaffirms the statement in the July 2022 NPRM that the offensiveness of a particular expression as perceived by some persons, standing alone, would not be a legally sufficient basis to establish a hostile environment under Title IX. *See* 87 FR 41415. Further, a statement of one's point of view on an issue of debate and with which another person disagrees, even strongly so, is not the kind or degree of conduct that implicates the regulations. In contrast, sex-based conduct that occurs on multiple occasions and is so persistent that, for example, it limits

another student's ability to complete assigned coursework at the student's typical level of performance would potentially constitute the type of pervasive sex-based conduct the final regulations are intended to reach. Moreover, because the final regulations draw from settled components of Title VII sexual harassment law, recipients and others may consult that field of law for additional guidance as to how courts have analyzed whether conduct is severe or pervasive.[13]

The Department disagrees with a commenter's assertion that the definition of hostile environment sex-based harassment would require a recipient to track speech because that is the only way to establish whether speech is severe or pervasive. The Department clarifies that nothing in the definition of ''sex-based harassment,'' or §§ 106.44, 106.45, or 106.46, which apply the definition of ''sex-based harassment,'' requires a recipient to directly or indirectly track speech for which no complaint was made or of which the Title IX Coordinator has not been notified. Contrary to the commenter's assertion, affirmatively tracking speech or sex-based conduct is not the only way to determine pervasiveness. Rather, harassment can be pervasive if it is widespread, openly practiced, or well-known to students and staff (such as sex-based harassment occurring in the hallways, graffiti in public areas, or harassment occurring during recess under a teacher's supervision). *See, e.g.,* 2001 Revised Sexual Harassment Guidance, at 13–14 & nn.76–78 (citing *Katz* v. *Dole,* 709 F.2d 251, 256 (4th Cir. 1983)); 85 FR 30166; *Smolsky* v. *Consol. Rail Corp.,* 780 F. Supp. 283, 293 (E.D. Pa. 1991), *reconsideration denied,* 785 F. Supp. 71 (E.D. Pa. 1992); *Jensen* v. *Eveleth Taconite Co.,* 824 F. Supp. 847, 887 (D. Minn. 1993); *Cummings* v. *Walsh Constr. Co.,* 561 F. Supp. 872, 878 (S.D. Ga. 1983)). Although pervasiveness can also be found if there is a pattern or practice of harassment, as well as if the harassment is sustained and nontrivial, *see, e.g., Moylan* v. *Maries Cnty.,* 792 F.2d 746, 749–50 (8th Cir. 1986); or part of a continuous series of events, *see, e.g., Williams* v. *Bd. of Regents of Univ. Sys. of Ga.,* 477 F.3d 1282, 1298 (11th Cir. 2007), this in no way requires a recipient to affirmatively track all speech, but rather to assess a complaint or notification of allegedly offensive sex-based speech considering the totality of the known circumstances, including whether the Title IX Coordinator has received other related complaints or notifications alleging conduct that reasonably may constitute sex discrimination. To the extent the commenter objects to a recipient maintaining records consistent with § 106.8(f)(1) and (2) for complaints or notifications alleging verbal sex-based harassment, the Department has determined that a recipient's recordkeeping obligations for complaints and notifications of speech-based sex-based harassment should be treated the same as other complaints and notifications of sex discrimination. Accordingly, the Department is unpersuaded that a revision of the ''severe or pervasive'' requirement is necessary or best serves Title IX's mandate that recipients promptly and effectively address sex discrimination in their education programs or activities.

To the extent commenters raised specific examples of conduct that may or may not satisfy the definition of hostile environment sex-based harassment, the Department declines to opine on specific examples because any such evaluation of the facts must be based on the totality of circumstances. In any event, further explanation of the content of the final regulations is provided in the discussions above and below.

Changes: The Department has revised the definition of ''sex-based harassment'' to state that the conduct must be ''so'' severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.,* it creates a hostile environment), rather than ''sufficiently'' severe or pervasive.

Hostile Environment Sex-Based Harassment—Subjectively and Objectively Offensive (§ 106.2)

Comments: Some commenters objected to the omission of offensiveness from the definition of hostile environment sex-based harassment, arguing that it would make students responsible for inoffensive conduct and could discourage a recipient from using informal approaches such as restorative justice to address minor conduct issues.

Some commenters asserted that a standard that is both objective and subjective is necessary to protect students. Other commenters preferred either the objective standard or the subjective standard, but not both. Another commenter asserted that combining subjective and objective components would effectively eliminate the objective component, and one commenter asked from whose perspective the subjective standard would be determined.

Some commenters said that the subjective standard violates the First Amendment and argued that an objective standard is more protective of free speech. Commenters said the subjective standard would require employees to police speech; cause a chilling effect; and potentially compel certain speech. Some commenters said the definition would create a ''heckler's veto'' because a single statement on a topic like abortion, sex outside marriage, or sexual orientation could be offensive to one student and lead to a complaint of sex-based harassment.

Some commenters said the subjective standard's vagueness would deny respondents due process, lead to meritless investigations and inconsistent enforcement across recipients, and favor complainants; argued that the proposed definition of ''sex-based harassment'' would discriminate against men; and said that the subjective standard would force recipients to expend scarce resources on an excessive number of investigations.

One commenter posited that the subjective standard could be unfair for complainants because a recipient could find the complainant did not subjectively perceive the environment to be abusive even if it met the objective standard. Another commenter was concerned that the subjective standard gives too much discretion to investigators or decisionmakers who could be biased.

Discussion: The Department thanks commenters for noting that the definition of hostile environment sex-based harassment in the proposed regulations omitted the concept of ''offensiveness.'' The Department agrees that ''offensiveness'' is a key part of the subjective and objective standards and is amending the definition of hostile environment sex-based harassment accordingly. This change also

[13] *See, e.g., Faragher* v. *City of Boca Raton,* 524 U.S. 775, 788 (1998) (referencing simple teasing, offhand comments, and isolated incidents as not amounting to discrimination, unless extremely serious); *Oncale* v. *Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 82 (1998) (''Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.''); *Harris,* 510 U.S. at 21 (referencing situations in which a workplace is permeated with discriminatory intimidation, ridicule, and insult); *Meritor Sav. Bank* v. *Vinson,* 477 U.S. 57, 64–67 (1986). The Department notes that courts often rely on interpretations of Title VII to inform interpretations of Title IX. *See, e.g., Franklin,* 503 U.S. at 75; *Jennings* v. *Univ. of N.C.,* 482 F.3d 686, 695 (4th Cir. 2007) (en banc); *Frazier* v. *Fairhaven Sch. Comm.,* 276 F.3d 52, 65–66 (1st Cir. 2002); *Gossett* v. *Oklahoma ex rel. Bd. of Regents for Langston Univ.,* 245 F.3d 1172, 1176 (10th Cir. 2001).

ameliorates a commenter's concern about a recipient's discretion to use informal mechanisms to address minor misconduct that does not rise to the level of sex-based harassment.

The Department acknowledges the commenters' support for the inclusion of both a subjective and objective standard in the definition of hostile environment sex-based harassment. Requiring unwelcome sex-based conduct to be evaluated subjectively and objectively is consistent with the Department's analysis in the preamble to the 2020 amendments. 85 FR 30167. This is also consistent with Supreme Court case law, which has employed both objective standards—*see, e.g., Davis,* 526 U.S. at 650 (conduct must be ''objectively offensive'' to trigger liability for money damages); *Oncale,* 523 U.S. at 81 (''[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the [complainant's] position, considering 'all the circumstances.' '' (quoting *Harris,* 510 U.S. at 23))—and subjective standards—*see Harris,* 510 U.S. at 21–22 (explaining that ''if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation,'' even if a reasonable person would find the environment hostile or abusive)—in determining whether a hostile environment existed.

The Department appreciates the comments opposed to either the subjective or objective standard, but the Department continues to take the position that unwelcome sex-based conduct must be evaluated both subjectively and objectively. The Department also does not agree with the commenter's assertion that inclusion of a subjective element in a definition would eliminate the objective element. As discussed in the July 2022 NPRM and elsewhere in this preamble, and as illustrated by courts in other contexts, the two elements are distinct, and a decisionmaker must find sufficient evidence to satisfy each element under the applicable standard before determining that alleged conduct constitutes sex-based harassment. *See* 87 FR 41414. The Department maintains, however, consistent with the preamble to the 2020 amendments and the July 2022 NPRM, that the objective standard is assessed from the perspective of a reasonable person in the complainant's position. 85 FR 30167; 87 FR 41414.

The Department agrees that the First Amendment provides clear protection for individual expressions of opinion, including expressions of opinions that are unpopular. As discussed in the July 2022 NPRM and elsewhere in this preamble, the First Amendment and academic freedom must be considered if issues of speech or expression are involved. *See* 87 FR 41415. The Department disagrees with commenters that subjectively offensive speech, in itself, would constitute sex-based harassment under Title IX, given the inclusion of an objectively offensive element in the definition. To the extent the other comments raise concerns under the First Amendment, those comments are addressed in the section above dedicated to First Amendment Considerations.

The Department disagrees that the inclusion of the subjective standard would be unfair to respondents, including by denying respondents due process, leading to meritless investigations, or leading to inconsistent enforcement across recipients. The Department disagrees that the final regulations discriminate against men and notes that the final regulations protect all students, employees, and other individuals from discrimination based on sex—including men, and ensure that all respondents are treated equitably, regardless of their sex. Specifically, recipient's obligations under § 106.45, and if applicable § 106.46, ensure that respondents' due process rights are respected, that complainants and respondents are treated equitably, and that investigations are evidence-based whenever a complaint is initiated. In addition, a subjective standard is commonly used, including under the 2020 amendments and prior guidance, to determine whether conduct is unwelcome. 85 FR 30167 (''whether harassment is actionable turns on both subjectivity (*i.e.,* whether the conduct is unwelcome, according to the complainant) and objectivity (*i.e.,* 'objectively offensive')''); 2001 Revised Sexual Harassment Guidance, at 5 (''OCR considers the conduct from both a subjective and objective perspective.'').

The Department disagrees that the subjective standard will cause a recipient to automatically credit a complainant's allegations or lead to heightened scrutiny that would force a recipient to expend scarce resources. Subjective offensiveness must be supported by evidence, and subjective offensiveness alone would not support a finding or discipline. As discussed previously, the definition of hostile environment sex-based harassment requires an evaluation, based on the totality of circumstances, of several key elements. Regardless, the inclusion of the objective standard would satisfy commenters' concerns that the subjective standard working alone may implicate these concerns.

The Department disagrees with the contention that the subjective standard could be unfair to complainants because a recipient could find that sex-based harassment did not occur even when objective factors indicate that it did. Whether the complainant subjectively found the conduct offensive or abusive is commonly understood as an important element of hostile environment harassment. *See Harris,* 510 U.S. at 21–22 (explaining that, even if a ''reasonable person'' might view the conduct as constituting harassment, no Title VII violation occurs ''if the victim does not subjectively perceive the environment to be abusive'' because ''the conduct has not actually altered the conditions of the victim's employment.'').

With respect to the comment that recipient employees could act with bias, the final regulations specifically require Title IX Coordinators, investigators, and decisionmakers to be trained on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias, § 106.8(d)(2); and to act without bias toward any specific party or toward complainants or respondents in general, § 106.45(b)(2). They also require postsecondary institutions, in cases involving a student party, to offer the parties an appeal on the basis that the Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome. § 106.46(i)(1)(iii). *See also* the discussions of §§ 106.45(b)(2), 106.46(i)(1)(iii). A respondent who believes a recipient violated its obligations under the final regulations may also file a complaint with OCR.

Finally, the Department appreciates the commenter's questions regarding from whose perspective the subjective standard would be determined. The final regulations' reference to a subjective perspective in the definition of hostile environment sex-based harassment refers to the complainant. The complainant's perspective is likewise part of the Title VII standard. *See Harris,* 510 U.S. at 21 (connecting a Title VII violation to whether, in part, the complainant subjectively perceives the environment to be abusive). Evidence regarding whether sex-based conduct meets the subjective element of the definition could include, but is not

limited to, the complainant's own statements about the alleged conduct or other sources that could establish the complainant's experience of the alleged conduct.

Changes: The Department has revised the definition of ''sex-based harassment'' to add the word ''offensive'' to the subjective and objective standard for establishing hostile environment sex-based harassment.

Hostile Environment Sex-Based Harassment—Limits or Denies (§ 106.2)

Comments: Some commenters supported the proposed definition of hostile environment sex-based harassment but were concerned that it could still create burdens for complainants by requiring a recipient to determine how the complainant's education is limited by the harassment. For example, these commenters said that a recipient could interpret this as requiring a complainant to show that they received lower grades.

A group of commenters, relying on *Davis,* noted that the text of Title IX only prohibits discrimination that denies access to the recipient's education program or activity and does not prohibit conduct that does not rise to that level of severity. One commenter said that the Department could not justify changing ''effectively denies'' to ''denies or limits'' because the Supreme Court in *Davis* concluded that Congress was concerned with ensuring equal access and not eradicating every limitation on access.

Some commenters said that the term ''limits'' is vague and overly broad. Commenters expressed concern that the use of the term ''limits'' would threaten protected speech, cover conduct that detracts in any way from another student's enjoyment of the recipient's education program, require a recipient to primarily consider the conduct from the complainant's perspective, and expose postsecondary institutions to lawsuits from students alleging they were expelled on arbitrary grounds.

Discussion: In the preamble to the 2020 amendments, the Department stated that the ''effectively denies a person access'' element of the definition of sexual harassment ''does not act as a more stringent element than the 'interferes with or limits a student's ability to participate in or benefit from the school's programs' language found in Department guidance.'' 85 FR 30152. The Department explained in the preamble to the 2020 amendments that this standard does not only apply when a complainant was ''entirely, physically excluded from educational opportunities,'' nor does it require showing that a complainant ''dropped out of school, failed a class, had a panic attack, or otherwise reached a 'breaking point' '' because ''individuals react to sexual harassment in a wide variety of ways.'' 85 FR 30169–70. As explained in the July 2022 NPRM, the Department believes that the phrase ''limits or denies'' more accurately captures the full scope of Title IX's nondiscrimination mandate. *See* 87 FR 41414. We also disagree that *Davis* requires the Department to restrict the definition of hostile environment sex-based harassment only to conduct that denies access to a recipient's education program or activity. As described in the July 2022 NPRM and elsewhere in this preamble, the holding in *Davis* does not limit the Department's authority to regulate under Title IX. *See id.* In addition, the Title IX statute states that no person shall, on the basis of sex, ''be excluded from participation in, be denied the benefits of, or be subjected to discrimination under'' any education program or activity receiving Federal financial assistance. If Title IX only covered exclusion from participation or denial of access, there would have been no reason for Congress to add ''be denied the benefits of.'' A limitation on equal access constitutes a denial of benefits. *See id.*

The Department appreciates the commenters' concern that the proposed definition could burden complainants by requiring a recipient to determine how the complainant's education is limited or impacted by the harassment; however, the Department maintains that the definition of hostile environment sex-based harassment appropriately requires evidence of the impact of the alleged conduct on the complainant, as Title IX requires. The Department reiterates that grades are not the only evidence of a student's ability to participate in and access the benefits of a recipient's education program or activity, and the Department reaffirms that the definition of hostile environment sex-based harassment does not require a complainant to demonstrate any particular harm, such as reduced grades or missed classes. Put another way, a complainant must demonstrate some impact on their ability to participate or benefit from the education program or activity, but the definition does not specify any particular limits or denials. Rather, as with all complaints, the recipient's evaluation of whether sex-based harassment occurred must be based on all of the relevant and not otherwise impermissible evidence.

The Department disagrees with commenters' views that the term ''limits'' is vague or overbroad, or that it would threaten protected speech because speech that is subjectively or objectively inoffensive would not satisfy that element of hostile environment sex-based harassment. For further discussion see the sections above on Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2), Hostile Environment Sex-Based Harassment—Subjectively and Objectively Offensive (§ 106.2), and Sex-Based Harassment—Vagueness and Overbreadth (§ 106.2).

The final regulations contain a number of provisions that prevent the arbitrary expulsion of students, including the grievance procedure requirements in § 106.45, and as applicable § 106.46. Whether conduct limits or denies a person's ability to participate in or benefit from the recipient's education program or activity is a fact-based inquiry that requires consideration of all relevant and not otherwise impermissible evidence. In response to the commenter who suggested that the definition of hostile environment sex-based harassment will deem a student who acts without animus to have created a hostile environment, the Department notes that consistent with the Supreme Court's analysis in *Davis,* as well as the preamble to the 2020 amendments and in prior OCR guidance, the Department does not understand animus to be a required element of a harassment claim. Instead, the analysis focuses on whether the harassment limits or denies a person's ability to participate in or benefit from the recipient's education program or activity based on sex. *See* 85 FR 30167; U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter: Harassment and Bullying, at 2 (Oct. 26, 2010) (2010 Harassment and Bullying Dear Colleague Letter), *https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.*

Upon its own review of the proposed regulations, the Department has decided to change the order of the words ''denies'' and ''limits'' so that ''limits'' comes first for clarity. This is a non-substantive change and does not indicate a change in the meaning of the standards discussed herein.

Changes: The Department has revised the definition of ''sex-based harassment'' to reverse the order of ''denies'' and ''limits.''

Hostile Environment Sex-Based Harassment—Factors To Be Considered (§ 106.2)

General Support and Opposition

Comments: Some commenters supported the inclusion of factors to be considered in determining whether hostile environment sex-based harassment occurred, and others opposed them or requested modifications.

Some commenters questioned the basis for the factors, found them confusing or unworkable, asserted that the examples in the preamble to the July 2022 NPRM did not align with courts' analyses, and asked how the factors might result in similar or different findings than under Title VII.

Some commenters said that it was not clear what conduct would constitute hostile environment sex-based harassment under the factors and objected to a non-exhaustive list, noting that additional factors would be unknown to students and employees. Some commenters said elementary schools need more clarity to distinguish ''annoying'' and ''immature'' conduct from conduct that constitutes hostile environment sex-based harassment.

One commenter objected to the Department's inclusion of examples of hostile environment sex-based harassment in the July 2022 NPRM, arguing that some examples, such as those involving speech or a single incident of harassment, could contradict *Davis.*

Discussion: The factors listed in the definition of hostile environment sex-based harassment are similar to those discussed in the preamble to the 2020 amendments, 85 FR 30170, and prior guidance based on case law, *see* 2001 Revised Sexual Harassment Guidance, at 5–7 and cases cited (discussing the following factors: the degree to which the conduct affected one or more students' education; the type, frequency, and duration of the conduct; the identity of and relationship between the alleged harasser and the subject or subjects of the harassment; the number of individuals involved; the age and sex of the alleged harasser and the subject or subjects of the harassment; the size of the school, location of the incidents, and context in which they occurred; other incidents at the school; and incidents of gender-based, but nonsexual harassment).

The Department also notes that the factors are similar to those that courts and agencies have used in evaluating a hostile environment in the employment context under Title VII. *See, e.g.,* 29 CFR 1604.11 (''In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.''). *See also* U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance on National Origin Discrimination (Nov. 18, 2016), *https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination#_Toc451518815* (''Relevant questions in evaluating whether national origin harassment rises to the level of creating a hostile work environment may include any of the following: whether the conduct was hostile/offensive; whether the conduct was physically threatening or intimidating; how frequently the conduct was repeated; or the context in which the harassment occurred.'').

The Department acknowledges, as referenced in the comments, that the factors listed in the definition of hostile environment sex-based harassment are not identical to the factors the EEOC considers, but the EEOC similarly examines the totality of the circumstances, including the nature, frequency, and context of the conduct. As discussed in the July 2022 NPRM, the preamble to the 2020 amendments, and elsewhere in this preamble, although there are some differences between the employment and education contexts, interpretations of Title VII appropriately inform interpretations of Title IX. *See* 87 FR 41415; 85 FR 30199. The factors the Department has included in the final regulations, like those used by courts and other agencies, reflect an effort to consider the ''constellation of surrounding circumstances, expectations, and relationships,'' *Oncale,* 523 U.S. at 82, that can inform whether conduct creates a hostile environment in a particular context.

The Department disagrees that the factors listed in the definition of hostile environment sex-based harassment or examples cited in the July 2022 NPRM are vague. The examples demonstrate the variety of contexts in which harassment may arise. Although the list of factors included in the final regulations is not exhaustive and there may be other considerations in examining the totality of the circumstances, the definition of hostile environment sex-based harassment is sufficiently broad to capture the contexts in which harassment can occur and sufficiently specific and consistent with precedent to provide appropriate notice to the public as to how the Department evaluates sex-based harassment. The Department declines to limit the factors to be considered to those listed in the definition of hostile environment sex-based harassment because of the necessarily fact-specific nature of the totality of the circumstances analysis.

With respect to the commenters' request for more clarity regarding how to draw the line between ''annoying'' and ''immature'' conduct and conduct that constitutes sex-based harassment, the Department notes that the legal standard is not whether or not conduct is subjectively ''annoying'' or ''immature.'' The standard for hostile environment sex-based harassment is whether or not the totality of the circumstances demonstrates conduct that is unwelcome sex-based conduct, subjectively and objectively offensive, and so pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity.

In response to the commenter who said that examples of harassment could contradict *Davis,* the Department notes that any examples the Department provides are for illustrative purposes. In all cases, the totality of the circumstances must be considered in connection with the definition of hostile environment sex-based harassment. The Department also notes that, as explained above, the standard for administrative enforcement need not be identical to the standard for holding a recipient liable for monetary damages under *Davis.* For additional discussion see the section above on Hostile Environment Sex-Based Harassment—the *Davis* Standard (§ 106.2).

Consideration of the factors listed in the definition of hostile environment sex-based harassment is one aspect of ensuring that the determination is made based on the totality of the circumstances. The July 2022 NPRM also made this point, explaining that the Department did not offer a definitive assessment of the examples not because the examples were insufficient but because ''a fuller, fact-specific analysis would be required'' to reach a final determination. 87 FR 41416; *see also Davis,* 526 U.S. at 651 (''Whether gender-orientated conduct rises to the level of actionable 'harassment' thus 'depends on a constellation of surrounding circumstances, expectations, and relationships' '' (quoting *Oncale,* 523 U.S. at 82) (internal quotation marks omitted)). The Department similarly declines to opine on specific examples presented in the

comments because a fuller, fact-specific analysis is required.

Changes: None.

The First Factor—Degree of Impact

Comments: One commenter asked the Department to add ''participate in'' to the first hostile environment factor, to cover the degree to which the conduct affected the complainant's ability to access *or participate in* the recipient's education program or activity.

Another commenter said the Department should not limit the first hostile environment factor to the complainant's educational access because a recipient must also consider the impact on campus community members who are directly or indirectly experiencing a hostile environment.

One commenter asserted that a recipient should not evaluate the degree of impact on a complainant based on its idea of a ''perfect victim,'' citing 85 FR 30170.

Discussion: The Department declines to add ''participate in'' to the first hostile environment factor because ''access'' in this context includes the ability to participate in or benefit from the recipient's education program or activity, consistent with use of the term in the current regulations and in case law. *See, e.g., Davis,* 526 U.S. at 631 (describing Title IX's prohibition on being ''excluded from participation in'' or ''denied the benefits of'' a recipient's education program or activity as denial of equal ''access'').

The Department declines to modify the first hostile environment factor to remove the reference to the complainant. The Department does not think that the factor, as described, will lead a recipient to ignore the impact of conduct on campus community members. As discussed elsewhere in this preamble, Title IX protects individuals who experience sex-based harassment, even if they are not the intended target, and the inclusion of this factor does not prevent a recipient from evaluating whether a hostile environment has been created for others. However, whether a hostile environment has been created for a particular complainant requires an individualized and fact-specific analysis of the effect of the alleged conduct on that complainant. For this reason, the first factor appropriately examines the degree to which the conduct affected the complainant's ability to access the recipient's education program or activity. Because a recipient has an obligation to operate its education program or activity free from sex discrimination as set forth in the final regulations, the definition does not limit how many people may experience a hostile environment related to conduct that constitutes sex-based harassment or how many people may make a complaint. Even in the absence of an additional complaint, the Title IX regulations permit the Title IX Coordinator to initiate grievance procedures after considering factors such as the risk of additional acts of sex discrimination and information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals. *See* § 106.44(f)(1)(v)(A)(*6*).

The Department takes this opportunity to affirm the statement in the preamble to the 2020 amendments that ''equal access'' ''neither requires nor permits school officials to impose notions of what a 'perfect victim' does or says, nor may a recipient refuse to respond to sexual harassment because a complainant is 'high-functioning' or not showing particular symptoms following a sexual harassment incident. School officials turning away a complainant by deciding the complainant was 'not traumatized enough' would be impermissible.'' 85 FR 30170.

Changes: None.

The Second Factor—Type, Frequency, and Duration

Comments: One commenter said that the second factor regarding ''type, frequency, and duration'' is unnecessary because it is covered by the ''severe or pervasive'' language in the proposed definition.

Some commenters objected to the July 2022 NPRM's assertion that asking someone out on a date or sending them flowers on one occasion ''generally'' would not create a hostile environment. Commenters argued that such conduct would clearly not create a hostile environment and cited case law to support this position.

Discussion: The Department declines to remove or modify the second factor. The Department acknowledges that type, frequency, and duration may overlap with the meanings of ''severe'' and ''pervasive'' in some respects, but a reference to type, frequency, and duration will help guide decisionmakers in their evaluation of the severity and pervasiveness of the conduct. In a case involving multiple incidents, for example, this factor would clarify the need for a decisionmaker to consider both the frequency of the incidents and the duration of each incident.

With respect to the example provided in the July 2022 NPRM of a single request for a date or a single gift of flowers from one student to another, the Department intended that example to demonstrate the type of conduct that may be sex-based but would not be pervasive. The Department declines to comment further on specific examples or factual scenarios prior to conducting an investigation and evaluating the relevant facts and circumstances.

Changes: None.

The Third Factor—Ages, Roles, Previous Interactions, Other Factors

Comments: One commenter asked the Department to change ''alleged unwelcome conduct'' to ''alleged sex-based harassment'' in the third factor for consistency. One commenter noted that the third factor regarding the parties' ages and roles is less applicable at the postsecondary level but may be a consideration at the elementary school and secondary school level. One commenter asked the Department to add language regarding the parties' developmental levels to clarify how recipients' Title IX obligations intersect with their obligations to students with disabilities.

Discussion: The Department declines to change ''alleged unwelcome conduct'' to ''alleged sex-based harassment'' in the third factor because the third factor appropriately focuses on the unwelcome conduct that is in the introductory text of the definition of hostile environment sex-based harassment. Based upon the Department's internal review for consistency with the rest of the provision, which does not use the term ''alleged'' and does not repeat ''unwelcome'' before ''conduct'' and to avoid redundancy since the introductory language specifies that the conduct must be unwelcome, the Department determined that the terms ''alleged'' and ''unwelcome'' before ''conduct'' should be removed.

The Department acknowledges the comment that reference to the parties' ages and roles in the third factor is less applicable at the postsecondary level than in the elementary school and secondary school level, but notes that some students in postsecondary education are under 18 years old, and the relative power dynamics and ages of the parties in the postsecondary context could still be a factor, particularly if the conduct involves a student and employee. With regard to the parties' developmental levels, the Department notes that the third factor includes ''other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct,'' which would include developmental levels. The Department is supportive of recipients' consideration of how Title IX obligations intersect with their obligations to students with disabilities,

but does not believe it is necessary to add language to the regulatory text.

Changes: The Department has deleted the terms ''alleged'' and ''unwelcome'' from the definition of ''sex-based harassment'' in the third consideration of whether a hostile environment has been created.

The Fourth Factor—Location and Context

Comments: One commenter said that the fourth factor is more applicable to liability for monetary damages than to administrative enforcement, noting that the proposed regulations lay out when behavior by a respondent warrants a response by the recipient without further differentiating respondents. Another commenter was concerned that the fourth factor would be considered without recognizing that *Davis* only imposed liability on recipients for failing to address conduct ''where the 'recipient exercises substantial control over both the harasser and the context in which the known harassment occurs.' '' 526 U.S. at 645.

Discussion: Location and context are important to consider in determining whether a hostile environment has been created because they provide information that is relevant to each of the hostile environment elements: unwelcomeness, objective and subjective offensiveness, and severity and pervasiveness and effect on a complainant's ability to access or benefit from the education program or activity. For example, harassing conduct on a school bus may be more intimidating than on school grounds because of the confined space. Similarly, harassing conduct in a personal and secluded area, such as a dorm room, can be more threatening than the same conduct in a public area. On the other hand, harassing conduct in public can be more humiliating. Each instance of alleged harassing conduct must take into account the totality of the circumstances, including consideration of the location and context.

After considering the comments, the Department is persuaded that the reference to ''control the recipient has over the respondent'' in the fourth factor created confusion, by mistakenly giving the impression that the substantial control language used in *Davis* to determine whether a recipient may be held liable in damages for a respondent's conduct, is the same as the hostile environment analysis that these factors are focused on. Because of this confusion, and because ''location and context'' fully account for the considerations intended to be covered by this factor, the Department has removed that language from the hostile environment factors in the final definition of hostile environment sex-based harassment. For a discussion of the relevance of a recipient's control over a respondent, see discussion of § 106.11.

Changes: The Department removed the language regarding ''control the recipient has over the respondent'' from the definition of ''sex-based harassment'' in the fourth consideration of whether a hostile environment has been created.

The Fifth Factor—Other Sex-Based Harassment

Comments: One commenter expressed concern about considering other sex-based harassment in the recipient's education program or activity because they said complainants would use this consideration to justify making Title IX complaints over isolated, fleeting, mild, or inoffensive conduct. One commenter said that even though other sex-based harassment may prompt a Title IX Coordinator to address broader concerns, it does not influence whether a hostile environment was created for the complainant. Another commenter asked the Department to clarify when the conduct of multiple individuals toward the same complainant would constitute enough ''other sex-based harassment in the recipient's education program or activity'' to amount to hostile environment sex-based harassment, but the conduct by one individual alone would not.

Discussion: With respect to the fifth factor, the Department notes that the commenters either mischaracterized or misunderstood the requirement that a recipient undertake a fact-specific inquiry that includes consideration of a variety of factors, including the occurrence of other sex-based harassment. As the regulatory text directs, the consideration of the factors must be *fact-specific,* meaning that the determination whether other sex-based harassment in the recipient's education program or activity is relevant will depend on specific facts. In the July 2022 NPRM, the Department provided the example of a student who reports that his peers repeatedly denigrated him as ''girly'' over a period of weeks. 87 FR 41417. In this example, if one peer made a one-off remark calling the student ''girly,'' that alone may not be severe or pervasive enough to create a hostile environment, but if multiple peers repeatedly call the student ''girly,'' then that same treatment may create a hostile environment for that student. Similarly, if one student at a postsecondary institution made a derogatory comment to a pregnant student based on her pregnancy, that alone may not be sufficient to create a hostile environment, but if multiple people make similar comments to the same student based on pregnancy, that may create a hostile environment for the student. The Department notes that, when the elements of sex-based hostile environment are satisfied for an affected student, a recipient has an obligation to address that hostile environment, even if a particular respondent's conduct does not justify discipline. For example, in response to a hostile environment created by a series of incidents by different respondents, a recipient may offer supportive measures to the affected student or provide training for the broader school community.

The Department agrees that other sex-based harassment may prompt a Title IX Coordinator to address broader concerns. The Department also clarifies that a respondent's past sex-based harassment of people other than the complainant would not be part of the analysis of whether current sex-based harassment by the respondent created a hostile environment for the complainant. However, as explained in the discussion of § 106.45(b)(7)(iii), such pattern evidence may be permissible for use in Title IX grievance procedures, as the recipient must objectively evaluate pattern evidence to the extent it is relevant, *i.e.,* whether it is related to the allegations of sex-based harassment under investigation and may aid a decisionmaker in determining whether the alleged sex-based harassment occurred.

Changes: None.

Hostile Environment Sex-Based Harassment—Online Harassment (§ 106.2)

Comments: Some commenters were concerned that the proposed regulations would obligate a recipient to address sex-based harassment among students that takes place on social media or other online platforms, such as an online comment seen by an employee that is posted by a student from home. These commenters were unsure how a recipient would know if such activity created a hostile environment in an education program or activity. Citing *Mahanoy,* 141 S. Ct. at 2046, commenters noted that the Supreme Court has held that ''the leeway the First Amendment grants to schools to control speech is 'diminished' when it comes to off-campus speech'' because off-campus speech is generally the responsibility of parents, not schools. In light of this, a group of commenters argued that elementary and secondary school

recipients would not be able to enforce the proposed regulations against off-campus speech without violating the First Amendment, and commenters expressed concern about chilling online debate among students and employees when they are in their own homes.

Discussion: When a recipient has information about sex-based harassment among its students that took place online and created a hostile environment in the recipient's education program or activity, the recipient has an obligation to address that hostile environment. As explained in the July 2022 NPRM, the Department does not expect a recipient to follow the online activity of its students outside of the recipient's education program or activity. 87 FR 41440. The Department notes that neither the proposed nor final regulations contain any separate requirements related to online harassment and abuse. Instead, a recipient's obligation is to address all forms of sex discrimination, including sex-based harassment that occurs within the recipient's education program or activity, whether the conduct takes place online, in person, or both. Online harassment can include, but is not limited to, unwelcome conduct on social media platforms such as sex-based derogatory name-calling, the nonconsensual distribution of intimate images (including authentic images and images that have been altered or generated by artificial intelligence (AI) technologies), cyberstalking, sending sex-based pictures or cartoons, and other sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity. A recipient must evaluate online conduct with the same factors that are used to determine whether in-person conduct creates a hostile environment. If an employee has information about sex-based harassment among its students that took place online, such as the nonconsensual sharing of intimate images, and that created a hostile environment in the recipient's education program or activity, the recipient has an obligation to address the conduct. 87 FR 41440; *see also* the discussion of § 106.11. The Department again notes, as stated above and in the July 2022 NPRM, that recipients are not expected to affirmatively monitor students' online activity. *See* 87 FR 41440.

With respect to the First Amendment and online speech, the Department understands that some commenters were concerned that the First Amendment may limit the ability of elementary schools and secondary schools to prevent hostile environments by disciplining students for online harassing conduct. The Department has concluded, however, that these schools retain sufficient authority to do so without running afoul of the First Amendment. First, the Supreme Court's opinion in *Mahanoy* suggests that much student online speech in the school context would be subject to school discipline. The Court observed that it had previously ''stressed'' that when elementary schools and secondary schools act in loco parentis, they have a greater interest in regulating student speech. 141 S. Ct. at 2045–46. And as Justice Alito explained in concurrence, much online speech will likely fall into this category, including ''online instruction at home,'' ''remote learning,'' ''participation in other online school activities,'' and—to the extent they involve schoolwork—''communications to school email accounts or phones'' and speech ''on a school's website.'' *Id.* at 2054 & n.16 (Alito, J., concurring). All of these school-related activities would likely be part of the education program or activity of the recipient, *see* discussion of § 106.11, and, as such, these final regulations would apply.

Second, *Mahanoy* recognizes elementary schools' and secondary schools' authority to regulate online speech to address sex-based harassment, even when that speech occurs outside school-related activities. The majority opinion observed that ''severe bullying or harassment targeting particular individuals'' ''may call for school regulation,'' 141 S. Ct. at 2045, and in considering the competing interests of the student and the school in the case before it, the majority opinion specifically noted that the speech in question ''did not . . . target any member of the school community,'' *id.* at 2047. The concurrence also agreed that elementary schools and secondary ''schools must be able to prohibit threatening and harassing speech.'' *Id.* at 2052 (Alito, J., concurring). Together, the opinions suggest speech targeting particular individuals may be regulated in certain circumstances. Moreover, in the time since *Mahanoy* was decided, lower courts have continued to recognize that elementary schools and secondary schools retain authority to discipline students for certain online, off-campus harassing speech not involving schoolwork or not part of a school-sponsored activity. *See, e.g., Kutchinski ex rel. H.K.* v. *Freeland Cmty. Sch. Dist.,* 69 F.4th 350, 358 (6th Cir. 2023) (off-campus Instagram posts that constituted ''serious or severe harassment'' could be regulated as long as the student ''bore some responsibility for the speech and the speech substantially disrupted classwork (or [the school] reasonably believed the speech would disrupt classwork)''); *Chen Through Chen* v. *Albany Unified Sch. Dist.,* 56 F.4th 708, 711 (9th Cir. 2022) (school ''properly disciplined'' two students for ''off-campus social media posts'' that ''amounted to severe bullying or harassment targeting particular classmates'' (internal quotation marks omitted)), *cert. denied sub nom. Epple* v. *Albany Unified Sch. Dist.,* 143 S. Ct. 2641 (2023). The Sixth Circuit in *Kutchinski* recognized that elementary schools and secondary schools receive ''a high degree of deference in the exercise of their professional judgment'' regarding student discipline. 69 F.4th at 360. And the Ninth Circuit in *Chen* specifically observed that, in considering an elementary school's or secondary school's interest in imposing discipline, the school's exposure ''to potential liability on the theory that it had 'failed to respond adequately' to a . . . hostile environment'' is relevant. 56 F.4th at 722; *see also id.* at 718 (noting that conduct need not be '' 'directed at the complainant in order to create a hostile educational environment' ''). The Department accordingly concludes that elementary schools and secondary schools have sufficient authority to address conduct that creates a hostile environment even when that conduct occurs online and outside of a specific school activity. *See* 87 FR 41440 (explaining that, when an employee has information about sex-based harassment among its students that took place online and created a hostile environment in the recipient's education program or activity, the recipient has an obligation to address that hostile environment).

Changes: None.

Hostile Environment Sex-Based Harassment—Sex Stereotyping and Gender Identity (§ 106.2)

Comments: Some commenters supported the proposed prohibition on harassment based on sex stereotypes and gender identity, arguing that harassment based on sex stereotypes can deprive students of equal access to educational opportunities, including by adversely affecting their academic performance. Commenters also noted that courts have recognized that such harassment can violate Title IX and other sex discrimination laws. Some

commenters asserted that harassment based on sex stereotypes could include statements like ''girls don't belong in school'' or ''girls should spend less time advancing in athletics and more time learning home economics.''

Other commenters urged the Department to clarify that misgendering is a form of sex-based harassment that can create a hostile environment, especially for gender-nonconforming and LGBTQI+ students. One commenter noted that the EEOC has recognized that misgendering can violate Title VII.

Other commenters argued that using names and pronouns consistent with an individual's sex assigned at birth should not be considered harassment based on sex stereotypes. Some commenters argued that prohibiting misgendering as a form of harassment could lead to compelled speech in violation of the First Amendment and could be used to target people with unpopular viewpoints, citing *Meriwether* v. *Hartop,* 992 F.3d 492 (6th Cir. 2021).

One commenter suggested that the Department summarize a recent resolution letter finding that a school district violated Title IX when it failed to effectively respond to misgendering of a student.

Discussion: The Department appreciates commenters' support for coverage of harassment based on sex stereotypes and gender identity. The Department has long recognized, consistent with the text and purpose of the statute and courts' interpretations, that Title IX's prohibition on sex discrimination encompasses harassment based on sex stereotypes. *See, e.g.,* 2001 Revised Sexual Harassment Guidance, at 3 (noting that ''acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping [is] a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student's ability to participate in or benefit from the educational program'') & nn.17–19 (citing cases); 85 FR 30179 (''sexual harassment . . . may consist of unwelcome conduct based on sex or sex stereotyping'').

The Department agrees with commenters that conduct directed at a student's nonconformity with stereotypical notions of how boys or girls are expected to act and appear or that seeks to restrict students from participating in activities that are not stereotypically associated with the students' sex could constitute sex-based harassment that creates a hostile environment. *See, e.g., Seiwert* v. *Spencer-Owen Cmty. Sch. Corp.,* 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007) (finding plaintiff stated Title IX claim when he alleged harassment for ''acting in a manner that did not adhere to the traditional male stereotypes''); *Theno* v. *Tonganoxie Unified Sch. Dist. No. 464,* 377 F. Supp. 2d 952, 972 (D. Kan. 2005) (finding plaintiff stated Title IX claim when peers engaged in teasing, name-calling and crude sexual gestures designed to ''disparage his perceived lack of masculinity''); *Lipsett* v. *Univ. of P.R.,* 864 F.2d 881, 903–05 (1st Cir. 1988) (woman participating in a surgical residency program was subjected to hostile environment sexual harassment based on evidence of general antagonism toward women, including statements that women should not be in the program, and assignment of menial tasks, combined with overt sexual harassment); *Montgomery* v. *Indep. Sch. Dist. No. 709,* 109 F. Supp. 2d 1081, 1092 (D. Minn. 2000) (finding plaintiff stated Title IX claim when peers harassed him for ''failure to meet masculine stereotypes,'' including by calling him ''girl'' and using a feminized version of his name). Similarly, unwelcome conduct based on gender identity can create a hostile environment when it otherwise satisfies the definition of sex-based harassment. *See, e.g.,* U.S. Equal Emp. Opportunity Comm'n, *Sexual Orientation and Gender Identity (SOGI) Discrimination, https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination* (last visited Mar. 12, 2024) (harassment based on gender identity can create a hostile environment in the workplace). Courts have also recognized that policies that prevent transgender students from participating in school consistent with their gender identity can harm those students. *Doe ex rel. Doe* v. *Boyertown Area Sch. Dist.,* 897 F.3d 518, 523 (3d Cir. 2018) (detailing the harms exclusionary school policies have on transgender students).

Sex-based harassment, including harassment predicated on sex stereotyping or gender identity, is covered by Title IX if it is sex-based, unwelcome, subjectively and objectively offensive, and sufficiently severe or pervasive to limit or deny a student's ability to participate in or benefit from a recipient's education program or activity (*i.e.,* creates a hostile environment). Thus, harassing a student—including acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on the student's nonconformity with stereotypical notions of masculinity and femininity or gender identity—can constitute discrimination on the basis of sex under Title IX in certain circumstances. Recipients have a responsibility to protect students against sex-based harassment. OCR will continue to address complaints of harassment based on sex stereotypes and gender identity, consistent with OCR's jurisdiction under Title IX and the final regulations.

Many commenters, as highlighted above, believe that misgendering is one form of sex-based harassment. As discussed throughout this preamble, whether verbal conduct constitutes sex-based harassment is necessarily fact-specific. While the final regulations do not purport to identify all of the circumstances that could constitute sex-based harassment under Title IX, a stray remark, such as a misuse of language, would not constitute harassment under this standard. *See* above discussion of Hostile Environment Sex-Based Harassment—Severe or Pervasive (§ 106.2). Similarly, the Department takes First Amendment concerns seriously, and nothing in the regulations requires or authorizes a recipient to violate anyone's First Amendment rights. *See* 34 CFR 106.6(d); *see, e.g., W. Va. State Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 642 (1943); *Hartop,* 992 F.3d at 511 (holding that in the absence of evidence that a professor's conduct ''inhibited Doe's education or ability to succeed in the classroom,'' the conduct was not sufficiently severe and pervasive to implicate Title IX); *see also* above discussion of Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2).

The Department also declines to summarize a resolution letter, as that letter describes OCR's determination in an individual case and is not a formal statement of OCR policy.

Changes: None.

Hostile Environment Sex-Based Harassment—Elementary Schools and Secondary Schools (§ 106.2)

Comments: One commenter expressed concern that the proposed definition of ''sex-based harassment'' would be difficult for elementary schools and secondary schools to apply in light of the range of conduct that occurs at that level that may warrant attention or discipline but may not rise to the level of sexual harassment under Title IX. One commenter asserted that the proposed definition of ''sex-based harassment'' would leave little room for school officials to make judgment calls and asserted that elementary schools and secondary schools have not received sufficient notice of this broad scope of Title IX's coverage as required

by the Constitution's Spending Clause. One commenter urged the Department to narrow the scope of the proposed definition of ''sex-based harassment'' to more closely track the definition in the 2020 amendments and compared the proposed definition to the definition of sexual harassment in OCR's 2011 Dear Colleague Letter on Sexual Violence, which the commenter asserted was unworkable for elementary schools and secondary schools.

A group of commenters expressed concern that the proposed definition of hostile environment sex-based harassment would depart from the *Davis* standard and be inappropriate for the elementary school context. The commenters asserted that under the *Davis* standard, the elementary school student would not be deemed to have engaged in sex discrimination because the conduct would be severe, but not pervasive, but under the proposed regulations, the outcome might be different because the regulations would cover conduct that is either severe or pervasive.

Discussion: Regarding the Spending Clause, Title IX has always required elementary school and secondary school recipients to operate their education programs or activities free from sex discrimination. And the Supreme Court has noted that ''[b]ecause Congress did not list any specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered.'' *Jackson* v. *Birmingham Bd. of Educ.,* 544 U.S. 167, 175 (2005) (emphasis omitted). Federal agencies have authority to define the contours of the Spending Clause contract with recipients through their regulations. *Bennett* v. *Ky. Dep't of Educ.,* 470 U.S. 656, 670 (1985). Accordingly, recipients of Federal financial assistance agree to comply with Title IX obligations as a condition of receiving Federal funds, including regulatory requirements. Contrary to the commenter's assertion, recipients received notice of the proposed definition of ''sex-based harassment'' in the July 2022 NPRM and these final regulations. This notice-and-comment rulemaking process provides the notice that the Spending Clause, as construed in *Pennhurst State School & Hospital* v. *Halderman,* requires. 451 U.S. 1, 17 (1981). Thus, recipients should have anticipated the final definition becoming effective when they continued to accept Federal funds. Further, for the reasons discussed elsewhere in this preamble, the regulatory regime is not vague, so recipients have sufficient notice of the conditions imposed on the receipt of funds.

The Department disagrees that the definition of hostile environment sex-based harassment is incompatible with the elementary school context or that it leaves no room for the judgment of school administrators. The definition contemplates and requires application of administrator judgment. The Department notes that, as discussed above, the final regulations define hostile environment sex-based harassment as unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.,* creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the degree to which the conduct affected the complainant's ability to access the recipient's education program or activity; the type, frequency, and duration of the conduct; the parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the unwelcome conduct; the location of the conduct and the context in which the conduct occurred; and other sex-based harassment in the recipient's education program or activity. Because the definition of hostile environment sex-based harassment accounts for factors such as the parties' ages and the objective offensiveness of the conduct—which commenters asserted officials at elementary schools and secondary schools typically consider when addressing student conduct—the Department disagrees with assertions that the definition of hostile environment sex-based harassment would be unworkable for recipients in this educational setting. Further, as discussed in more detail above in Hostile Environment Sex-Based Harassment—the *Davis* Standard (§ 106.2), though *Davis* applies a higher standard for monetary damages in private litigation, it has also endorsed a fact-specific assessment of whether sex-based conduct rises to the level of harassment, and schools have long applied that ''totality of the circumstances'' assessment without issue. *See Davis,* 526 U.S. at 651 (''Whether gender-oriented conduct rises to the level of actionable 'harassment' thus 'depends on a constellation of surrounding circumstances, expectations, and relationships' ''). Accordingly, the Department believes the definition can appropriately be applied in the elementary school and secondary school context.

The Department notes that the hypotheticals posed by commenters ignore other elements of the definition of ''sex-based harassment,'' including that conduct that is an isolated event must be so severe that it limits or denies participation in an activity, and that the conduct be sex-based, not merely a circumstance in which the students involved happen to be different genders. *Cf. Oncale,* 523 U.S. at 80 (''We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex[ ]''). Accounting for the other elements included in the definition of ''sex-based harassment'' significantly narrows the scope of conduct implicated by the final regulations and thus helps address the concerns of these commenters.

Further, the *Davis* Court acknowledged that a single instance of severe student-to-student harassment could have the systemic effect of denying a student equal access to an education program or activity. The *Davis* Court doubted that Congress meant to hold schools liable in private suits for money damages for such single acts, but the Court did not cabin the authority of the Department to administratively enforce Title IX in such contexts. For further explanation of the *Davis* standard and the distinction between private litigation and administrative enforcement, *see* the above discussion of Hostile Environment Sex-Based Harassment—the *Davis* Standard (§ 106.2).

The Department discusses the burdens, costs, and benefits of the definition of hostile environment sex-based harassment in more detail below and in the *Regulatory Impact Analysis.*

Changes: None.

Sex-Based Harassment—Specific Offenses (§ 106.2)

General Comments

Comments: Some commenters supported general alignment of the specific offenses listed in the definition of ''sex-based harassment'' with the Clery Act, and others opposed it because they said it would make postsecondary institutions more likely to expel respondents without due process. Some commenters supported the inclusion of the definitions of sexual assault, dating violence, domestic violence, and stalking in the definition

as opposed to cross-referencing the applicable provisions in the Clery Act, but others stated that maintaining a cross-reference will prevent confusion if Congress amends the Clery Act definitions in the future.

Some commenters objected to the inclusion of domestic violence, dating violence, and stalking within the definition of ''sex-based harassment'' because they said these offenses are not always sex-based, and Congress did not classify them as sex-based harassment. One commenter urged the Department to include human trafficking in the definition of ''sex-based harassment'' because sex trafficking is a problem in elementary schools and secondary schools.

One commenter supported having a single instance of a specific offense constitute sex-based harassment and cited cases that, according to the commenter, established that a single incident of rape is sufficient to establish that a student was subjected to severe, pervasive, and objectively offensive conduct. To the contrary, another commenter said that courts have dismissed sexual harassment lawsuits over misdemeanor sexual assaults when they have determined that a single sexual assault by a peer did not create a hostile environment. This commenter objected to defining the specific offenses as Title IX violations regardless of where they occurred.

One commenter was concerned that specific offenses would introduce the concepts of intent and consent into the analysis of sex-based harassment, rather than unwelcomeness. Another noted that the specific offenses are not written in the same format as the definitions of quid pro quo sex-based harassment or hostile environment sex-based harassment.

Discussion: The Department's definition of ''sex-based harassment'' largely aligns with the Clery Act, as explained in the preamble to the July 2022 NPRM. *See* 87 FR 41418. The Department appreciates the comments affirming the Department's inclusion of textual definitions rather than cross-references in the definitions of sexual assault, dating violence, domestic violence, and stalking. The Department acknowledges the commenters' concern that if the Clery Act definitions are amended, the difference in definitions could be confusing. As explained in the preamble to the July 2022 NPRM and elsewhere in this preamble, while the Department intends the definitions of these terms to be consistent with the Clery Act, the Department opted to include the textual definitions rather than cross-references for readability of the regulations, to generally eliminate the need for recipients and other members of the public to consult other statutes for the definitions of the specific offenses, and because part of the statutory definition of domestic violence is not applicable in a Title IX context. *See id.* If there are future changes to the statutory definitions, the Department will assess whether a technical update to the Title IX definitions is appropriate to maintain the intended consistency.

The Department disagrees with the commenter who stated that inclusion of the Clery Act offenses would make a postsecondary institution more likely to expel respondents without due process. As discussed elsewhere in this preamble, especially the discussions of §§ 106.45 and 106.46, the final regulations contain numerous guardrails to ensure that grievance procedures are conducted without bias and with notice and an opportunity to be heard, and to ensure that no person is subject to disciplinary sanction absent a determination that they engaged in sex discrimination prohibited by Title IX.

In response to comments that domestic violence, dating violence, and stalking are not always sex-based, the Department notes, similar to the 2020 amendments, that the introductory text of the definition of ''sex-based harassment'' in the final regulations specifies that any sex-based harassment must be ''*on the basis of sex.*'' Therefore, these final regulations capture the requirement that, for conduct to be prohibited under Title IX, it must be on the basis of sex.

The Department recognizes that sex trafficking is both a crime under Federal law, including under 18 U.S.C. 1591, and a grave concern. Although the Department declines to revise the definition of ''sex-based harassment'' at this time because the specific offenses referenced in the definition are limited to those listed in the Clery Act, and sex trafficking is not listed in the Clery Act, the Department takes this opportunity to clarify that acts associated with sex-trafficking may also fall within the definition of hostile environment sex-based harassment if they meet the elements of the definition.

The Department confirms that under these final regulations, similar to the 2020 amendments, the specific offenses of sexual assault, dating violence, domestic violence, and stalking need not satisfy the elements of severity or pervasiveness or subjective and objective offensiveness in order to constitute sex-based harassment. 85 FR 30153–54. Whether courts have found that certain misdemeanor sexual assaults did not constitute sexual harassment thus is not pertinent to these final regulations. The specific offenses included in the definition of ''sex-based harassment'' are based on the federally validated definitions of these offenses. The Department recognizes that under State law, there may be other sex offenses. Those other sex offenses may meet the definition of hostile environment sex-based harassment if they satisfy the elements of hostile environment harassment set forth in these final regulations.

The Department also confirms that the specific offenses need not satisfy the element of unwelcomeness in order to constitute sex-based harassment. The Department agrees that the reference to sexual assault, which is based on the Clery Act, introduces the concept of consent, as discussed below. The Department recognizes that the specific offenses are not written in the same format as quid pro quo sex-based harassment or hostile environment sex-based harassment, but that is because the specific offenses are based on other federally validated definitions.

The Department disagrees with a commenter's suggestion that the specific offenses are covered regardless of where they occur. The commenter misapprehends the scope of the regulations. As explained in the discussion of § 106.11, Title IX applies to sex discrimination, including sex-based harassment, occurring under a recipient's education program or activity in the United States. When sex-based harassment, including the specific offenses, occurs outside of a recipient's education program or activity, Title IX would not apply. However, as § 106.11 makes clear, Title IX requires that a recipient address a hostile environment that exists under its education program or activity even when some conduct, including in the form of any specific offense, alleged to be contributing to the hostile environment occurred outside of the recipient's education program or activity.

Changes: None.

Sexual Assault

Comments: One commenter was concerned that the definition of sexual assault was too narrow because it would require the conduct to meet the FBI's definition of rape, incest, fondling, or statutory rape, and also stated that the proposed definition fails to meet the American Academy of Pediatrics' definition of sexual assault.

One commenter asked the Department not to define sexual assault with reference to the FBI's Uniform Crime Reporting (UCR) definition because it is

difficult to locate the definition that the Department wants postsecondary institutions to use on the FBI's UCR website. The commenter suggested, instead, to include the definition of sexual assault in the regulations to ensure that if the FBI revises its definition before the Title IX regulations go into effect, it will not impact the definition under Title IX.

Some commenters were concerned that the proposed definition of sexual assault uses outdated terminology. Commenters objected to the terms ''forcible'' and ''nonforcible'' because they are not defined and the appropriate consideration, according to commenters, is lack of consent rather than use of force. Some commenters urged the Department to incorporate the definitions in the Clery Act regulations because they use more inclusive and accessible terminology and so that postsecondary institution recipients can use the same definitions under Title IX and the Clery Act. Other commenters urged the Department to elaborate on the definition of various terms (*e.g.,* fondling, rape), including to clarify whether the covered bases must be limited to the purpose of sexual gratification.

Discussion: The Department acknowledges that commenters found the definition of sexual assault confusing and appreciates the opportunity to provide additional clarity to the discussion provided in the July 2022 NPRM. *See* 87 FR 41418. The 2020 amendments and these final regulations adopt the Clery Act's statutory definition of the term ''sexual assault,'' 20 U.S.C. 1092(f)(6)(A)(v), which defines sexual assault as ''an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting [UCR] system of the Federal Bureau of Investigation [FBI].'' The FBI UCR currently consists of the National Incident-Based Reporting System (NIBRS), which defines sex offenses as ''[a]ny sexual act including Rape, Sodomy, Sexual Assault With An Object, or Fondling directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent; also unlawful sexual intercourse.'' FBI, Uniform Crime Reporting Program: National Incident-Based Reporting System (2018), *https://ucr.fbi.gov/nibrs/2018/resource-pages/nibrs_offense_definitions-2018.pdf.*

The definition of sexual assault in the final regulations mirrors the Clery Act's statutory definition of sexual assault, which tracks the FBI definition of sex offenses. The Department declines to write out the FBI definition of sexual assault in the final Title IX regulations, as one commenter recommended. While the Department understands the concerns about ease of locating the definition, the Department drafted these final regulations to include the text of the Clery Act statute's definitions of sexual assault, dating violence, domestic violence and stalking (except for minor changes to the definition of domestic violence). *See* 87 FR 41418. The definition of sexual assault in 20 U.S.C. 1092(f)(6)(A)(v) refers to the FBI's UCR system, and therefore these final regulations track VAWA 2022 by doing so as well. The Department recognizes that, as explained in NIBRS, ''the UCR program combined the offense categories of Sex Offenses (formerly Forcible) and Sex Offenses, Nonforcible'' and beginning in 2018 ''all offense types previously published in those two categories are now published in one category as Sex Offenses'' and include the following offenses: Rape, Sodomy, Sexual Assault With An Object, Fondling, Incest, and Statutory Rape. Although the terms forcible and nonforcible are no longer used by the UCR, the Department believes it is appropriate to maintain the reference to those terms in the definition of sexual assault to maintain consistency with the statutory definition of sexual assault under the Clery Act. The Department also notes that use of the words ''forcible or nonforcible'' in the Title IX definition of sexual assault is not meant to imply that force is required. Instead, the use of the terms communicates that either forcible or nonforcible sex offenses under the UCR fulfill the definition.

The Department thanks the commenter for pointing out that definitions of sexual assault vary, and that the definition advanced by the American Academy of Pediatrics captures conduct that is not included in the FBI's definition. However, the Department's Title IX regulations affect both elementary and secondary students, who are children, and postsecondary students, most of whom are adults. Therefore, while the American Academy of Pediatrics' definition of sexual assault may capture additional conduct, the Department notes that it may not be an appropriate definition for all recipients.

The Department declines to adopt a more specific definition of sexual assault as suggested by commenters because the definition contained in the Clery Act, which incorporates the FBI UCR system definition, is broad enough to cover many of the examples mentioned by the commenter. The Department also maintains that this approach facilitates postsecondary institutions' understanding of their obligations under Title IX and the Clery Act and provides elementary schools and secondary schools with an appropriate definition of sexual assault to protect their students from sex offenses under Title IX. *See* 85 FR 30176. In addition, nothing in the final regulations precludes a recipient from providing examples and scenarios in its policy, from considering the age of the complainant when classifying certain incidents of sexual assault, or from providing related trainings to help students and others understand what types of conduct are prohibited under the recipient's policy. The Department also notes that unwelcome sex-based conduct that is severe or pervasive and meets the other elements of hostile environment sex-based harassment would constitute sex-based harassment under Title IX, that a single instance of sexual assault would likely meet the definition of hostile environment sex-based harassment, and that sexual gratification is not an element required by the definition of ''sex-based harassment'' under Title IX.

The Department recognizes that one commenter asked for additional explanation of the definition of rape. The Department declines to include additional information in these final regulations because the definition of rape is included in the Clery Act's statutory definition of the term ''sexual assault.'' The Department also notes that unwelcome sex-based conduct that is severe or pervasive and meets the other elements of hostile environment sex-based harassment would constitute sex-based harassment under Title IX regardless of whether the conduct meets the definition of a specific offense.

Changes: As discussed below, the Department has added a note to the final regulations regarding consent.

Consent

Comments: Some commenters asserted that removing the definition of ''consent'' exceeds the Department's authority and is inconsistent with Title IX and established case law, citing *Doe* v. *Oberlin College,* 963 F.3d 580, 587–88 (6th Cir. 2020) and *Doe* v. *University of Sciences,* 961 F.3d 203, 206 (3d Cir. 2020). These commenters stated that some courts have criticized the consent definitions used by some postsecondary institutions and that inconsistent application of consent definitions by postsecondary institutions may violate Title IX and a respondent's constitutional rights, citing, *e.g., Doe* v. *Miami University,* 882 F.3d 579 (6th Cir. 2018); *Nokes* v. *Miami University,* No.

17–cv–482, 2017 WL 3674910, at *10 (S.D. Ohio Aug. 25, 2017); *Matter of Doe* v. *Purchase College State University of New York,* 192 A.D.3d 1100, 1103 (N.Y. App. Div. 2021). Other commenters stated that the absence of a clear definition of ''consent'' was not helpful to recipients, students, and employees and that including a definition of ''consent'' would be particularly helpful for elementary schools and secondary schools.

One commenter urged the Department to require a recipient to define ''consent'' when it is part of the definition of any form of sex-based misconduct to alleviate confusion between acquiescence and consent. The commenter noted that unwelcomeness is the historical test for determining whether sex-based harassment occurred. Another commenter asked the Department to prohibit a recipient from using a definition of ''consent'' that shifts the burden of proof to the respondent, including affirmative consent.

One commenter requested that the Department clarify how to apply the concept of consent at the elementary school and secondary school level, including in cases involving very young children and students with disabilities.

Discussion: ''Consent'' is a component of the sex offenses classified under the FBI's UCR system, which are referenced in the definition of sexual assault. Although the Department is not itself defining ''consent'' nor requiring recipients to define ''consent,'' a recipient may choose to define ''consent'' in its policies, as explained below.

In the July 2022 NPRM, the Department expressed the tentative view that it was appropriate to remove the entry for consent in § 106.30(a) of the 2020 amendments because it was unnecessary and confusing to include language in the definitions section stating that the Department declines to define a certain term. *See* 87 FR 41423. However, based on comments, the Department has determined that although it is not defining the term ''consent,'' it is helpful to include a note after the description of the specific offenses, similar to the entry for consent in the 2020 amendments at § 106.30(a), that states the Assistant Secretary will not require a recipient to adopt a particular definition of consent with respect to sex-based harassment as defined in this section, if applicable. Including this note will ensure that a recipient is aware that it is within the recipient's discretion whether and how to define consent in its policies.

Commenters cite various cases, but those authorities do not support their position that removing the definition of ''consent'' exceeds the Department's authority, is inconsistent with Title IX, or that a specific definition of ''consent'' is required under Title IX. The cases cited by commenters do not discuss the Department's authority to decline to define consent under Title IX, nor do they hold that Title IX requires a specific definition of ''consent.'' Rather, these cases discuss the meaning and application of consent under particular postsecondary institution's Title IX policies. Under 20 U.S.C. 1682, the Department may promulgate regulations to effectuate Title IX, and after serious consideration and for the reasons stated in this discussion, the Department has decided that providing flexibility to recipients about whether and how to define the term ''consent'' is consistent with that mandate.

The Department acknowledges commenters who wanted the Department to define ''consent'' for recipients. The Department's position remains, as stated in the preamble to the 2020 amendments, that whether and how to define ''consent'' for purposes of sexual assault within a recipient's educational community should be left to the discretion of recipients, including elementary schools and secondary schools, and so the Department declines to adopt a Federal definition of ''consent'' for Title IX purposes. *See* 85 FR 30124–25. The Department notes that many recipients are required by State law to apply particular definitions of ''consent,'' and recipients may consider relevant State law if they choose to adopt a definition of ''consent.''

With respect to the commenter's concern that elementary school and secondary school employees may have less experience applying a definition of ''consent'' than those at the postsecondary level, the Department notes that the training required under the final regulations would include any definitions used by the recipient, including with respect to consent if the recipient chooses to define it.

The Department disagrees that the failure to require recipients to adopt a particular definition of ''consent'' with respect to sexual assault will lead recipients to confuse acquiescence for consent. As discussed earlier, the Department's view is that a recipient has the discretion to choose whether and how to define ''consent'' based on what is best suited for its educational community and consistent with its State law. Therefore, the Department declines in the final regulations to prohibit or require a particular definition of ''consent.'' Consistent with the position taken in the preamble to the 2020 amendments, the Department disagrees with the commenter that affirmative consent inherently places the burden of proof on a respondent. *See* 85 FR 30125. The Department notes that, similar to the 2020 amendments, the final regulations at § 106.45(f)(1) require that the recipient—and not the parties—gather sufficient evidence to determine whether sex discrimination occurred. Regardless of whether and how a recipient defines ''consent,'' the burden of proof, and the burden of gathering evidence sufficient to reach a determination regarding whether sex discrimination occurred, is on the recipient. The final regulations do not permit the recipient to shift that burden to a respondent to prove consent, nor do they permit the recipient to shift that burden to a complainant to prove absence of consent. *See* 85 FR 30125.

Consistent with the view that institutions should have discretion to choose a particular definition of ''consent,'' the Department declines to provide specific examples of how to apply the concept of consent to specific scenarios in elementary schools and secondary schools. With respect to the application of consent in elementary schools and secondary schools and to students with disabilities, nothing in the final regulations precludes a recipient from using a definition of ''consent'' that takes into account a student's age or developmental level, and a recipient's definition of ''consent'' must be consistent with applicable disability laws. In addition, the final regulations require that when a complainant or respondent is an elementary or secondary student with a disability, the Title IX Coordinator must consult with one or more members of the student's Individualized Education Program (IEP) team, if any, and one or more members of the student's Section 504 team,[14] if any, to help ensure that the recipient complies with the requirements of the IDEA, 20 U.S.C. 1400 *et seq.,* and Section 504, 29 U.S.C. 794, throughout the recipient's implementation of its grievance procedures.

The Department notes that some of the evidence that may be relevant to determining capacity to consent for students with disabilities may be records that are maintained by a physician, psychologist, or other

[14] Under the IDEA regulations, that group is known as the IEP Team. 34 CFR 300.23. The term ''Section 504 team'' does not appear in the regulations implementing Section 504, but the Department uses this term informally throughout this preamble, as it is often used by commenters.

recognized professional or paraprofessional in connection with the provision of treatment to the party. The final regulations at § 106.45(b)(7)(ii) state that use of such records in the recipient's grievance procedures is impermissible unless the recipient obtains the party's voluntary, written consent for such use. Therefore, as long as an eligible student or the parent of a student with a disability consents to the use of such records in the recipient's grievance procedures under § 106.45(b)(7)(ii), the recipient may use the records to aid it in making a determination regarding consent.

Changes: The Department has added a note to the definition of ''sex-based harassment'' to explain that the Assistant Secretary will not require a recipient to adopt a particular definition of consent, where that term is applicable with respect to sex-based harassment.

Dating Violence

Comments: Some commenters noted that the definition of dating violence in the proposed definition of ''sex-based harassment'' would not completely align with the statutory definition under VAWA 2013 or VAWA 2022. One commenter recommended that the Department specify whether dating violence requires a crime of violence. The commenter noted that the definition of dating violence includes the term violence, but, unlike the definition of domestic violence, does not specify that it must be a crime of violence.

One commenter suggested combining the definitions of domestic violence and dating violence. One commenter suggested the definition of dating violence should cover coercive behavior that is used to threaten and intimidate survivors. Specifically, the commenter suggested adding to the dating violence definition language from the VAWA 2022 definition of domestic violence regarding victim services that the Department omitted from the proposed definition of domestic violence.

Discussion: The Department acknowledges that the definition of dating violence in the proposed definition of ''sex-based harassment'' would not completely align with the statutory definition in 34 U.S.C. 12291(a) (as cross-referenced in the Clery Act). Under VAWA 2022, dating violence means violence committed by a person (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship; (ii) The type of relationship; and (iii) The frequency of interaction between the persons involved in the relationship. 34 U.S.C. 12291(a)(11). This difference was inadvertent, and the Department is revising the proposed definition of dating violence in the final regulations to align with the definition in section 12291(a)(11). As a point of clarification, the definition does not require that dating violence be a ''crime of violence.''

The Department acknowledges the suggestion to combine the definitions of domestic violence and dating violence and add references to coercive behavior used to threaten or intimidate survivors, but declines to do so in order to align the specific offenses under Title IX as closely as possible with the relevant parts of the Clery Act and VAWA 2022. The Department similarly declines the suggestion to incorporate the part of the VAWA 2022 domestic violence definition that, as discussed below, was omitted from the Department's proposed definition of domestic violence into the definition of dating violence in the final regulations. As explained below in the discussion of the definition of domestic violence, the Department omitted that part of the VAWA 2022 definition of domestic violence from the final definition because some of the VAWA 2022 definition of domestic violence is not applicable to Title IX. *See* 87 FR 41418.

Changes: The Department has revised the definition of dating violence to fully align with the definition in 34 U.S.C. 12991(a) (as cross-referenced in the Clery Act).

Domestic Violence

Comments: Some commenters recommended that the Department adopt a final definition of domestic violence that more closely tracks the definition in VAWA 2022 because the Department's proposed definition omitted part of the VAWA 2022 definition. One commenter who wanted the omitted language from the VAWA 2022 definition added to the definition in the Title IX regulations said that the omitted language would require a recipient to recognize how patterns of power and control, including technological and economic abuse, interfere with a complainant's ability to participate in or benefit from the recipient's education program or activity.

One commenter said that while the definition of domestic violence in VAWA 2022 includes conduct that ''may or may not constitute criminal behavior,'' the Department's proposed definition of domestic violence only applies to criminal behavior, which ignores the fact that domestic violence often includes repeated coercive or controlling behavior, which, when viewed in isolation, may or may not constitute criminal conduct. This commenter also said that because the proposed definition of domestic violence would only cover felony or misdemeanor ''crimes of violence,'' the Department would be ignoring other common forms of abuse besides physical violence that are included in the definition of domestic violence in VAWA 2022. This commenter objected to the Department's assertion that parts of the definition of domestic violence in VAWA 2022 are not applicable to Title IX, explaining that research shows it is common for students to experience forms of domestic violence other than sexual and physical abuse.

One commenter was concerned that the reference to felony or misdemeanor crimes ''under the family or domestic violence laws of the jurisdiction of the recipient'' would require those implementing Title IX to know the crimes in their jurisdictions and have the ability to evaluate conduct from that perspective.

Other commenters recommended that the Department continue to cross-reference the definitions of dating violence, domestic violence, and stalking and explain in the preamble to the final regulations that only the first part of the VAWA statutory definition of domestic violence applies in the Title IX context.

Discussion: The Department appreciates commenters' suggestions that the definition of domestic violence should more closely track the definition in VAWA 2022 and acknowledges that the definition of domestic violence in these final regulations is not the same as the definition of domestic violence in VAWA 2022.

As discussed in the July 2022 NPRM, the Department has not included all of the language from the definition of domestic violence in VAWA 2022 in the definition of domestic violence in the Title IX regulations. *See* 87 FR 41418. The second part of the VAWA 2022 definition begins with ''in the case of victim services,'' and victim services is a defined term in VAWA 2022 that refers to specific victim services funded and made available under VAWA that are not available under Title IX. In addition, the definitions in VAWA 2022 are applicable for purposes of grants authorized under VAWA and Title IX implementation is not a grant program authorized under VAWA. Therefore, the Department was not legally obligated to

incorporate the entire VAWA 2022 definition into the Title IX regulations and determined that including the reference to victim services and the language that follows it from the VAWA 2022 definition of domestic violence in the Title IX regulations would create confusion for recipients. *See id.* The Department maintains the view, expressed in the July 2022 NPRM, that omitting this language does not create a substantive change to the VAWA 2022 definition of domestic violence for Title IX purposes. *Id.* Further, the Department's omission of this language is not intended to suggest that evidence of the conduct described in the omitted language is not or can never be the basis for a determination that sex-based harassment has occurred. Indeed, depending on the facts and circumstances, such conduct (*e.g.,* physical abuse or sexual abuse, or a pattern of any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a victim, including verbal, psychological, economic, or technological abuse) may constitute sex-based harassment if it is based on sex and meets the elements of the definition of hostile environment sex-based harassment or other specific offenses in the definition of sex-based harassment such as sexual assault or stalking.

The Department acknowledges that the definition of domestic violence in these final regulations may not align with the definition of domestic violence used by other Federal agencies, but nothing precludes recipients from complying with the definition of domestic violence in these final regulations and to the extent applicable, any definition of domestic violence used by other Federal agencies, including the U.S. Department of Housing and Urban Development (HUD). The Department explained in the July 2022 NPRM that, in some cases, the Department and HUD may have overlapping jurisdiction over a recipient due to HUD regulations that apply to campus housing for students, faculty, or staff. *See* 87 FR 41416. The Department noted that it was not required to align its definition of hostile environment sex-based harassment with the definition of ''hostile environment harassment'' in the context of HUD's enforcement of the Fair Housing Act. *See id.* The Department is similarly not required to align its definition of domestic violence with the definition of domestic violence used by HUD. 24 CFR 5.2003. Recipients that are subject to HUD's regulations must comply with these final regulations as well as any applicable HUD regulations.

The Department further notes that the beginning of the VAWA 2022 definition does not refer to felony and misdemeanor crimes ''of violence'' as the proposed definition of domestic violence did, and instead refers to ''felony and misdemeanor crimes.'' In response to comments and after further consideration, the Department is removing the phrase ''of violence'' to more closely align with VAWA 2022. The Department acknowledges that the definition of domestic violence in the final regulations still refers to crimes, but the Department declines to remove that reference because the Department's view is that it is preferable to track the language in the VAWA 2022 as closely as possible except when the language is not relevant in the Title IX context or the language in VAWA 2022 may be covered by another part of the definition of ''sex-based harassment.'' The Department notes that even if coercive or controlling behavior does not meet the definition of domestic violence under the final regulations, it may constitute sex-based harassment if it is based on sex and meets the elements of the definition of hostile environment sex-based harassment.

The Department does not share the concern expressed by one commenter that individuals responsible for implementing Title IX will not have the knowledge of the criminal laws of the recipient's jurisdiction necessary to evaluate whether the conduct alleged meets the definition of domestic violence under the regulations. The individual responsible for implementing the Clery Act at a postsecondary institution must already be familiar with such laws because the same language appears in VAWA 2022, which also applies to the Clery Act. A recipient may also include information on the relevant crimes and definitions as part of its training on the scope of conduct that constitutes sex discrimination, including sex-based harassment as required under § 106.8(d)(1). Therefore, the Department declines to remove ''under the family or domestic violence laws of the jurisdiction of the recipient.''

The Department declines to replace the proposed definitions of dating violence, domestic violence, and stalking with cross-references to the Clery Act and VAWA 2022. The 2020 amendments used cross-references, and stakeholders told the Department that this caused some confusion. The Department believes that including the language from the statutory definitions themselves will be more helpful for recipients because it will be clearer how these terms are defined for purposes of Title IX. 87 FR 41418.

Changes: The Department has removed the words ''of violence'' that were modifying ''felony and misdemeanor crimes'' in the definition of domestic violence.

Stalking

Comments: Some commenters said the proposed definition of stalking is unclear. One commenter was concerned that the proposed definition of stalking could violate the First Amendment because it is overbroad or vague and prohibits protected speech. This commenter suggested that the course of conduct must be ''menacing or invasive'' and that it be defined as ''two or more acts, including, but not limited to acts in which the respondent directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.'' This commenter suggested that a reasonable person should be defined as ''a reasonable person under similar circumstances and with similar identities to the complainant'' and that ''substantial emotional distress'' should be defined as ''significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.'' This commenter also requested that the Department include examples of the elements of the definition of stalking in the preamble to the final regulations. Some commenters asserted that the proposed definition could inadvertently discriminate against individuals with disabilities whose nonthreatening behavior is a manifestation of their disability and against individuals from different cultural backgrounds.

Discussion: As discussed above, the Department has largely decided to align the definitions of specific offenses with the VAWA 2022 definitions. Under VAWA 2022, stalking means a course of conduct directed at a specific person that would cause a reasonable person to either fear for their safety or the safety of others or suffer substantial emotional distress. 34 U.S.C. 12291(a)(36). Given that the Department is maintaining the definition of stalking from the 2020 amendments in the final regulations, the Department does not believe it is necessary to provide examples of the elements of the definition of stalking, but the Department discusses some of the terms in the definition in more detail below.

With respect to potential speech concerns, the court in *Rowles,* discussed earlier, addressed the university's

stalking policy. 983 F.3d at 352. That policy was similar to the definition of stalking in these final regulations in that it applied to any ''course of conduct on the basis of sex with no legitimate purpose that puts another person reasonably in fear for his or her safety or would cause a reasonable person under the circumstances to be frightened, intimidated or emotionally distressed.'' *Id.* (quoting the policy). As with the university's harassment policy, the court rejected both vagueness and overbreadth challenges to the stalking policy, observing in particular that the ''reasonable person'' standard appropriately defined the scope and meaning of the policy. *Id.* at 357–58. The Department maintains that the definition of stalking in the final regulations similarly is not vague or overbroad.

In response to the commenter who said that stalking could include nonthreatening behaviors, the Department notes that the definition of stalking under 34 U.S.C. 12291(a) (as cross-referenced in the Clery Act) specifically requires a course of conduct that would cause a reasonable person to fear for safety or suffer substantial emotional distress. A ''course of conduct'' requires that there be more than one incident and the conduct must be directed at a specific person. Stalking can occur in person or using technology, and the duration, frequency, and intensity of the conduct should be considered. Stalking tactics can include, but are not limited to watching, following, using tracking devices, monitoring online activity, unwanted contact, property invasion or damage, hacking accounts, threats, violence, sabotage, and attacks. *See, e.g.,* Stalking Prevention Awareness and Resource Center, Identifying Stalking SLII Strategies, *www.stalkingawareness.org/wp-content/uploads/2022/04/Identifying-Stalking-as-SLII-Strategies.pdf* (last visited Mar. 12, 2024).

The Department declines to define a reasonable person in the regulations because the definition of stalking in 34 U.S.C. 12291(a) does not include such a definition. In this context, a reasonable person is a reasonable person in the complainant's position, which is consistent with how the Clery Act regulations define a reasonable person in the context of stalking. *See* 34 CFR 668.46(a). The Department does not adopt a definition of substantial emotional distress because the definition of stalking in 34 U.S.C. 12291(a) does not include such a definition. However, consistent with how the Clery Act regulations define substantial emotional distress in the context of stalking, medical or other professional treatment and counseling would not be required to show substantial emotional distress in the Title IX context. *See* 34 CFR 668.46(a).

In response to comments that the definition of stalking would inadvertently discriminate against individuals with disabilities or individuals from different cultural backgrounds, the Department notes that in the context of stalking a recipient would consider whether a reasonable person in the complainant's position would fear for their safety or suffer emotional distress. The Department also notes that recipients must comply with prohibitions on discrimination based on disability in accordance with Section 504, the ADA, and § 106.8(e) of these final regulations. Additionally, recipients must comply with Title VI, which prohibits discrimination based on race, color, or national origin, including actual or perceived shared ancestry or ethnic characteristics, or citizenship or residency in a country with a dominant religion or distinct religious identity. Under § 106.8(e) of these final regulations, if a party is an elementary or secondary student with a disability, the recipient must require the Title IX Coordinator to consult with one or more members, as appropriate, of the student's IEP team, 34 CFR 300.321, if any, or one or more members, as appropriate, of the group of persons responsible for the student's placement decision under 34 CFR 104.35(c), if any, to determine how to comply with the requirements of the IDEA, 20 U.S.C. 1400 *et seq.,* and Section 504, 29 U.S.C. 794, throughout the recipient's implementation of grievance procedures. If a party is a postsecondary student with a disability, the Title IX Coordinator may consult, as appropriate, with the individual or office that the recipient has designated to provide support to students with disabilities to determine how to help comply with Section 504, 29 U.S.C. 794.

Changes: None.

8. Section 106.2 Definition of ''Relevant''

Comments: Some commenters supported the proposed definition of ''relevant,'' as it would help officials understand what evidence can be relied upon in grievance procedures. One commenter opposed the proposed definition because the commenter believed it would be too narrow and would lead to the unfair exclusion of evidence from grievance procedures.

For various reasons, some commenters suggested that the Department adopt the definition of ''relevant'' in Rule 401 of the Federal Rules of Evidence, including because they see that definition as well-established and supported by case law. Another commenter recommended the Department retain the requirement in the 2020 amendments to provide directly related information to parties so that they can meaningfully participate in relevance determinations. Another commenter asked the Department to modify the definition of ''relevant'' to state that evidence is also relevant if it aids in credibility determinations, even if the questions or evidence are not necessarily directly relevant to determining whether the alleged sex discrimination occurred. Another commenter suggested the Department use the term ''information'' rather than ''evidence'' in the proposed definition of ''relevant'' because a recipient does not operate as a court of law and does not apply the Federal Rules of Evidence to its grievance procedures. Some commenters stated that if the Department's final regulations retain proposed § 106.46(e)(6)(i), which requires access to relevant evidence or a written investigative report that summarizes relevant evidence, the Department should keep the distinction between evidence ''related to'' the allegations and evidence ''relevant'' to the allegations and not define ''relevant'' as including all evidence ''related to'' allegations of sex discrimination. The commenters stated the proposed definition of ''relevant'' would be too broad and would result in unwieldy hearings and investigative reports. Alternatively, the commenters suggested that the Department remove the requirement to provide parties with access to all relevant evidence and instead define ''relevant'' as ''evidence that may aid a decisionmaker in determining whether the alleged sex discrimination occurred.''

One commenter suggested that the proposed definition of ''relevant'' is complicated and asked whether the proposed definition and the proposed regulations would require the adoption of a set of evidentiary standards. The commenter asked the Department to provide, if possible, a set of guiding standards that a recipient could use to promote consistency. Other commenters expressed concern that the proposed definition of ''relevant'' is internally inconsistent. The commenters stated that relevant means ''related to'' the allegations of sex discrimination but noted that not all things ''related to'' an allegation are relevant to grievance procedures. The commenters also noted

that the proposed definition provides that questions or evidence are relevant if they ''may aid'' in determining whether alleged sex discrimination occurred, which the commenters thought was narrower than the ''related to'' language in the definition. Similarly, another commenter stated that the proposed definition of ''relevant'' is confusing because the commenter did not understand how a question or evidence could be ''related to'' allegations of sex discrimination but not aid the investigation of such allegations as the Department discussed in the July 2022 NPRM. 87 FR 41419.

Discussion: The Department has considered commenters' support and concerns with the definition of ''relevant'' and has determined that it will retain the definition as proposed. The Department disagrees with commenters' suggestions that the definition of ''relevant'' is too narrow and will lead to the unfair exclusion of evidence. As the Department explained in the July 2022 NPRM, the definition of ''relevant'' is intended to assist a recipient with relevance determinations and clarify the term for those who may not have substantial experience applying the legal concept. 87 FR 41419. The definition of ''relevant'' is sufficiently broad in that it allows for the inclusion of all evidence that is related to an allegation of sex discrimination and will aid the decisionmaker in determining whether alleged sex discrimination occurred. With respect to scenarios presented by commenters as examples of situations in which evidence might be unfairly excluded due to the definition of ''relevant'' and § 106.45(b)(7), the Department declines to make definitive statements about these hypothetical situations because analyzing whether evidence is relevant is necessarily fact-specific and commenters did not provide sufficient information to make any specific determinations.

These regulations adopt a definition of ''relevant'' that reflects its plain and ordinary meaning and is intended to provide clarity for recipients that do not have extensive familiarity with legal concepts. The Department therefore declines to adopt the Federal Rules of Evidence's definition of ''relevant.'' The Department disagrees with the commenter's suggestion that the Department should also eliminate the term ''evidence'' entirely and use ''information'' in the definition of ''relevant'' instead. The term ''evidence'' is well-known and has a plain and ordinary meaning such that it can be understood by all recipients, even those without a legal background and even though the grievance procedures are not conducted in a court of law.

The Department also declines the commenter's suggestion to modify the definition of ''relevant'' to state that evidence that aids in credibility determinations is also relevant, even if the questions or evidence are not necessarily directly relevant to whether the alleged sex discrimination occurred. While evidence related to a witness's or party's credibility may be relevant if it aids the decisionmaker in determining whether alleged sex discrimination occurred, the Department declines to state that all evidence that aids in credibility determinations is relevant, as there may be evidence that arguably pertains to credibility but is irrelevant to the allegations of sex discrimination. The Department notes that §§ 106.45(g) and 106.46(f) permit a decisionmaker to question parties and witnesses to assess a party's or witness's credibility, but only to the extent that credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.

For the reasons discussed in § 106.46(e)(6)—Access to Evidence, the Department declines to remove the requirement to provide an equal opportunity to access either the relevant and not otherwise impermissible evidence or the same written investigative report that accurately summarizes this evidence in § 106.46, provided that if the postsecondary institution provides access to an investigative report, it must further provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party. The Department also declines to retain the current regulations' distinction between providing parties access to evidence ''directly related to'' allegations of sexual harassment while requiring a recipient only to include ''relevant'' information in an investigative report or hearing. The Department does not agree that the definition of ''relevant'' will result in overly burdensome investigative reports or hearings. As noted in the July 2022 NPRM, a recipient will still be permitted to exclude questions or evidence that are related to allegations of sex discrimination but would not aid a decisionmaker in determining whether the alleged sex discrimination occurred. 87 FR 41419.

The Department also appreciates the opportunity to clarify what the commenters perceived as an inconsistency in the definition of ''relevant.'' The definition states that relevant evidence and relevant questions in grievance procedures must first be related to the allegations of sex discrimination under investigation as part of the grievance procedures under § 106.45, and if applicable § 106.46. Assuming this threshold standard is met, the definition clarifies that questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred. The evaluation of whether questions are relevant under the definition of ''relevant'' includes consideration of whether the question is both related to the allegations of sex discrimination under investigation and will aid in showing whether the alleged sex discrimination occurred. The evaluation of whether evidence is relevant under the definition of ''relevant'' includes consideration of whether the evidence is both related to the allegations of sex discrimination under investigation and will aid a decisionmaker in determining whether the alleged sex discrimination occurred. The Department declines to provide specific examples of such questions or evidence due to the necessarily fact-specific nature of the analysis, but reiterates that under the Department's final regulations a recipient would exclude questions or evidence that are not relevant.

The Department's definition of ''relevant'' does not require the adoption of a specific set of evidentiary rules. Instead, these final regulations provide the appropriate balance between prescribing sufficiently detailed procedures to foster consistently applied grievance procedures while deferring to a recipient to tailor rules that best fit each recipient's unique needs.

Changes: None.

9. Section 106.2 Definition of ''Remedies''

Comments: One commenter generally supported the proposed definition of ''remedies.'' Some commenters opposed the proposed definition of ''remedies'' as too broad, without further explanation. Other commenters found the proposed definition of ''remedies'' too vague because it does not clarify what a remedy looks like or how a recipient would know when the effects of discrimination have been remedied. One commenter requested that the Department modify the proposed definition of ''remedies'' to state that remedies are ''provided, as appropriate, to a complainant or another person determined by the recipient as having

had their equal access to the recipient's education program or activity unlawfully limited or denied by sex discrimination.'' The commenter stated this would ensure there is a process for identification of who is entitled to remedies and avoid the term being misused to protect those found responsible for sex discrimination.

Discussion: The definition of ''remedies'' in the final regulations is consistent with the Department's explanation of remedies in the 2020 amendments. It also aligns with the changes the Department has made to other parts of the regulations, such as the application of remedies to all forms of sex discrimination, including sex-based harassment. The Department acknowledges commenters' concerns that the definition of ''remedies'' does not specify what a remedy looks like or how a recipient would know when effects have been remedied. Because remedies generally are designed to restore or preserve access to the recipient's education program or activity for a particular complainant or other person or group of persons, they will be individualized and highly fact-specific. For this reason, the Department has concluded it would not be appropriate for the definition to state what a remedy would categorically look like or how a recipient would know when effects have been remedied in every instance. The Department notes, however, that it provided a non-exhaustive list of examples of possible measures a recipient may need to offer as remedies in the July 2022 NPRM. 87 FR 41423. Examples of possible measures a recipient may need to offer a student to remedy the effects of sex-based harassment, to remedy the additional harm caused by a recipient's action or inaction, or to restore or preserve a student's continued access to a recipient's education program or activity after a determination that sex-based harassment occurred could include: ensuring that a complainant can move safely between classes and while at school or on campus such as by providing a campus escort or allowing a student to park in the teachers' parking lot; making changes to class schedules and extracurricular activities to ensure the complainant and respondent are separated; making adjustments to student housing; providing services, including medical support and counseling; providing academic resources and support; reviewing any disciplinary actions taken against the complainant to determine whether there is a causal connection between the sex-based harassment and the misconduct; providing reimbursement for professional counseling services; making tuition adjustments; and any other remedies it deems appropriate. *Id.*

The Department acknowledges commenters' concerns about the definition of ''remedies'' but disagrees that the definition of ''remedies'' is too broad. The Department appreciates the commenter's suggested language for revising the definition of ''remedies'' to ensure that there is a process to identify who is entitled to remedies and to avoid misuse of remedies to protect those found responsible for sex discrimination under Title IX. The Department declines to adopt the commenter's suggested language, however, as § 106.45(h)(3) adequately protects against potential misuse by limiting the provision and implementation of remedies to, as appropriate, a complainant and other persons the recipient identifies as having had equal access to the recipient's education program or activity limited or denied by sex discrimination. The Department also notes that § 106.45(h)(3) and (4) make clear that, following a determination that sex discrimination occurred, remedies may be provided to complainants, while disciplinary sanctions may be imposed on respondents.

Changes: The Department has added ''their'' to the definition of ''remedies'' for clarity.

10. Section 106.2 Definition of ''Respondent''

Comments: Commenters generally supported the proposed definition of ''respondent.'' Some commenters noted the proposed definition would more accurately frame the allegations against a respondent in the context of the prohibition on sex discrimination. One commenter also stated that the definition, when combined with the Department's assurances that all other civil rights laws apply to Title IX grievance procedures, would help to ensure a fair and consistent process for respondents with disabilities. Some commenters asked the Department to clarify whether a student organization or other entity is included within the definition of ''respondent.'' Some commenters stated that if a volunteer can be a ''respondent,'' it would be harder for a recipient to recruit and retain volunteers.

Discussion: The Department acknowledges commenters' support and agreement with the definition of ''respondent'' and retains the definition as proposed. As discussed in the preamble to the 2020 amendments, only a person in their individual capacity can be a respondent in a Title IX grievance procedure. 85 FR 30139. The Department continues to decline to require a recipient to apply Title IX grievance procedures to groups or organizations. Nothing within the final regulations prohibits a recipient from addressing the actions of a student organization or other entity through a recipient's applicable code of conduct procedures. To the extent commenters suggest it would be preferable not to hold a recipient responsible for addressing sex discrimination by volunteers because doing so might make volunteering less attractive, the benefits of protecting civil rights and addressing sex discrimination justify any such costs.

Changes: None.

11. Section 106.2 Definition of ''Student With a Disability''

Comments: Many commenters supported the proposed definition of ''student with a disability,'' stating the definition would provide clarity for students with disabilities who experience sex discrimination and would help ensure that all students with disabilities have full access to a recipient's education program or activity.

Some commenters opposed including the proposed definition of ''student with a disability'' in § 106.2 as unnecessary because Title IX applies to all students regardless of disability. Some commenters requested that the definition of ''student with a disability'' also refer to the definition of disability under the ADA, 42 U.S.C. 12102, and one commenter requested that the Department employ alternative language such as ''disabled person'' or ''disabled student.'' Some commenters asked questions about the application of the proposed definition to particular populations of students.

Discussion: The Department appreciates the opinions expressed by the commenters and has carefully considered the commenters' views. While it is true that Title IX applies to all students regardless of disability, it is important to clarify the intersection of a recipient's obligations under Title IX with its obligations to protect the rights of students with disabilities. A definition of ''student with a disability'' is necessary for recipients to understand the scope of §§ 106.8(e) and 106.44(g)(6). Because it provides additional clarity, this definition will strengthen overall enforcement of Title IX.

The Department declines to add a reference to the ADA in this definition

since that would be redundant. Further, the Department appreciates the suggestion to use alternative language such as ''disabled person'' or ''disabled student'' but declines, as the phrase ''student with a disability'' is a familiar term regularly used by the Department. The Department also declines to speculate on the application of this definition to particular populations of students, as such inquiries are fact-specific and must be determined on a case-by-case basis.

Changes: None.

12. Section 106.2 Definition of ''Title IX''

Comments: None.

Discussion: In the Consolidated Appropriations Act of 2022, Congress directed the Department and other Federal agencies to establish an interagency task force on sexual violence in education, and this provision was subsequently codified in the chapter of the U.S. Code that contains Title IX, 20 U.S.C. 1689. Public Law 117–103, div. W, title XIII, § 1314, Mar. 15, 2022, 136 Stat. 936. The Department has therefore further revised the definition of ''Title IX'' to include section 1689.

Changes: The Department has added section 1689 to the list of sections in title 20 of the U.S. Code that comprise Title IX.

D. Other Definitions (Definitions That the Department Did Not Propose To Amend)

1. Section 106.2 Definition of ''Employee''

Comments: Some commenters asked the Department to include a definition for ''employee'' to make clear who has reporting requirements under § 106.44(c) and who needs to be trained under § 106.8(d).

Discussion: Given the wide variety of arrangements and circumstances across recipients and variations in applicable State employment laws, the Department has determined that recipients are best positioned to determine who is an ''employee.'' For additional discussion on who is subject to the employee reporting obligations in § 106.44(c) and the employee training requirements under § 106.8(d), see those sections of this preamble.

Changes: None.

2. Section 106.2 Definition of ''Federal Financial Assistance''

Comments: A number of commenters asked the Department to amend or clarify the definition of ''Federal financial assistance'' in light of recent court decisions holding that tax-exempt status under 26 U.S.C. 501(c)(3) constitutes Federal financial assistance for purposes of Title IX.[15] Some commenters were concerned that this would obligate a wider range of educational institutions, including private religious institutions, to comply with Title IX. Commenters asserted this would be inconsistent with the Department's current and proposed regulations and prior interpretations.

Discussion: The Department has determined that it is not necessary to amend the definition of ''Federal financial assistance'' at this time. Generally, tax benefits, tax exemptions, tax deductions, and most tax credits are not included in the statutory or regulatory definitions of Federal financial assistance. *See, e.g.,* 42 U.S.C. 2000d–1; 28 CFR 42.102(c); 31 CFR 28.105; 34 CFR 106.2(g). Most courts that have considered the issue have concluded that typical tax benefits are not Federal financial assistance because they are not contractual in nature.[16] The Department notes that even if tax-exempt status is considered a form of Federal financial assistance by some courts, not all educational institutions that have tax-exempt status are subject to the Department's Title IX regulations because the Department's Title IX regulations only cover educational institutions that receive funds from the Department. 34 CFR 100.2 (incorporated through 34 CFR 106.81). Since the Department's Title IX regulations apply only to recipients of funding from the Department, whether an educational institution may also be a recipient for other purposes is outside the scope of these regulations.

Changes: None.

3. Section 106.2 Definition of ''Program or Activity''

Comments: One commenter was concerned that the current definition of ''program or activity'' in § 106.2, which the Department did not propose amending, covers entities that are not connected to education and thus are outside the Department's authority to regulate. This commenter urged the Department to revise the definition of ''program or activity'' to make clear that it only includes programs or activities related to elementary schools and secondary schools or postsecondary institutions and related activities.

Discussion: The Department declines the suggestion to amend the definition of ''program or activity,'' as that definition is consistent with the statutory definition of the term as clarified by the Civil Rights Restoration Act of 1987, 20 U.S.C. 1687 (CRRA).[17] Title IX, unlike the other statutes amended by the CRRA, prohibits discrimination only in a recipient's ''education'' program or activity. 20 U.S.C. 1681(a). The term ''education program or activity'' is not separately defined in the Title IX statute or regulations, so a fact-specific inquiry is required to determine whether a particular program or activity of a non-educational institution recipient is educational, and thus covered by Title IX. Note that if any part of an educational institution receives Federal funds, all of its operations are covered by Title IX. *See, e.g., O'Connor* v. *Davis,* 126 F.3d 112, 117 (2d Cir. 1997); *Horner* v. *Ky. High Sch. Athletic Ass'n,* 43 F.3d 265, 271 (6th Cir. 1994); *Cohen* v. *Brown Univ.,* 991 F.2d 888, 894 (1st Cir. 1993).

Changes: None.

4. Section 106.2 Definition of ''Recipient''

Comments: One commenter suggested that, in light of the Fourth Circuit's decision in *Peltier* v. *Charter Day School, Inc.,* 37 F.4th 104 (4th Cir. 2022), *cert. denied,* 143 S. Ct. 2657 (2023), the Department should amend the current definition of ''recipient'' to state that Title IX applies to charter school operating companies and subcontractors engaged by charter schools or their owners to operate charter schools.

Discussion: In *Peltier,* the Fourth Circuit held that a for-profit corporation responsible for the day-to-day operations of a charter school received Federal funds through its contract with the charter school operator—the intermediary—and was therefore a recipient subject to the requirements of Title IX. *Id.* at 127. The Department agrees with the Fourth Circuit's determination that, under the longstanding regulatory definition of ''recipient'' and Supreme Court precedent, '' '[e]ntities that receive federal assistance, whether directly or through an intermediary, are recipients

[15] Commenters cited *E.H.* v. *Valley Christian Acad.,* 616 F. Supp. 3d 1040, 1050 (C.D. Cal. 2022); *Buettner-Hartsoe* v. *Baltimore Lutheran High Sch. Ass'n,* No. CV RDB–20–3132, 2022 WL 2869041, at *5 (D. Md. July 21, 2022), *reconsideration denied, motion to certify appeal granted,* No. CV RDB–20–3132, 2022 WL 4080294 (D. Md. Sept. 6, 2022).

[16] *See, e.g., Paralyzed Veterans of Am.* v. *Civil Aeronautics Bd.,* 752 F.2d 694, 708–09 (D.C. Cir. 1985); *Johnny's Icehouse, Inca* v. *Amateur Hockey Ass'n of Ill., Inc.,* 134 F. Supp. 2d 965, 971–72 (N.D. Ill. 2001); *Chaplin* v. *Consol. Edison Co.,* 628 F. Supp. 143, 145–46 (S.D.N.Y. 1986).

[17] The CRRA clarified the interpretation of ''program or activity'' under Title IX, Section 504, the Age Discrimination Act of 1975, and Title VI. *See* Public Law 100–259, 102 Stat. 28 (Mar. 22, 1988).

within the meaning of Title IX.' '' *Id.* (quoting *NCAA* v. *Smith,* 525 U.S. 459, 468 (1999)). The Department therefore declines, as unnecessary, the suggestion to amend the definition of ''recipient'' in § 106.2, as courts have made clear that the definition applies to charter school operating companies and subcontractors who receive Federal financial assistance directly or through an intermediary.

Changes: None.

5. Section 106.2 Definition of ''Student''

Comments: The Department received comments regarding the longstanding definition of ''student,'' which the Department did not propose to change in the July 2022 NPRM. Some commenters expressed concern that the current definition of ''student'' as ''a person who has gained admission'' is overly broad because it includes individuals who have been admitted to and may not enroll in an educational institution. Commenters expressed concern that requiring postsecondary institutions to communicate Title IX policies and rights to all admitted students would be overly burdensome. One commenter was concerned that this definition of ''student,'' combined with language in proposed § 106.11, would suggest that a postsecondary institution would be required to initiate grievance procedures in response to a complaint alleging student-to-student sex-based harassment that occurred prior to either student attending the postsecondary institution.

Conversely, some commenters noted that this definition of ''student'' may be too narrow because it does not cover individuals who participate in an institution's programs but have not ''gained admission.'' This includes certain elementary school and secondary school students enrolled in dual-enrollment programs and people who audit courses or enroll in courses sporadically.

Some commenters suggested aligning the definition of ''student'' in the Title IX regulations with the FERPA regulations, 34 CFR 99.3, which include individuals who are or have been ''in attendance'' at an educational institution, and the Clery Act, 20 U.S.C. 1092, which uses the term ''enrolled students.''

Discussion: The Department appreciates the comments received about the definition of ''student.'' The Department did not propose any changes to the definition of ''student'' in the July 2022 NPRM, and this definition is the same one that has been in effect since the U.S. Department of Health, Education and Welfare (HEW) first issued final regulations implementing Title IX in 1975. *See* 40 FR 24128, 24138 (June 4, 1975).[18] Recipients have been required to notify students (defined to include persons who have gained admission) of their nondiscrimination policies and to resolve student complaints of sex discrimination since 1975. The Department disagrees that the application of this longstanding definition of ''student'' in these contexts is overly burdensome. Title IX protects all persons, including applicants for admission and admitted students, from sex discrimination, and those persons must have appropriate access to a recipient's policies and procedures. The costs associated with changes to the regulatory provisions on nondiscrimination notices and grievance procedures are addressed in more detail in the *Regulatory Impact Analysis.*

The Department disagrees with the commenters' concerns that the definition of ''student'' as a person who has gained admission is too broad. As stated in the preamble to the 2020 amendments, Title IX prohibits a recipient from discriminating on the basis of sex in its education program or activity and protects any ''person'' from such discrimination. *See* 85 FR 30187. The preamble to the 2020 amendments also stated that a student who has applied for admission and has gained admission is attempting to participate in the education program or activity of the recipient. *See* 85 FR 30187; *cf. Brown,* 896 F.3d at 132 & n.6, 133 (clarifying that Title IX's coverage is not limited to enrolled students and includes members of the public ''either taking part or trying to take part of a funding recipient institution's educational program or activity'' when they attend events such as campus tours, sporting events, and lectures, as long as the alleged discrimination relates to the individual's participation or attempted participation in such programs).

With regard to concerns that the definition of ''student'' is too narrow, the Department maintains the position stated in the preamble to the 2020 amendments that where the final regulations use the phrase ''students and employees'' or ''students,'' such terms are used not to narrow the application of Title IX's nondiscrimination mandate but to require particular actions by the recipient reasonably intended to benefit students, employees, or both. *See* 85 FR 30187. In addition, the Department notes that ''admission,'' as defined in § 106.2, covers a wide range of programs and is not limited to a formal offer of admission but rather is defined to include ''selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.'' *Id.*

Regarding the commenter's concern that a postsecondary institution would be required to initiate its grievance procedures in response to a complaint alleging student-to-student sex-based harassment that occurred prior to either student attending the postsecondary institution, under § 106.11 a recipient has an obligation to address a sex-based hostile environment under its education program or activity, even when some of the conduct alleged to be contributing to that hostile environment occurred outside of the recipient's education program or activity. For additional discussion of the applicability of Title IX, see the section on § 106.11 in this preamble. In addition, under § 106.2 the definition of ''complainant'' includes a person other than a student or employee who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination. For additional discussion of the definition of ''complainant,'' see the section on § 106.2 in this preamble.

The Department agrees with commenters that consistent use of terminology can be valuable; however, terminology may appropriately vary to reflect differences in the structures and purposes of different statutes. FERPA, the Clery Act, and Title IX each serve distinct objectives. For example, in the Clery Act, Congress specified that institutions must carry out certain information dissemination activities for the benefit of both prospective and enrolled students. 20 U.S.C. 1092(a). And in FERPA, the definition of ''student,'' 20 U.S.C. 1232g(a)(6), reflects congressional intent to exclude from that law's coverage applicants for admission who did not attend the educational agency or institution. *See* 120 Cong. Rec. S39863 (Dec. 13, 1974). The Department believes that the longstanding definition of ''student'' in the Title IX regulations accurately

[18] In 1980, Congress created the United States Department of Education. Department of Education Organization Act, Public Law 96–88, sec. 201, 93 Stat. 668, 671 (1979); Exec. Order No. 12212, 45 FR 29557 (May 2, 1980). By operation of law, all of the determinations, rules, and regulations of what was then HEW continued in effect, and functions of HEW's Office for Civil Rights were transferred to the Secretary of Education. 20 U.S.C. 3441(a)(3). The regulations implementing Title IX were recodified without substantive change in 34 CFR part 106. 45 FR 30802, 30955–65 (May 9, 1980).

reflects the scope of Title IX's prohibition on sex discrimination and the longstanding statutory and regulatory framework, under which the requirements governing sex discrimination against applicants for admission and admitted students are addressed separately.

Changes: None.

6. Adding a Definition of ''Party''

Comments: None.

Discussion: The Department determined that it would be helpful to clarify that ''party'' or ''parties,'' as used in the final regulations, is intended to include only a ''complainant'' or ''respondent,'' as those terms are defined in § 106.2. The term ''party'' does not include a Title IX Coordinator who initiates a complaint under § 106.44(f)(1)(v) or another participant in Title IX grievance procedures, such as a witness or adjudicator.

Changes: Section 106.2 of the final regulations defines ''party'' as ''a complainant or respondent.''

7. Adding a Definition of ''Sex Discrimination''

Comments: Some commenters requested that the Department add a definition of ''sex discrimination'' to the regulations.

Discussion: The Department appreciates the suggestion to define the term ''sex discrimination'' and believes that final § 106.10 helps clarify the scope of sex discrimination, as discussed more fully in the discussion of § 106.10. To further clarify sex discrimination, other sections of the regulations, including but not limited to § 106.31, include examples of prohibited sex discrimination. The Department therefore determined that it is not necessary to add a definition of ''sex discrimination'' to these final regulations.

Changes: None.

E. Application

1. Section 106.11 Application

Obligation To Address Conduct Occurring Under a Recipient's Education Program or Activity

Comments: Many commenters expressed overall support for proposed § 106.11, including because it would remove many geographical limitations on a recipient's responsibilities under Title IX and require a recipient to address sex-based harassment in its education program or activity broadly—on a recipient's grounds, during school activities off campus, and under a recipient's disciplinary authority; would be consistent with recent court decisions recognizing that a recipient must respond to sex-based harassment in off-campus settings; would better reflect where sex-based harassment occurs given that students live, learn, and participate in education programs off campus and in remote settings; and would promote uniformity and consistency of Federal laws because it would be more consistent with Title VII. Some commenters also highlighted student populations more likely to live off campus who would benefit from proposed § 106.11, including graduate, vocational, and community college students; low-income students, students of color, former foster youth, and LGBTQI+ students; student athletes; and students who attend training and workforce development programs. Other commenters supported proposed § 106.11 because it would close a gap in the 2020 amendments that the commenters asserted created the potential for students to engage in off-campus sex-based harassment to avoid disciplinary consequences.

Some commenters opposed proposed § 106.11 and asked that the Department retain the 2020 amendments because they have been upheld by multiple courts. Some commenters asserted that proposed § 106.11 would contradict the spirit and original intent of Title IX and exceed the Department's authority. Other commenters opposed proposed § 106.11 because they believed it would be inconsistent with Supreme Court case law limiting private damages liability under Title IX to ''circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs,'' citing *Davis,* 526 U.S. at 645. One commenter stated that proposed § 106.11 would fail under the major questions doctrine because the commenter felt it is far outside the authority previously asserted by the Department, and Congress has attempted but failed to pass legislation similar to proposed § 106.11—H.R. 5396 (''Title IX Take Responsibility Act of 2021'').

Some commenters asked the Department to include additional examples of conduct occurring under a recipient's program or activity in § 106.11, including AI technologies used by a recipient in, for example, grading of tests or admissions programs, and any gender bias within these technologies and conduct that impacts a recipient's education and workplace environments, as well as off-campus locations related to a recipient or a recipient-sponsored event or organization, including fraternity and sorority houses, honors housing, apartments contracted by third-party housing companies but affiliated with a university, and other organizational meeting places. Another commenter asked the Department to provide guidance on whether § 106.11 would include conduct that occurs during institution-sponsored field trips or outings; conduct that occurs during remote learning in a parent's home; and conduct that occurs in recipient-owned buildings or during recipient-recognized student-run activities. Some commenters asked the Department to clarify what would constitute ''off campus'' and specifically what authority and obligations a recipient would have off campus.

Discussion: The Department acknowledges commenters' support for § 106.11 and agrees with commenters who expressed that § 106.11 aligns with the purpose and intent of Title IX, including the meaning of ''under any education program or activity'' in the Title IX statute.

The Department recognizes that some commenters would prefer the Department maintain the existing language in § 106.44(a) of the 2020 amendments. The final regulations clarify and more completely describe all of the circumstances in which Title IX applies. This includes conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution and conduct that is subject to a recipient's disciplinary authority. Title IX also applies to sex-based hostile environments occurring under a recipient's education program or activity even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

The Department disagrees that § 106.11 contradicts the original intent of Title IX, exceeds the Department's authority, or is inconsistent with relevant case law. As discussed in the preamble to the 2020 amendments, the Department's regulatory authority is coextensive with the scope of the Title IX statute. 85 FR 30196. The Title IX statute authorizes the Department to regulate sex discrimination occurring under any education program or activity of a recipient, 20 U.S.C. 1682, and defines ''program or activity'' broadly and without geographical limitation, *see* 20 U.S.C. 1687 (defining ''program or activity'' to include ''all of the operations of'' a wide array of recipient entities); *see also* 34 CFR 106.2(h), 106.31(a). Further, the Department disagrees that § 106.11 fails under the major questions doctrine. The Supreme

Court, for example, has recognized the Department's authority to issue regulations prohibiting sex discrimination under Title IX. *Gebser,* 524 U.S. at 280–81 (citing 20 U.S.C. 1682). The Department disagrees that congressional failure to amend Title IX as proposed in H.R. 5396 prevents the Department from adopting § 106.11. The Supreme Court has made clear that ''[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.'' *Pension Ben. Guar. Corp.* v. *LTV Corp.,* 496 U.S. 633, 650 (1990) (citations and quotations omitted). And while the 2020 amendments were upheld by some courts, this does not preclude the Department from changing or modifying the regulations consistent with the Department's overarching Title IX authority and existing case law. *See, e.g., Brown* v. *Arizona,* 82 F.4th 863, 875–76 (9th Cir. 2023), *petition for cert. filed,* No. 23–812 (U.S. Jan. 25, 2024); *Roe* v. *Marshall Univ. Bd. of Governors,* 668 F. Supp. 3d 461, 467–68 (S.D.W. Va. 2023) (finding plaintiff plausibly alleged substantial control over the context of her assault when school exerted disciplinary authority over off-campus incident); *see also* 87 FR 41401–04.

The Department also disagrees that § 106.11 is inconsistent with the Supreme Court's holding in *Davis* that, in the context of a private cause of action, a recipient is only responsible under Title IX for ''circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs.'' 526 U.S. at 630. Section 106.11 clarifies that Title IX does not apply to sex-based harassment that occurs outside of a recipient's education program or activity. A recipient remains responsible only for discrimination that occurs under its education program or activity, *i.e.,* ''in a 'context' over which the [institution] has substantial control.'' *Brown,* 82 F.4th at 875 (citing *Davis,* 526 U.S. at 644). Consistent with *Davis,* under § 106.11, a recipient is not responsible for the actions of parties over which it lacks significant control. Rather, a recipient is responsible only for alleged discriminatory conduct over which it exercises disciplinary authority or otherwise has substantial control. *See Davis,* 526 U.S. at 641. The Department therefore reiterates that a recipient should not focus its analysis on whether alleged conduct happened ''on'' or ''off'' campus but rather on whether the recipient has disciplinary authority over the respondent's conduct in the context in which it occurred.

The Department acknowledges that some commenters requested that the Department expand § 106.11 to include additional examples of conduct occurring under a recipient's education program or activity, including AI technologies. Other commenters requested more guidance on what constitutes conduct under a recipient's education program or activity and how § 106.11 would apply to specific circumstances such as institution-sponsored field trips, remote learning that occurs in a parent's home, and recipient-recognized student-run activities, including single-sex clubs and activities, fraternities and sororities, and affinity groups. The Department declines to provide additional examples of conduct occurring under a recipient's education program or activity. As discussed in the July 2022 NPRM, conduct occurring under a recipient's education program or activity would include, but is not limited to, conduct that occurs in off-campus settings that are operated or overseen by the recipient, including, for example, field trips, online classes, and athletic programs; conduct subject to a recipient's disciplinary authority that occurs off campus; conduct that takes place via school-sponsored electronic devices, computer and internet networks and digital platforms operated by, or used in the operations of, the recipient, including AI technologies; and conduct that occurs during training programs sponsored by a recipient at another location. *See* 87 FR 41401. Section 106.11 does not provide an exhaustive list, and additional forms of conduct or scenarios may fall under a recipient's education program or activity, depending on the facts. The Department reiterates that the final regulations do not distinguish between sex discrimination occurring in person and that occurring online. *See id.*

Changes: The Department has deleted the reference to ''even if sex-based harassment'' from § 106.11 and replaced it with ''even when some conduct alleged to be'' in final § 106.11 to clarify that a recipient has an obligation to address a sex-based hostile environment under its education program or activity in the United States, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

Obligation To Address Hostile Environments

Comments: Many commenters expressed support for the requirement that a recipient address a hostile environment created under its education program or activity in the United States.

Some commenters opposed the requirement in proposed § 106.11 to address conduct that creates a hostile environment under the recipient's program or activity, stating that the Department failed to identify limits to proposed § 106.11. Some commenters believed that proposed § 106.11 would infringe on family privacy and parental rights by requiring a recipient to address conduct such as speech that generally occurs under the supervision of a student's parent off campus or actions by parents that prevent a child from participating in school in a manner consistent with their gender identity.

Other commenters stated that the police or the FBI, not recipients, should investigate alleged sex-based harassment that occurs outside of a recipient's education program or activity or outside of the United States.

Some commenters asked the Department to provide guidance and examples to help a recipient understand how to apply proposed § 106.11 in a range of settings involving a possible hostile environment. Another commenter asked the Department to clarify a recipient's responsibility to address situations in which a student alleges off-campus sexual harassment without alleging any on-campus misconduct. The commenter also asked whether one student's allegation of an off-campus sexual assault against another student who is in the same class would be sufficient to create a hostile environment in the program and if so, what the recipient's obligation would be to investigate these allegations.

Some commenters asked the Department to clarify an example discussed in the July 2022 NPRM regarding proposed § 106.11 in which Student A reports that she was sexually assaulted by Student B while studying abroad, that Student B has been taunting her with sexually suggestive comments since their return to campus and that, as a result, Student A is unable to concentrate or participate fully in her classes and activities. 87 FR 41403. Several commenters stated that under the current and proposed regulations, Student B's conduct would require a recipient to take action and one commenter asked how proposed § 106.11 would change a recipient's current obligations to Student A,

including whether a recipient would have to investigate and address both the off-campus sexual assault and the on-campus taunting.

One commenter asked the Department to clarify its example of a student (Student C) who was assaulted by a third party at an off-campus nightclub, asking whether such an incident would require a recipient to provide supportive measures to Student C. The commenter stated that although the recipient would not have disciplinary authority over a third-party assailant in the same way that it has authority over a student, it would still have the authority to issue a no-trespass order against a non-affiliated third party who assaults a student. Another commenter asked the Department to clarify what it meant by ''representative of the recipient'' in the following July 2022 NPRM statement regarding the Student C scenario: ''[b]ecause the assault [] occurred off campus, and the respondent is not a representative of the recipient or otherwise a person over whom the recipient exercises disciplinary authority, the assault did not occur under the recipient's education program or activity.'' 87 FR 41403.

Discussion: The Department acknowledges commenters' support for the requirement in § 106.11 that a recipient must address a sex-based hostile environment under its education program or activity in the United States. As discussed in the July 2022 NPRM, this requirement is consistent with the Supreme Court's requirements under *Davis,* 526 U.S. at 645, and lower court precedent. 87 FR 41402–03; *see, e.g., Brown,* 82 F.4th at 875; *Rost* v. *Steamboat Springs RE–2 Sch. Dist.,* 511 F.3d 1114, 1121 n.1 (10th Cir. 2008) (citing *Davis,* 526 U.S. at 645); *L.E.* v. *Lakeland Joint Sch. Dist. #272,* 403 F. Supp. 3d 888, 900–01 (D. Idaho 2019); *Spencer* v. *Univ. of N.M. Bd. of Regents,* 15–cv–141, 2016 WL 10592223, at *6 (D.N.M. Jan. 11, 2016).

Upon further consideration, the Department has modified § 106.11 to clarify that a recipient has an obligation to address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States. In the July 2022 NPRM, § 106.11 stated that a recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States. 87 FR 41401. In doing so, the Department did not intend to suggest that a recipient must determine that conduct that occurred outside of the education program or activity or outside of the United States is itself ''sex-based harassment'' to consider that conduct in its assessment of whether a hostile environment exists within its education program or activity. To avoid confusion and provide further clarity, the Department has changed the phrase ''even if sex-based harassment contributing to the hostile environment'' to ''even when some conduct alleged to be contributing to the hostile environment.'' This change does not change the scope of Title IX's application or a recipient's obligations under § 106.11, but more accurately accounts for the fact that conduct that may contribute to a hostile environment under the recipient's education program or activity need not necessarily be ''sex-based harassment.'' Consistent with the above discussion of Hostile Environment Sex-Based Harassment—Factors to be Considered (§ 106.2), a recipient must evaluate the totality of the circumstances when determining whether there is a sex-based hostile environment in its education program or activity, which may require that the recipient consider allegations about conduct that occurred outside of its education program or activity that may be contributing to the alleged sex-based hostile environment.

When evaluating the totality of the circumstances to determine whether a sex-based hostile environment exists under the recipient's education program or activity, the factors a recipient would need to consider are set forth in the definition of ''sex-based harassment'' in § 106.2 and include: (1) the degree to which the conduct affected the complainant's ability to access the recipient's education program or activity; (2) the type, frequency and duration of the conduct; (3) the parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct; (4) the location of the conduct and the context in which the conduct occurred; and (5) other sex-based harassment in the recipient's education program or activity. Not all alleged conduct occurring outside a recipient's education program or activity will contribute to a sex-based hostile environment within a recipient's program or activity. For more information, see the above discussion of Hostile Environment Sex-Based Harassment—Factors to Be Considered (§ 106.2).

The Department appreciates commenters' concerns about the limits of § 106.11 and requests for guidance and examples of circumstances in which alleged conduct occurring outside a recipient's education program or activity would contribute to a sex-based hostile environment under a recipient's education program or activity. While the Department agrees that conduct anywhere could contribute to a hostile environment in a recipient's education program or activity, the Department appreciates the opportunity to clarify that a recipient's Title IX obligation is to address only the hostile environment that exists under its education program or activity. Alleged conduct, including alleged sex-based harassment, that occurred outside of the recipient's education program or activity may be relevant to the investigation of, and may inform the recipient's response to, the allegation of a hostile environment under the education program or activity. But the recipient is not required to respond independently to the alleged conduct that occurred outside the education program or activity. Thus, in the Department's example of Student A and Student B in the July 2022 NPRM, *see* 87 FR 41403, the recipient would be obligated to address Student A's allegations of a hostile environment under the recipient's program, including Student A's allegations of taunting by Student B and Student A's inability to concentrate in Student B's presence due to Student B's previous alleged sexual assault of Student A. Indeed, a recipient's fact-specific inquiry must consider whether a complainant's encounters with a respondent in the recipient's education program or activity in the United States give rise to a hostile environment, even when related incidents of alleged conduct may have occurred outside of the recipient's education program or activity or outside the United States. 87 FR 41403. The recipient would not, however, have a standalone obligation to address the underlying alleged sexual assault of Student A that allegedly occurred while Student A and Student B were abroad because Title IX's protections do not apply extraterritorially.

In response to commenters' concerns about the Department's Student C example in the July 2022 NPRM, *see id.,* a recipient would not be required under Title IX to provide supportive measures for sex-based harassment that occurred outside the recipient's education program or activity and has not contributed to a sex-based hostile

environment under its education program or activity. Nothing in these final regulations, however, would prohibit a recipient from taking action to support a student in this scenario, including, for example, providing counseling services or other supportive measures. Moreover, if the recipient has information indicating a specific and imminent threat of sexual assault within its education program or activity, it must take reasonable action to address that threat, for instance, by issuing a no-trespass order or working with the student to notify law enforcement.

The Department acknowledges commenters' concerns that the statement ''representative of a recipient'' in the example of Student C could be confusing. The Department did not intend to introduce a new concept of a ''representative'' in the July 2022 NPRM and appreciates the opportunity to clarify that, in the hypothetical sexual assault of Student C by a third party, if the recipient determines that the third party is not a person over whom the recipient exercises disciplinary authority, then the sexual assault did not occur within the recipient's education program or activity. 87 FR 41403.

The Department disagrees that § 106.11's requirement to address sex-based hostile environments will infringe on the privacy of family life, compromise parental control, or require a recipient to take action against a parent who, for example, will not acknowledge their child's expressed gender identity. As discussed above, § 106.11 only requires a recipient to address a hostile environment occurring under the recipient's education program or activity. Title IX does not apply to the privacy of family life. The Department appreciates the fundamental role of parents and respects the rights and responsibilities of parents regarding the upbringing of their children. The fact-specific nature of the hostile environment determination prevents the Department from making definitive determinations about specific examples of conduct. But the Department reiterates that § 106.11 does not require a recipient to respond to any conduct occurring solely outside of the recipient's education program or activity.

The Department agrees that when sex-based harassment occurs outside of a recipient's education program or activity, law enforcement may have a responsibility to investigate and respond to such sex-based harassment. The Department notes that nothing in the final regulations prevents a complainant from reporting sex-based harassment that occurs off campus or outside of a recipient's education program or activity to law enforcement, and the Department acknowledges that mandatory reporting laws often require a recipient to report sex-based harassment to law enforcement in addition to fulfilling the recipient's obligations under Title IX. How a recipient's Title IX grievance procedures interact with a concurrent law enforcement proceeding is a fact-specific analysis that will depend on the requirements of the applicable procedures, details of the particular conduct, and local laws.

Changes: The Department has deleted the reference to ''even if sex-based harassment'' from § 106.11 and replaced it with ''even when some conduct alleged to be'' in final § 106.11 to clarify that a recipient has an obligation to address a sex-based hostile environment under its education program or activity in the United States, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

Extraterritorial Application

Comments: Commenters offered a range of perspectives on proposed § 106.11 and extraterritorial application of Title IX. Some commenters supported proposed § 106.11 because they understood the proposed regulations would protect students studying and participating in school-sponsored programs abroad. Other commenters suggested the Department modify proposed § 106.11 to state clearly that Title IX applies to all forms of sex discrimination that occur outside the United States or strike ''in the United States'' from proposed § 106.11.

Other commenters stated that proposed § 106.11's application to circumstances outside of the United States has no statutory basis in Title IX and that, absent specific language, the Supreme Court has made clear that statutes have domestic, not extraterritorial, application. Some commenters opposed what they described as the application of Title IX extraterritorially under § 106.11 because it may preempt the laws of foreign countries, conflict with local privacy laws, or conflict with the requirements of the General Data Protection Regulations (GDPR) in the European Union.

Several commenters requested additional clarification on how to handle incidents of sex-based harassment that occur abroad. Another commenter asked whether a postsecondary institution with an international satellite campus must investigate and respond to sex discrimination arising from conduct outside of the United States even if the conduct does not contribute to a hostile environment under its education program or activity. Some commenters asked whether the application of Title IX under proposed § 106.11 would include events that involve two students outside of the United States and create a hostile on-campus environment when they return.

Discussion: The Department appreciates commenters' perspectives concerning § 106.11 and acknowledges commenters who requested that the Department provide additional clarification concerning the extraterritorial application of Title IX, including to study abroad programs. As discussed in the preamble to the 2020 amendments, the Department continues to maintain that 20 U.S.C. 1681 does not have extraterritorial application based on its plain text and the judicial presumption against extraterritoriality. 85 FR 30474. Title IX states that ''*No person in the United States* shall, on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.'' 20 U.S.C. 1681(a) (emphasis added). The plain language of the statute therefore makes clear that Congress did not intend for 20 U.S.C. 1681 to apply extraterritorially given the language limiting its application to the United States.

The judicial presumption against extraterritoriality is a rebuttable presumption that U.S. laws apply only within U.S. boundaries. *EEOC* v. *Arabian Am. Oil Co (Aramco),* 499 U.S. 244 (1991). This presumption is rebuttable by evidence that Congress has clearly expressed its affirmative intention to give a statute extraterritorial effect. *Morrison* v. *Nat'l Austl. Bank Ltd.,* 561 U.S. 247, 255 (2010). When a statute gives no clear indication of extraterritorial application, the Supreme Court has reiterated that it will be interpreted as having none. *Morrison,* 561 U.S. at 255; *Kiobel* v. *Royal Dutch Petroleum,* 569 US 108, 124–25 (2013).[19] This presumption seeks to avoid unintended conflicts between U.S. laws and the laws of other nations that were the subject of commenters' concerns.

[19] While *King* v. *Eastern Michigan University,* 221 F. Supp. 2d 783 (E.D. Mich. 2002), was cited by one commenter as support for the application of Title IX extraterritorially, this case predates the Supreme Court's holdings in *Morrison* and *Kiobel.*

Because Title IX does not apply extraterritorially, it does not apply to conduct that occurs outside of the United States, including in study abroad programs, and the Department declines to modify § 106.11 to state that Title IX applies to sex discrimination that occurs outside of the United States. The Department emphasizes that a recipient does not have an obligation under Title IX address sex discrimination occurring outside of the United States. However, nothing in these regulations prohibits a recipient from responding as appropriate under its existing code of conduct or other policies pertaining to study abroad programs.

As discussed in the July 2022 NPRM, a recipient does, however, have a responsibility to address a sex-based hostile environment in its education program or activity in the United States, even when some conduct alleged to be contributing to the hostile environment occurred outside of a recipient's education program or activity or outside of the United States, including in a study abroad program. 87 FR 41403. When, for example, a student alleges they have been assaulted by a professor in a study abroad program and that a sex-based hostile environment exists when the student and professor return to campus, a recipient would be obligated to address the alleged hostile environment that exists under its education program or activity in the United States. How a recipient should address a complaint of a hostile environment resulting from conduct alleged to have occurred outside of the United States will depend on the particular facts and circumstances.

The Department also appreciates commenters' concerns about privacy laws in other countries, including the application of the GDPR in the European Union. The Department reiterates that because Title IX does not apply extraterritorially, a recipient would not be independently obligated to respond to an incident of sex discrimination that occurs in another country. If, while investigating and addressing a hostile environment under its education program or activity in the United States, a recipient seeks information about conduct that occurred in another country, nothing in these regulations preempts applicable privacy laws.

Changes: The Department has deleted the reference to ''even if sex-based harassment'' from § 106.11 and replaced it with ''even when some conduct alleged to be'' in final § 106.11 to clarify that a recipient has an obligation to address a sex-based hostile environment under its education program or activity in the United States, even if conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

Conduct in Buildings Owned or Controlled by Officially Recognized Student Organizations

Comments: Some commenters perceived proposed § 106.11 as closing a gap in a recipient's authority to address sex-based harassment in student-recognized organizations such as spiritual clubs and fraternities and sororities. One commenter stated, however, that proposed § 106.11 could be interpreted to entirely prohibit sororities and fraternities from operating because conduct in a building owned or controlled by a student organization is considered part of the recipient's education program or activity, and a recipient is required to end any sex discrimination occurring in its education program or activity. Another commenter suggested proposed § 106.11 would violate constitutional freedoms of association because the commenter felt it would require a recipient to prohibit single-sex clubs and activities, fraternities and sororities, single-sex affinity groups and even single-sex dormitories. Some commenters asked the Department to clarify the term ''officially recognized,'' and whether an organization is officially recognized only when there is a voluntary agreement to submit to the authority of a postsecondary institution. One commenter asked the Department to clarify whether use of the term ''postsecondary institution'' means that proposed § 106.11 does not apply to elementary schools and secondary schools.

Discussion: The Department appreciates the opportunity to clarify that § 106.11 does not prohibit single-sex clubs and activities, social fraternities and sororities, single-sex affinity groups, or single-sex dormitories that are otherwise permissible under Title IX. Section 106.11 does not change existing statutory exemptions to Title IX, such as 20 U.S.C. 1681(a)(6), which clarifies that Title IX does not apply to the membership practices of social fraternities or sororities or certain voluntary youth organizations; and 20 U.S.C. 1686, which provides that Title IX does not prohibit a recipient from maintaining single-sex living facilities. However, as the Department explained in both the 2020 amendments and the July 2022 NPRM, while Title IX exempts the membership practices of social fraternities and sororities, it does not exempt such organizations from Title IX altogether; a recipient is responsible for addressing other forms of sex discrimination, including sex-based harassment, against participants in a program offered by any such organization that it officially recognizes or to which it provides significant assistance. *See* 85 FR 30061; 87 FR 41536; *see also* U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter on Voluntary Youth Service Organizations, at 5 (Dec. 15, 2015), *https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201512-voluntary-youth-service-organizations.pdf.*

The Department also appreciates the opportunity to clarify its discussion of buildings owned or controlled by a student organization officially recognized by a postsecondary institution. The decision to officially recognize a student organization is within the purview of the postsecondary institution itself and will depend on that institution's particular policies and procedures. Depending on the circumstances, a student organization may be officially recognized by a postsecondary institution when the postsecondary institution exerts oversight over the student organization or has the authority to discipline the student organization. *See, e.g., Farmer* v. *Kan. State Univ.,* 16–cv–2256, 2017 WL 980460 at *7–10 (D. Kan. Mar. 14, 2017), *aff'd on other grounds,* 918 F.3d 1094 (10th Cir. 2019); *Weckhorst* v. *Kan. State Univ.,* 241 F. Supp. 3d 1154, 1166–70 (10th Cir. 2019). However, the Department's reference to buildings owned or controlled by a student organization officially recognized by a postsecondary institution does not mean that § 106.11 applies only to postsecondary institutions. Section 106.11 applies to all recipients, including elementary schools and secondary schools.

Changes: None.

Conduct Under a Recipient's Disciplinary Authority

Comments: Some commenters opposed proposed § 106.11 because they believed it would require a recipient to monitor or police student life for possible sex discrimination, regardless of where it occurs, as part of its responsibility to address conduct under its disciplinary authority. One commenter suggested the Department revise proposed § 106.11 to eliminate references to a recipient's disciplinary authority because many recipients have policies that allow the imposition of discipline for conduct broadly, and expanding Title IX jurisdiction to all such instances would be overbroad and inconsistent with the plain meaning of

the term ''program or activity.'' One commenter asked the Department to define disciplinary authority and asserted that the Department's examples in the July 2022 NPRM did not provide any objective standards by which a recipient could determine whether conduct would be under its disciplinary authority.

One commenter suggested the Department limit proposed § 106.11 to events that occur under or during a recipient's supervision, while another suggested the Department change proposed § 106.11 to include conduct that is subject to potential sanctions by a recipient. One commenter asked the Department to modify proposed § 106.11 to state explicitly that all off-campus sex-based harassment is covered by Title IX, while another raised concerns that a recipient may not be able to fully and fairly investigate all incidents occurring off campus.

One commenter asked the Department to clarify how a recipient should address conduct that implicates Title IX consistent with its disciplinary authority under its code of conduct. The commenter noted that recipients often have provisions in their codes of conduct that grant the recipient broad authority to address illegal or reckless conduct that creates health or safety risks for the campus community, even if the conduct is beyond the typical scope of the recipient's jurisdiction. Another commenter urged the Department to consider whether proposed § 106.11 would cause a recipient to limit its code of conduct to reduce exposure to OCR investigations.

Another commenter asked the Department to clarify what constitutes a ''similar context,'' as discussed in the July 2022 NPRM, for purposes of determining conduct that is within the scope of a recipient's disciplinary authority. Another commenter asked the Department to clarify an example that was included in the preamble to the 2020 amendments and referenced in the July 2022 NPRM, in which the Department stated that a teacher's sexual harassment of a student off campus would ''likely'' be considered sex-based harassment in the education program or activity.

Discussion: The Department disagrees with the commenters' suggestion that including off-campus conduct within a recipient's disciplinary authority is overbroad and inconsistent with Title IX. As discussed in the July 2022 NPRM, conduct occurring under a recipient's education program or activity also includes settings off campus when such conduct is under the recipient's disciplinary authority. *See Davis,* 526 U.S. at 647; 87 FR 41402. The Department has concluded that the final regulations should align with this language in *Davis* to fully clarify all of the circumstances in which Title IX applies. The Department disagrees that covering such conduct requires a recipient to monitor all of student life for possible sex discrimination, is overbroad, or is unsupported by case law. As explained in the discussion of § 106.44(b), these final regulations do not impose a duty on a recipient to affirmatively monitor for all prohibited sex discrimination occurring under its education program or activity. Rather, a recipient with knowledge of conduct that reasonably may constitute sex discrimination under Title IX has specific obligations set out under these final regulations. *See* § 106.44(a), (f)(1) (requiring the Title IX Coordinator, once on notice of conduct that reasonably may constitute sex discrimination, to take action to promptly and effectively end any sex discrimination in its education program or activity, prevent its recurrence, and remedy its effects).

Further, the Department notes that Federal courts have held that a recipient's responsibilities under Title IX extend to conduct subject to the recipient's disciplinary authority. *See, e.g., Brown,* 82 F.4th at 878–79 (finding student presented sufficient evidence of substantial control when, among other things, the university's code of conduct applied to conduct ''both on-campus and off-campus'' and the university previously issued a no-contact order that applied off campus). Section 106.11 is also consistent with the example that the Department already recognized in the preamble to the 2020 amendments, namely that a teacher's sexual harassment of a student is ''likely'' to constitute sexual harassment ''in the program'' of the recipient even if the harassment occurs off campus or off school grounds and outside a school-sponsored activity. 85 FR 30200; 87 FR 41402. The Department therefore finds it unnecessary to include language explicitly stating that off-campus sex-based harassment is covered by Title IX, as one commenter suggested. One commenter sought clarification of the Department's use of the term ''likely,'' which was quoted in the preamble to the July 2022 NPRM from the preamble to the 2020 amendments. *See* 87 FR 41402 (quoting 85 FR 30200). The Department confirms that if a recipient has disciplinary authority over a teacher's sexual harassment of a student that occurs off campus or outside of a school-sponsored activity, a recipient would be obligated to respond to that sexual harassment under § 106.11.

The Department declines commenters' suggestions to change the language of § 106.11 from conduct ''subject to a recipient's disciplinary authority'' to conduct ''occurring under or during a recipient's supervision,'' ''subject to potential sanctions by a recipient,'' or ''that occurs off campus if the recipient has control over the staff and students at the off-campus event where the conduct occurred.'' The Department maintains that ''conduct subject to a recipient's disciplinary authority'' most accurately reflects the scope of a recipient's obligations under Title IX in the administrative context and is consistent with existing case law, including *Davis. See* 526 U.S. at 646–7 (''We thus conclude that recipients of federal funding may be liable for 'subject[ing]' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority.''); *Brown,* 82 F.4th at 875 (''[A] key consideration is whether the school has some form of disciplinary authority over the harasser in the setting in which the harassment takes place.''); *Marshall Univ. Bd. of Governors,* 668 F. Supp. 3d at 467–68 (finding plaintiff plausibly alleged substantial control over the context of her assault when school exerted disciplinary authority over off-campus incident); *Pogorzelska* v. *VanderCook Coll. of Music,* No. 19–cv–05683, 2023 WL 3819025, *15 (N.D. Ill. June 5, 2023) (finding that a school may be liable for peer-on-peer harassment when ''the harasser is under the school's disciplinary authority'' (citing *Davis,* 526 U.S. at 646–67)).

The Department also acknowledges that some recipients may exercise their authority to address conduct that creates health or safety risks for campus communities. The same broad authority would apply to a recipient's obligation to address sex discrimination occurring in similar contexts, as described in the July 2022 NPRM. 87 FR 41402. How a recipient determines whether conduct would be subject to its disciplinary authority and what constitutes a ''similar context'' is a fact-specific analysis unique to each recipient; however, the Department reiterates that to the extent a recipient addresses other student misconduct or other interactions between students that occur off campus, a recipient may not disclaim responsibility for addressing sex discrimination that occurs in a similar context. If a recipient responds when, for instance, one student steals

from another at an off-campus location, or when a student engages in a nonsexual assault of another student at an off-campus location, it must likewise respond when a student engages in sexual assault or sex-based harassment of another student off campus. The Department notes, however, that a recipient's obligation to investigate conduct occurring under its disciplinary authority is only ever as broad as the recipient's reasonable ability to do so.

The Department recognizes some commenters' concerns that § 106.11 might cause recipients to limit their codes of conduct to reduce exposure to OCR investigations, but the Department believes the benefits of clarifying that conduct subject to a recipient's disciplinary authority occurs under the recipient's education program or activity outweigh potential concerns. The Department does not agree with commenters who believe that a recipient will decide what conduct to regulate based on whether recognition of such conduct would also require them to address off-campus sex-based harassment. The Department notes that recipients have been on notice since the 2020 amendments that their disciplinary authority is a factor considered in evaluating the extent of their responsibilities under Title IX, 85 FR 30093, and commenters have not provided any examples of recipients limiting their codes of conduct in light of such notice. Further, the Department believes that recipients will continue to prioritize the safety and well-being of their educational community in promulgating codes of conduct that address conduct that poses ethical, safety, or health risks to the community.

Changes: None.

Benefits and Burdens for Recipients

Comments: Several commenters stated that the current regulations have resulted in many recipients adopting a confusing two-track system under which on-campus conduct is handled through a Title IX process and off-campus conduct is handled through alternative disciplinary processes. These commenters supported proposed § 106.11 because it would help a recipient create a more streamlined process that would be less confusing for students, be more resource-efficient, and help a recipient better respond to sex discrimination, which is necessary to fulfill the purpose of Title IX.

Some commenters opposed proposed § 106.11 and stated that requiring a recipient to address off-campus conduct or the on-campus effects of off-campus conduct would strain recipient resources, negatively impact recipient staffing and finances, and impact the quality of education. One commenter stated that the Department failed to consider the costs to recipients and the difficulty in administering the requirements of proposed § 106.11. Other commenters opposed proposed § 106.11 because they said it would deny a recipient reasonable discretion to determine what conduct it has the capacity to address. Some commenters stated that codes of conduct are a more appropriate mechanism for addressing behavior that occurs outside a recipient's education program or activity or outside of the United States.

Several commenters requested modifications to proposed § 106.11 to assist with the perceived burdens on a recipient. One commenter asked that the Department provide a timeline or expectations for how a recipient should investigate off-campus conduct, including the anticipated duration of such investigations. Another commenter asked the Department to amend proposed § 106.11 to provide that when some of the conduct or parties in a complaint are not within the recipient's education program or activity, the recipient is only required to make reasonable efforts to investigate, provide supportive measures, remedy discrimination, and prevent the recurrence of the discrimination.

Discussion: The Department acknowledges commenters' support for the clarity that § 106.11 will provide to a recipient in responding to sex discrimination under its education program or activity. The Department recognizes commenters' concerns that the clarifications provided in § 106.11 may result in an increased caseload for some recipients and possible additional administrative costs. As discussed in the July 2022 NPRM, the Department is aware through anecdotal reports that the 2020 amendments resulted in many recipients adopting a two-track system for addressing sex discrimination, in which on-campus sex-based harassment was addressed through Title IX grievance procedures and off-campus sex-based harassment was handled through alternative disciplinary processes. 87 FR 41549. Accordingly, the Department assumes that many recipients already use alternative disciplinary proceedings to address off-campus sex-based harassment occurring under their disciplinary authority. 87 FR 41554. Thus, as discussed in the *Regulatory Impact Analysis* in the July 2022 NPRM, although § 106.11 may change the procedures under which conduct occurring off campus may be addressed, the Department does not anticipate that it will meaningfully increase the burden imposed on recipients. 87 FR 41562. Moreover, § 106.11 will assist recipients in responding to sex discrimination in a manner that is less confusing to the educational community and more resource-efficient for some recipients by reducing the need for a two-track system to address sex discrimination. The Department also maintains that ensuring a recipient fully addresses any sex discrimination occurring under its education program or activity is not optional, is of paramount importance, and justifies any increased cost. For more discussion of how the Department has evaluated the costs and burdens of § 106.11, see the *Regulatory Impact Analysis.*

The Department understands that some commenters would prefer more flexibility and discretion in responding to sex discrimination tailored to their individual institutional circumstances. With respect to sex discrimination, however, recipients are not simply enforcing their own codes of conduct; rather, they are complying with a Federal civil rights law, the protections and benefits of which extend uniformly to every person in the recipient's education program or activity. The need for full and complete implementation of the Title IX mandate that no person be subjected to sex discrimination in education programs or activities weighs in favor of adopting Federal regulations that ensure recipients address all sex discrimination that occurs in their education programs or activities consistent with the statute.

In response to commenters' requests for timelines or expectations for how a recipient should investigate off-campus conduct or the anticipated duration of such investigations and requests for changes to proposed § 106.11, those obligations are addressed above.

Changes: None.

Free Speech and the Doctrine of Ministerial Exception

Comments: Some commenters opposed proposed § 106.11, which they asserted would chill free speech and academic expression and invade privacy at home. Other commenters did not oppose § 106.11 but expressed concerns about its impact on free speech. Some commenters understood the provision to require a recipient to monitor off-campus speech including scholarly articles, blog posts and personal social media messages that could contribute to a hostile environment, while others understood it to require school employees to report any knowledge of potentially sex-related speech online, in person, or off campus. One commenter

urged the Department to provide a clear statement that a recipient does not have a duty to monitor students' online activities proactively because this could lead to discriminatory surveillance. Other commenters stated that the proposed regulations would create uncertainty and increase litigation over a recipient's response to off-campus speech, noting that the First Amendment gives a recipient less control over off-campus speech. Some commenters asserted that the proposed regulations threaten the First Amendment rights of student journalists operating publications in off-campus offices to ensure editorial independence and freedom for their publications.

Other commenters opposed proposed § 106.11 because they claimed it would infringe upon the rights of university-recognized student religious organizations that own buildings off campus, where students congregate for worship, organizational activities, or even to live, such as a Christian sorority. Commenters stated that proposed § 106.11 would also violate the doctrine of ministerial exception under the First Amendment, which they asserted provides student religious organizations with immunity from regulation on matters of internal governance or operations.[20] These commenters asserted that proposed § 106.11 would infringe on these organizations' right to freely exercise their faith and conduct their internal affairs, particularly when their exercise of faith or internal governance might conflict with proposed changes to the definition of ''sex-based harassment.'' One commenter asked the Department to address this conflict either by expanding application of the existing religious exemption under Title IX to apply to religious student groups or by creating an express carve-out in proposed § 106.11 for religious student groups.

Discussion: The Department appreciates commenters' concerns about the impact of § 106.11 on free speech among students, faculty, and other members of a recipient's educational community. The Department has determined that the definition of ''sex-based harassment'' sufficiently protects individual constitutional rights and interests because it is tailored to require that any finding of a sex-based hostile environment be based on the totality of the circumstances, and be based on conduct that is both subjectively and objectively offensive, and so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity. Under the definition, isolated comments, for example, would generally not meet the definition of hostile environment sex-based harassment. As explained more fully above in the discussion of the Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2) and in the July 2022 NPRM, the Department maintains that this definition comports with *Davis* and First Amendment protections. 87 FR 41414.

In response to commenters who expressed concerns about impacts on student journalists operating off campus, the Department reiterates that Title IX does not regulate the content of speech as such and § 106.6(d) clearly states that nothing in the Title IX regulations requires a recipient to restrict any rights that would otherwise be protected from government action by the First Amendment or any other rights guaranteed against government action by the U.S. Constitution. The Department notes that although Title IX does not require a recipient to infringe on anyone's right to free speech under the First Amendment, a recipient still has the ability to take responsive action consistent with its policies and procedures to respond to protected speech that affects their community, including by, for example, offering supportive measures to a student who may be targeted by protected speech, providing its own educational programming in response to such speech, and other non-disciplinary measures.

The Department disagrees that § 106.11 will require a recipient to police speech and conduct in any location. In response to a commenter's request for clarification about the obligation of a recipient to monitor students' online activities, the Department notes, as stated in the preamble to the July 2022 NPRM, that a recipient is not expected to monitor the online activity of students or faculty. 87 FR 41440. When an employee, however, has information about conduct among students that took place on social media or other platforms and that reasonably may have created a sex-based hostile environment in the recipient's education program or activity, the employee must comply with the applicable notification requirements under § 106.44(c) and the recipient would have an obligation under § 106.44(a)(1) to respond promptly and effectively to address any hostile environment. *Id.*

The Department also appreciates commenters' concerns about the impact of § 106.11 on university-recognized student religious organizations that own buildings off campus, where students live or congregate for worship or organizational activities. The Department recognizes the importance of religious freedoms, including the right for such organizations to congregate and freely exercise their faith, as well as the doctrine of ministerial exception that precludes application of Title VII and other employment discrimination laws to the employment relationship between a religious institution and its ministers.[21] As with the concerns commenters raised about free speech, the Department emphasizes that § 106.6(d) clearly states that nothing within these final regulations requires a recipient to restrict any rights that would otherwise be protected from government action by the First Amendment, which includes any First Amendment rights pertaining to religious freedom. Accordingly, the Department disagrees with commenters who suggested that § 106.11 would infringe on what commenters described as religious organizations' right to congregate and freely exercise their faith. Additionally, because these regulations do not require or authorize a recipient to violate the First Amendment, the Department declines commenters' suggestion to expand the application of the religious exemption to Title IX or to provide an express carve-out in § 106.11 for religious organizations as some commenters suggested. While the statute's religious exemption applies to education programs and activities operated by educational institutions or other entities that receive Federal funds and are controlled by a religious organization, it does not exempt entities that are not controlled by a religious organization or individual employees or students. It would be inappropriate to amend § 106.12, which effectuates Title IX's statutory religious exemption, to address the rights of employees or students or recipients that are not controlled by religious organizations.

The Department notes that it is unclear the extent to which the First

[20] The commenter cited *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru,* 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC,* 565 U.S. 171 (2012); *InterVarsity Christian Fellowship/USA* v. *Bd. of Governors of Wayne State Univ.,* 534 F. Supp. 3d 785, 803–04 (E.D. Mich. 2021); *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384 (1993); *Good News Club* v. *Milford Cent. Sch.,* 533 U.S. 98 (2001); *DeJohn,* 537 F.3d at 317–19; *Reno* v. *ACLU,* 521 U.S. 844, 874 (1997) (quoting *Sable Commc'ns of Cal., Inc.* v. *FCC,* 492 U.S. 115, 126 (1989)).

[21] *Our Lady of Guadalupe Sch.,* 140 S. Ct. 2049; *Hosanna-Tabor Evangelical Lutheran Church & Sch.,* 565 U.S. 171.

Amendment's ministerial exception doctrine applies to student religious organizations and Title IX, as the U.S. Supreme Court has not ruled on this question and some courts have declined to extend this exception beyond an employment law context.[22] To the extent that a future court would find that the doctrine applies to Title IX, § 106.6(d) instructs a recipient not to take action in violation of the First Amendment, which would include such an exception.

Changes: None.

F. The Effect of Other Requirements and Preservation of Rights

1. Section 106.6(e) Effect of Section 444 of General Education Provisions Act (GEPA)/Family Educational Rights and Privacy Act (FERPA) and Directed Question 1

Interaction Between FERPA and Title IX Generally

Background: As discussed in the July 2022 NPRM, 87 FR 41404, FERPA protects the privacy of students' education records and the personally identifiable information they contain. Privacy is an important factor that the Department carefully considered in promulgating the proposed and final regulations, and recipients need to consider this factor in implementing these regulations. To the extent that a conflict exists between a recipient's obligations under Title IX and under FERPA, § 106.6(e) expressly states that the obligation to comply with the Title IX regulations is not obviated or alleviated by the FERPA statute or regulations. In 1994, as part of the Improving America's Schools Act, Congress amended GEPA, of which FERPA is a part, to state that nothing in GEPA shall be construed to ''affect the applicability of . . . title IX of the Education Amendments of 1972[.]'' 20 U.S.C. 1221(d). The Department has long interpreted this provision to mean that FERPA continues to apply in the context of enforcing Title IX, but if there is a direct conflict between FERPA's requirements and Title IX's requirements, such that enforcing FERPA would interfere with Title IX's primary purpose to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions. 85 FR 30424. This override of FERPA when there is a direct conflict with Title IX is referred to in this preamble as the ''GEPA override.''

As an agency of the Federal government subject to the U.S. Constitution, the Department is precluded from administering, enforcing, and interpreting statutes, including Title IX and FERPA, in a manner that would require a recipient to deny the parties their constitutional rights to due process. *See* § 106.6(d). This principle was articulated in the Department's 2001 Revised Sexual Harassment Guidance, which clarified that ''[t]he rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding'' and that ''[FERPA] does not override federally protected due process rights of persons accused of sexual harassment.'' 2001 Revised Sexual Harassment Guidance at 22. The Department maintains this interpretation under these final regulations. The override of FERPA when there is a direct conflict with due process rights is referred to in this preamble as the ''constitutional override.''

These final regulations, including §§ 106.45(c), (f), and (g) and 106.46(c), (e), and (f) help protect a party's, including an employee respondent's, procedural due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution by providing notice and a meaningful opportunity to respond. *See Mathews* v. *Eldridge,* 424 U.S. 319, 348 (1976) (holding that procedural due process requires notice and a meaningful opportunity to respond). Therefore, to the extent provisions in these final regulations are necessary to protect due process rights but conflict with FERPA, the conflicting FERPA provisions would be subject to the constitutional override, in addition to the GEPA override, as discussed below and as explained in greater detail in the discussions of §§ 106.45(f)(4) and 106.46(e)(6), regarding access to evidence.

Comments: The Department received comments in response to Directed Question 1: Interaction with FERPA (proposed § 106.6(e)). The Department addresses these comments and other FERPA-related comments in this section, as well as in other sections that pertain to FERPA's application to particular regulatory provisions.

Some commenters addressed the GEPA override, including one commenter who recommended incorporating the GEPA override into Title IX's regulatory text and another commenter who stated that FERPA should preempt Title IX if there is a conflict regarding the privacy of student information. Some commenters asked the Department to clarify Title IX's intersection with FERPA and constitutional rights. One commenter stated that complainants have a constitutional right to privacy under the Fourteenth Amendment that overrides both Title IX and FERPA.

The Department received several requests for clarification related to the intersection between FERPA and Title IX. One commenter asked the Department to provide resources addressing the intersection of the Title IX regulations with FERPA, the Equal Access Act,[23] Title VI, the IDEA, and Section 504. Another commenter stated that more detailed regulations regarding the interaction of FERPA and Title IX would be helpful to stop recipients from using FERPA to protect themselves from liability during the Title IX grievance procedures by, for example, restricting the role of advisors or by requiring parties to waive potential claims or indemnify recipients. The commenter noted that Congress could amend FERPA.

Discussion: The Department emphasizes that a recipient must fulfill its obligations under both Title IX and FERPA unless there is a direct conflict that precludes compliance with both laws and their corresponding regulations. The Department maintains its prior position from the preamble to the 2020 amendments that ''[a] recipient should interpret Title IX and FERPA in a manner to avoid any conflicts.'' 85 FR 30424; *see also New York,* 477 F. Supp. 3d at 301–02 (rejecting an arbitrary and capricious challenge to the 2020 amendments regarding their interaction with FERPA). Whether a direct conflict arises is a fact-specific determination that must be addressed on a case-by-case basis.

As discussed above, the GEPA override, which is statutorily mandated by GEPA, 20 U.S.C. 1221(d), requires that Title IX override FERPA when there is a direct conflict. Although one commenter asked the Department to include the GEPA override in the regulations, this change is not necessary because the GEPA override is already incorporated into § 106.6(e) with a

[22] While commenters cited *InterVarsity Christian Fellowship/USA* v. *Board of Governors of Wayne State University,* 534 F. Supp. 3d 785 (E.D. Mich. 2021), for the proposition that the doctrine can be applied to protect the rights of religious student organizations, other courts have rejected the extension of the ministerial exception to disputes regarding student organizations. *See InterVarsity Christian Fellowship/USA* v. *Univ. of Iowa,* 408 F. Supp. 3d 960, 986 (S.D. Iowa 2019) (''The ministerial exception is an affirmative defense 'grounded in the First Amendment, that precludes application of [employment discrimination laws] to claims concerning the employment relationship between a religious institution and its members.' ''), *aff'd,* 5 F.4th 855 (8th Cir. 2021).

[23] 20 U.S.C. 4071.

paragraph heading that references GEPA and with regulatory text stating that the obligation to comply with Title IX is not obviated or alleviated by FERPA. The Department maintains that these final regulations make clear that a recipient must not use FERPA as a shield from compliance with Title IX. *See* § 106.6(e) (stating that the obligation to comply with Title IX and its regulations is not obviated or alleviated by FERPA). The Department notes a commenter's point about changes that Congress could make to FERPA, but legislative changes are outside the scope of the Department's authority. Likewise, the Department does not have the authority to reverse the statutorily mandated GEPA override, as suggested by a commenter.

As discussed above, the constitutional override, in addition to the GEPA override, will apply when there is a direct conflict between constitutional due process rights and FERPA. The Department is bound by the U.S. Constitution and cannot administer Title IX or FERPA in a way that deprives individuals of due process. Section 106.6(d)(2) and (3), which was enacted as part of the 2020 amendments and remains unchanged in these final regulations, states that nothing in Title IX requires a recipient to deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution or restrict any other rights guaranteed against government action by the U.S. Constitution.

The Department acknowledges the request that the Department provide technical assistance addressing the intersection of the final Title IX regulations with other Federal laws. The Department will offer technical assistance, as appropriate, to promote compliance with these final regulations.

Changes: The Department is making technical changes to § 106.6(e) to introduce the acronym ''FERPA'' in the paragraph heading, replace the reference to ''the Family Educational Rights and Privacy Act'' with the acronym ''FERPA'' in the regulatory text, and reference Title IX specifically.

Interaction Between Title IX and FERPA Regarding the Disclosure of Information That is Relevant to Allegations of Sex Discrimination and Not Otherwise Impermissible

Comments: Commenters generally sought clarification of the interaction between Title IX and FERPA regarding evidentiary disclosures. Some commenters addressed the disclosure of disciplinary determinations. Some commenters sought confirmation that FERPA would not prevent a recipient from notifying another recipient of the identity of respondents and disciplinary determinations, while another commenter expressed concern that FERPA exceptions might permit certain information about the determination to be publicly disclosed.

One commenter asked the Department to clarify whether a recipient must redact student names from documents related to the grievance procedures, emphasizing that parties need to know the identities of student-witnesses. Another commenter suggested that the Department limit a recipient's ability to disclose Title IX information without consent that would otherwise be permitted under FERPA, and to apply FERPA's ban on the redisclosure of students' education records to the parties' and their advisors' receipt of information regarding the opposing party.

Discussion: These final regulations require a recipient to provide the parties with access to the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible. *See* §§ 106.45(f)(4), 106.46(e)(6). In the context of disciplinary proceedings, the Department has previously recognized that under FERPA, ''a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning.'' U.S. Dep't of Educ., Office of Planning, Evaluation, and Policy Development, Final Regulations, Family Educational Rights and Privacy, 73 FR 74806, 74832–33 (Dec. 9, 2008). In the context of Title IX grievance procedures, there is no direct conflict between Title IX and FERPA regarding the recipient's disclosure of information contained in one student's education records to another student to whom that information is also directly related. *See* 85 FR 30431; *New York,* 477 F. Supp. 3d at 301–02. The Department acknowledges, however, that certain evidence that is relevant to the allegations may not necessarily be directly related to all parties for purposes of FERPA. To the extent these final regulations require disclosure of personally identifiable information from education records to the parties (or their parents, guardians, authorized legal representatives, or advisors) that directly conflicts with FERPA (*e.g.,* disclosure of a student complainant's education records to an employee respondent as part of investigating an allegation of sex-based harassment), the constitutional override and the GEPA override apply, and require such disclosure. FERPA does not override the due process rights of the parties, including, at minimum, the right to an explanation of the evidence and a meaningful opportunity to be heard. *See Goss,* 419 U.S. at 579, 581.

The Department notes that the Title IX regulations only require a recipient to provide the parties with the opportunity to access evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible. As explained in detail in the discussion of § 106.45(b)(7), these Title IX regulations require a recipient's grievance procedures to exclude three types of evidence and questions seeking that evidence, namely evidence that is protected under a privilege or confidentiality, records made or maintained by a physician, psychologist, or other recognized professional in connection with treatment, and evidence relating to the complainant's sexual interests or prior sexual conduct. Evidence in these categories, with narrow exceptions as provided in § 106.45(b)(7), is considered impermissible and must not be accessed, considered, disclosed, or otherwise used regardless of whether it is relevant.

With respect to redactions, these final regulations require a recipient to make certain disclosures of personally identifiable information to the parties, including access to the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible. *See* §§ 106.45(f)(4), 106.46(e)(6). A recipient must redact (or otherwise refrain from disclosing) information that is impermissible under § 106.45(b)(7); however, a recipient must not redact information or evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible because such redaction would infringe on the right of the parties to receive access to the relevant and not otherwise impermissible evidence, as well as on the parties' due process rights. As noted above, the Department has previously recognized situations in which FERPA permits the unredacted disclosure of education records related to disciplinary proceedings. When there is a direct conflict and redactions would preclude compliance with Title IX obligations, the GEPA override would require that the recipient comply with Title IX. To the extent that FERPA would require the redaction of personally identifiable information in education records, the

Department takes the position that principles of due process and fundamental fairness require the disclosure of unredacted information to the parties that is relevant to the allegations and not otherwise impermissible. Accordingly, the constitutional override and the GEPA override justify the disclosure to the parties of unredacted personally identifiable information that is relevant to the allegations of sex discrimination and not otherwise impermissible, even if the disclosure is not consistent with FERPA. For additional explanation of redactions within Title IX grievance procedures, see the discussions of §§ 106.45(b)(5), (f)(4), and 106.46(e)(6). For an explanation of the types of evidence that are impermissible under these Title IX regulations regardless of relevance, see the discussion of § 106.45(b)(7).

As explained further in the discussion of § 106.44(j), in response to commenters' concerns regarding confidentiality and the need to limit disclosures under Title IX to prevent sex discrimination, including sex-based harassment and retaliation, the Department has revised § 106.44(j). That provision prohibits a recipient from disclosing personally identifiable information that a recipient obtains in the course of complying with this part, with limited exceptions that are detailed in the discussion of § 106.44(j). Relevant to the comments summarized here, § 106.44(j)(5) allows a recipient to make a disclosure that is permitted by FERPA to the extent such disclosure is not otherwise in conflict with Title IX or this part. FERPA permits disclosures in limited circumstances. *See, e.g.,* 34 CFR 99.31(a)(2), (14). For further explanation of when a recipient may disclose personally identifiable information obtained in the course of complying with this part, including when a recipient can make disclosures that would be permitted by FERPA, see the discussion of § 106.44(j).

FERPA sets forth detailed requirements regarding when and how a recipient can disclose personally identifiable information from education records. FERPA neither authorizes nor restricts a student from redisclosing their own education records. It would not be appropriate to apply the FERPA provisions that govern disclosures by recipients to redisclosures made by parties and their advisors, as suggested by a commenter; however, these final Title IX regulations require recipients to take reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosures of evidence. §§ 106.45(f)(4)(iii), 106.46(e)(6)(iii). These steps may include restrictions on the parties' and advisors' ability to redisclose the information. The interaction between FERPA and the Title IX regulatory provisions that require disclosure of evidence is explained in greater detail in the discussions of §§ 106.45(f)(4) and 106.46(e)(6).

Changes: None.

Interaction Between FERPA and Title IX by Type of Recipient

Comments: Some commenters asked the Department to clarify Title IX's requirements for sharing information that qualifies as an education record under FERPA within elementary schools and secondary schools, and one commenter recommended that the Department differentiate the procedures for elementary schools and secondary schools, when appropriate, to safeguard the privacy of these students.

Other commenters urged the Department to acknowledge the privacy and autonomy rights of students at postsecondary institutions, who have their own privacy rights under FERPA.

Discussion: FERPA provides certain rights for parents and guardians regarding their children's education records. When a student reaches 18 years of age or attends an institution of postsecondary education at any age, the student becomes an ''eligible student,'' and all rights under FERPA transfer from the parent to the student. *See* 34 CFR 99.3, 99.5(a)(1). The Department's Student Privacy Policy Office (SPPO) administers FERPA. SPPO has issued guidance regarding parents' rights under FERPA. *See, e.g.,* U.S. Dep't of Educ., Student Privacy Policy Office, A Parent Guide to the Family Educational Rights and Privacy Act (FERPA) (July 2021), *https://studentprivacy.ed.gov/resources/parent-guide-family-educational-rights-and-privacy-act-ferpa.* SPPO has also issued guidance regarding eligible students' rights under FERPA. *See, e.g.,* U.S. Dep't of Educ., Student Privacy Policy Office, An Eligible Student Guide to the Family Educational Rights and Privacy Act (FERPA) (Mar. 2023), *https://studentprivacy.ed.gov/resources/eligible-student-guide-family-educational-rights-and-privacy-act-ferpa.* Nothing in these Title IX regulations alters the distinction between the rights of parents and the rights of eligible students under FERPA.

The Department notes that, in certain respects, these Title IX regulations distinguish between elementary school and secondary school students and postsecondary students. For example, with regard to handling sex-based harassment complaints, § 106.45 provides the requirements for grievance procedures for elementary schools and secondary schools, whereas § 106.46, in addition to § 106.45, provides the requirements for those complaints involving a postsecondary student. The notification requirements in § 106.44(c) also vary based on whether the recipient is an elementary school or secondary school, or a postsecondary institution. Section 106.45 contains the Title IX disclosure requirements that apply to elementary schools and secondary schools, principally at § 106.45(c) (notice of allegations), (f)(4) (access to the relevant and not otherwise impermissible evidence or an accurate description of that evidence), and (h)(2) (notification of determination whether sex discrimination occurred). Section 106.46 contains disclosure requirements that, in addition to the disclosure requirements in § 106.45, apply to sex-based harassment complaints involving a postsecondary student, principally at §§ 106.46(c) (notice of allegations), (e)(6) (access to the relevant evidence or a written investigative report), and 106.45(h) (written determination whether sex-based harassment occurred). As discussed above, based on the GEPA and constitutional overrides, an elementary school, secondary school, or postsecondary school must comply with its § 106.45, and if applicable § 106.46, disclosure requirements even when such disclosures conflict with FERPA.

Changes: None.

Interaction Between FERPA and Title IX Regarding Students With Disabilities

Comments: One commenter expressed concern that the Title IX Coordinator might not have a legitimate educational interest under FERPA to access a student party's education records, including documents related to special education services, while another commenter viewed FERPA's exception for legitimate educational interests as resolving any concerns about the interaction between the proposed Title IX regulations and FERPA.

Discussion: Section 106.8(e) requires a Title IX Coordinator to take certain steps if a party is a student with a disability. If the party is an elementary or secondary student with a disability, the Title IX Coordinator must consult with one or more members of the group of persons responsible for the student's placement decision, as appropriate, to ensure that the recipient complies with IDEA and Section 504 requirements during the grievance procedures. If the party is a postsecondary student with a disability, the Title IX Coordinator may consult, as appropriate, with the

individual or office that the postsecondary institution has designated to provide support to students with disabilities to help comply with Section 504. FERPA permits ''school officials'' to access personally identifiable information from education records without the parent's or eligible student's prior written consent, provided that the recipient has determined that the officials have a ''legitimate educational interest'' in the information. 34 CFR 99.31(a)(1)(i)(A). FERPA requires a recipient to specify the criteria for determining who constitutes a ''school official'' and what the recipient considers to be a ''legitimate educational interest'' in the recipient's annual notification of rights under FERPA. 34 CFR 99.7(a)(3)(iii). The Department has recognized that ''[t]ypically, a school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.'' U.S. Dep't of Educ., Student Privacy Policy Office, A Parent Guide to the Family Educational Rights and Privacy Act (FERPA) (July 2021), *https://studentprivacy.ed.gov/resources/parent-guide-family-educational-rights-and-privacy-act-ferpa.* To the extent that a Title IX Coordinator obtains access to personally identifiable information from the education records of a party with a disability to comply with § 106.8(e), the Department views this access as a legitimate educational interest. Accordingly, to comply with both FERPA and Title IX, a recipient must establish criteria in its annual notification of FERPA rights to permit its Title IX Coordinator to constitute a school official with legitimate educational interests when performing functions to carry out § 106.8(e).

Changes: None.

Interaction Between FERPA and Title IX Regarding Sexual Orientation, Gender Identity, and Pregnancy

Comments: Some commenters expressed concern that the Title IX regulations would authorize schools to withhold information from parents relating to their child's sexual orientation and gender identity that parents would otherwise be entitled to under FERPA, while other commenters asked the Department to make clear that Title IX overrides FERPA when disclosures about a student's sex, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity could put the student in danger, could create a chilling effect, or could result in sex-based harassment or retaliation.

Discussion: These Title IX regulations do not interfere with a parent's or guardian's rights under FERPA to obtain records or access information involving their child. Additional comments and discussion regarding parental rights and issues related to sexual orientation, gender identity, and pregnancy are addressed in the discussion of §§ 106.6(g) and 106.44(j), as well as in Section III and Section IV.

Changes: None.

2. Section 106.6(g) Exercise of Rights by Parents, Guardians, or Other Authorized Legal Representatives

Comments: The Department received several comments in support of the proposed addition of an authorized legal representative in § 106.6(g). Some commenters agreed that including an authorized legal representative would be important to recognize the role of court-appointed educational representatives and other legally authorized decisionmakers for youth in out-of-home care, and others believed this addition to § 106.6(g) may be helpful for students with disabilities.

The Department also received comments opposed to the proposed changes to § 106.6(g), requesting that the Department retain § 106.6(g) as written in the 2020 amendments. Some commenters generally asserted that proposed § 106.6(g) would exceed the Department's authority and would be inconsistent with Title IX, case law, and the Constitution.

Some commenters disagreed with the proposed addition of ''authorized legal representative'' for reasons including that doing so would reduce the role of a parent; would be too vague and could allow teachers, administrators, or advocacy organizations to be a child's representative or to bring a claim against a parent; would encourage students to disregard parental authority; and would give a child the responsibilities of an adult parent. Objections also included that proposed § 106.6(g) would allow a legal representative to make decisions without a parent's consent, including decisions related to a student's medical care. Some commenters suggested that the Department modify proposed § 106.6(g) to include a hierarchy that prioritizes the rights of a parent over the rights of an authorized legal representative, and some commenters asked the Department to clarify how an authorized legal representative is selected. One commenter asked the Department to add language to proposed § 106.6(g) to ensure that an authorized legal representative can communicate with a recipient on behalf of their party. Some commenters asked the Department to define ''authorized legal representative.''

Some commenters asked the Department to clarify whether proposed § 106.6(g) would require parental notification when a recipient becomes aware of conduct that may constitute sex-based harassment. Other commenters believed that proposed § 106.6(g) would improperly allow postsecondary institutions to exclude parents from their children's disciplinary proceedings. Commenters expressed differing views about the interaction between proposed § 106.6(g) and FERPA, with one commenter stating that proposed § 106.6(g) would not conflict with FERPA and some commenters stating that it would.

Discussion: The revisions the Department proposed to § 106.6(g) clarify that an authorized legal representative, as with a parent or guardian, also has the right to act on behalf of a complainant, respondent, or other person, subject to § 106.6(e), including but not limited to making a complaint of sex discrimination through a recipient's grievance procedures. As the Department explained in the 2020 amendments, § 106.6(g) was added to acknowledge ''the legal rights of parents and guardians to act on behalf of a complainant, respondent, or other individual with respect to exercise of rights under Title IX.'' 85 FR 30136. This rationale holds true for the addition of ''authorized legal representative'' to § 106.6(g), which ensures the applicability of this section to an individual who is legally authorized to act on behalf of a certain minor, such as a foster parent caring for a youth in out-of-home care but who is not necessarily deemed a parent or guardian.

Section 106.6(g) remains consistent with the 2020 amendments, which provided that, although the student would remain the complainant or respondent in situations involving a minor, ''the parent or guardian must be permitted to exercise the rights granted to the party . . . whether such rights involve requesting supportive measures or participating in the process outlined in the recipient's grievance process.'' 85 FR 30453. As further explained in the 2020 amendments, when the party is a minor or has an appointed guardian, ''the parent or guardian must be permitted to accompany the student to meetings, interviews, and hearings during a grievance process to exercise rights on behalf of the student, while the student's advisor of choice may be a different person from the parent or guardian.'' *Id.* The 2020 amendments also clarified that the regulations do not

alter a parent's or guardian's legal right to act on behalf of the complainant or respondent. *Id.* at 30136. Specifically, ''[t]he extent to which a recipient must abide by the wishes of a parent, especially in circumstances where the student is expressing a different wish from what the student's parent wants, depends on the scope of the parent's legal right to act on the student's behalf.'' *Id.; see also id.* at 30453 (''Whether or not a parent or guardian has the legal right to act on behalf of an individual would be determined by State law, court orders, child custody arrangements, or other sources granting legal rights to parents or guardians.'').

The Department disagrees with commenters who view § 106.6(g) as outside the Department's authority and inconsistent with Title IX, case law, and the U.S. Constitution. The Department was unable to find, and commenters did not provide, any case law suggesting that § 106.6(g) is inconsistent with the U.S. Constitution or outside the authority granted by Congress for the Department to issue regulations to effectuate Title IX's prohibition on sex discrimination in education programs or activities that receive Federal financial assistance.

The Department declines to define ''authorized legal representative'' or describe the process for selecting an authorized legal representative because specific terminology and procedures may differ across States and contexts; nor is it necessary to expand upon an authorized legal representative's authority to communicate on behalf of their party because that will depend on the scope of legal authority under which the authorized legal representative is permitted to act. Whether an individual may serve as the authorized legal representative of a child, and the scope of that authority, would be determined by State law, court orders, child custody arrangements, or other sources granting legal rights to guardians or legal representatives.

The Department appreciates the opportunity to clarify that the addition of ''authorized legal representative'' to § 106.6(g) does not grant parental authority to any individual or derogate parental rights. Instead, this language acknowledges the role of a court-appointed educational representative or other individual who has been determined by sources such as State law, court orders, or child custody arrangements to have the authority to act on behalf of, for example, a youth in out-of-home care, in matters addressed by the Title IX regulations, consistent with their legally granted authority. With regard to comments stating that the addition of ''authorized legal representative'' to § 106.6(g) would allow a teacher, administrator, or an advocacy organization to act on behalf of a student, including with regard to medical decisions, the Department emphasizes that this addition to § 106.6(g) does not grant permission to entities or other individuals who are not bestowed with legal authority to act on a student's behalf. Further, this provision is limited in scope to matters addressed by the Title IX regulations, which do not address or govern decisions about medical care. Because § 106.6(g) does not confer parental rights upon any individual, the Department also declines to add a hierarchy to this section (*i.e.,* to prioritize the rights of parents over authorized legal representatives).

The Department disagrees that recognizing the legally granted authority of an authorized legal representative to act on behalf of certain youth encourages students to disregard parental authority or forces a child to assume responsibilities of an adult; rather, it ensures that students whose rights are committed to an authorized legal representative may still be able to participate in Title IX proceedings through that representative. Section 106.6(g) of the 2020 amendments does not require notification to parents, and the Department declines to do so now because the Department believes additional public comment would be appropriate before making such changes related to parental notification. The Department notes that nothing in these regulations requires or prohibits a recipient from notifying a parent, guardian, or authorized legal representative of a minor student's complaint alleging sex discrimination so they can exercise their rights to act on behalf of the minor student. Additionally, as explained in greater detail in the discussion of § 106.44(j), that paragraph explicitly permits a recipient to disclose personally identifiable information obtained in the course of complying with this part to a parent, guardian, or other authorized legal representative with the legal right to receive disclosures on behalf of the person, including a minor student, whose personally identifiable information is at issue. Further, the modifications that the Department has made to § 106.6(g) do not impact this section's consistency with parents' inspection and review rights under FERPA or its implementing regulations.

Finally, with regard to comments about the application to postsecondary students, as elaborated in the discussion of the overall considerations and framework for Title IX's grievance procedure requirements, and consistent with the explanation of § 106.6(g) in the 2020 amendments, a parent or guardian does not typically have legal authority to exercise rights on behalf of a postsecondary student, by virtue of a student's age, in contrast to any authority they or another authorized legal representative may have for a student in elementary school or secondary school. Section 106.6(g) does not mandate the exclusion of a parent, guardian, or other authorized legal representative at the postsecondary level, and the opportunity for a postsecondary student to be accompanied by an advisor of their choice or to have persons other than the advisor of choice be present during any meeting or proceeding for a complaint of sex-based harassment is clarified in the discussion of § 106.46(e)(2)–(3).

Changes: The Department has made a technical change to § 106.6(g) to add a reference to ''Title IX.''

3. Section 106.6(b) Preemptive Effect

Comments: Some commenters raised concerns about preemption of State laws under proposed § 106.6(b). Some commenters asserted that Spending Clause statutes like Title IX can attach conditions to receipt of Federal funds but do not give the Department authority to preempt State law. Some commenters stated that the Department can only preempt a State law to the extent a requirement is within the scope of its congressionally delegated authority and States have clear notice as to any conditions attached to those funds, citing *Pennhurst,* 451 U.S. at 1. Those commenters argued, for example, that the Department cannot preempt State law that discriminates based on gender identity because recipients did not have clear notice that Title IX prohibits gender identity discrimination. A group of commenters asserted that preemption of State law would violate the ''presumption against preemption'' because it would regulate ''in a field which States have traditionally occupied,'' citing, *e.g., Wyeth* v. *Levine,* 555 U.S. 555, 565 (2009). Some commenters expressed concern that proposed § 106.6(b) is contrary to the Tenth Amendment, which leaves matters not delegated to the Federal government, such as education, to the States.

Some commenters urged the Department to allow State and local governments and schools to make their own decisions that reflect their community standards and local demographic interests and priorities or preserve their existing policies and

procedures to prevent and address sex discrimination. Some commenters urged the Department to maintain current § 106.6(h) and (b) because, under the current versions of those provisions, a narrower set of State laws would be preempted.

Some commenters argued that the First Amendment bars the Federal government from regulating protected speech or preempting State free speech laws.

Some commenters supported proposed § 106.6(b) because it would allow schools to comply with State or local laws that provide greater protections against sex discrimination. Other commenters expressed concern that proposed § 106.6(b) would permit schools to comply with State laws that provide greater protection against sex discrimination but would not permit schools to comply with State laws that provide greater protection for students who were alleged to have engaged in misconduct. Some commenters asserted that the reference to laws that provide ''greater protection against sex discrimination'' is too vague for a recipient to determine whether a State or local law is preempted. The commenter stated that it would be helpful for the Department to more thoroughly explain how it would analyze such State and local laws to determine whether they conflict with the proposed regulations and whether such a conflict is preempted.

A number of commenters urged the Department to clarify whether and how the proposed regulations would preempt conflicting State laws and policies related to sexual orientation, gender identity, parental rights, or abortion. Commenters also asked the Department to clarify how the proposed regulations would interact with conflicting court decisions, including regarding constitutional due process.

Discussion: The Department appreciates the variety of views expressed by commenters regarding the proposed preemption provision. After thoroughly considering the comments, the Department maintains that the preemption provision in the final regulations, with the modification noted below, appropriately ensures the final regulations cover the full scope of Title IX. Thus, final § 106.6(b) does not extend beyond the Department's authority to promulgate regulations to effectuate Title IX.

The Department notes, first, that all 50 States have accepted Federal funding for education programs or activities and are subject to Title IX as to those programs and activities. Compliance with Title IX and its implementing regulations is ''much in the nature of a contract: in return for Federal funds, the States agree to comply with federally imposed conditions.'' 85 FR 30458 (citing *Pennhurst,* 451 U.S. at 17). Nothing in these regulations requires the abrogation of a State's sovereign powers because States retain the ability to address discrimination on the basis of sex in the educational realm in a manner that does not conflict with these final regulations. *See Cameron* v. *EMW Women's Surgical Ctr., P.S.C.,* 595 U.S. 267, 277 (2022) (''Paramount among the States' retained sovereign powers is the power to enact and enforce any laws that do not conflict with federal law.'' (citing U.S. Const., art. VI, § 2)). The Department also notes that courts have long held that Spending Clause statutes, like Title IX, can preempt inconsistent State laws by operation of the Supremacy Clause. *See, e.g., Planned Parenthood of Hous.* v. *Sanchez,* 403 F.3d 324, 329–37 (5th Cir. 2005) (using ''the terminology and framework of preemption in analyzing'' a claim that a State law conflicts with a Federal statute enacted under the Spending Clause); *Townsend* v. *Swank,* 404 U.S. 282, 286 (1971) (''state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause''); *King* v. *Smith,* 392 U.S. 309 (1968); *O'Brien* v. *Mass. Bay Transp. Auth.,* 162 F.3d 40 (1st Cir. 1998); *cf. Health & Hosp. Corp. of Marion Cnty.* v. *Talevski,* 599 U.S. 166, 188 (2023) (holding that § 1983 litigation to enforce a Spending Clause statute is not necessarily precluded by a separate administrative enforcement scheme). This position is consistent with the 2020 amendments, which state ''[t]he Department through these final regulations, is not compelling the States to do anything. In exchange for Federal funds, recipients—including States and local educational institutions—agree to comply with Title IX and regulations promulgated to implement Title IX as part of the bargain for receiving Federal financial assistance, so that Federal funds are not used to fund sex-discriminatory practices. As a consequence, the final regulations are consistent with the Tenth Amendment.'' 85 FR 30459. Similarly here, these regulations simply reiterate that longstanding principle, which in the Title IX context means that a recipient may not adopt a policy or practice that contravenes Title IX or this part even if such a policy or practice is required by a conflicting State law.

The Department also disagrees with the contention that a presumption against preemption prohibits the promulgation of § 106.6(b). The Supreme Court has explicitly held that Federal law may supersede State law, even in a field historically occupied by States, when ''that [is] the clear and manifest purpose of Congress.'' *Wyeth,* 555 U.S. at 565 (citing *Medtronic, Inc.* v. *Lohr,* 518 U.S. 470, 485 (1996); *Retail Clerks* v. *Schermerhorn,* 375 U.S. 96, 103 (1963); *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218 (1947)); *see also Free* v. *Bland,* 369 U.S. 663, 666 (1962) (''[A]ny state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.''). Title IX's purpose is clear in the text of the statute: to ensure that ''[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance,'' 20 U.S.C. 1681(a); as is Congress's intent to provide the Department broad authority to issue regulations to effectuate the statute's purpose, *see* 20 U.S.C. 1682 (authorizing Federal agencies to issue regulations consistent with achievement of the objectives of the statute); *see also Gebser,* 524 U.S. at 292. Accordingly, Congress has ''unambiguously'' ''impose[d] a condition on the grant of federal moneys'' in the context of Title IX. *Pennhurst,* 451 U.S. at 17. Indeed, the Supreme Court has reaffirmed that Congress intended Title IX's prohibition on sex discrimination to have a broad reach, *see, e.g., Jackson,* 544 U.S. at 175 (''Courts must accord Title IX a sweep as broad as its language'' (quoting *N. Haven Bd. of Educ.,* 456 U.S. at 521) (internal quotation marks omitted)); and specifically held that State law may be preempted when its purpose or effect conflicts with the objectives of Federal civil rights law. *See, e.g., Felder* v. *Casey,* 487 U.S. 131, 138 (1988) (preempting a State's notice-of-claim statute when it conflicted in purpose and effect with the remedial objectives of 42 U.S.C. 1983); *cf. Montgomery* v. *Indep. Sch. Dist. No. 709,* 109 F. Supp. 2d 1081, 1101 (D. Minn. 2000) (citing *Felder* while denying defendant's motion for summary judgment on plaintiff's Title IX claim). Because § 106.6(b) limits preemption to instances in which State or local law conflicts with Title IX or this part, this provision is consistent with preemption doctrine as articulated by the Supreme Court.

Second, the Supreme Court has made clear that State laws can be preempted by Federal regulations. *See, e.g.,*

Hillsborough Cnty. v. *Automated Med. Labs., Inc.,* 471 U.S. 707, 713 (1985) (''state laws can be pre-empted by federal regulations as well as federal statutes''); *Geier* v. *Am. Honda Motor Co.,* 529 U.S. 861, 873 (2000).

Third, we disagree with the suggestion that the Department lacks the delegated authority to promulgate § 106.6(b). By statute, Congress has conferred authority on the Department to promulgate regulations to effectuate the purposes of Title IX. 20 U.S.C. 1682. The Supreme Court has noted that ''[t]he express statutory means of enforc[ing] [Title IX] is administrative,'' as the ''statute directs Federal agencies that distribute education funding to establish requirements to effectuate the non-discrimination mandate, and permits the agencies to enforce those requirements through 'any . . . means authorized by law,' including ultimately the termination of Federal funding.'' *Gebser,* 524 U.S. at 280–81 (quoting 20 U.S.C. 1682). The Supreme Court has also explained that ''[b]ecause Congress did not list any specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered.'' *Jackson,* 544 U.S. at 175; *see also Grimm* v. *Gloucester Cnty. Sch. Bd.,* 972 F.3d 586, 619 n.18 (4th Cir. 2020), *as amended* (Aug. 28, 2020). As described in more detail in the discussions of §§ 106.10 and 106.31(a), the Supreme Court has held that sex discrimination, as prohibited by Title VII, encompasses discrimination based on sexual orientation and gender identity, *Bostock* v. *Clayton Cnty.,* 590 U.S. 644, 659–62 (2020), and lower courts have applied this reasoning to Title IX. Further, this rulemaking process has afforded recipients notice and opportunity to comment, as well as the opportunity to decline Federal funding.

Fourth, consistent with the Department's position in the 2020 amendments and Supreme Court preemption jurisprudence, in the event of an actual conflict between State or local law and Title IX or its implementing regulations, a conflicting State law would not permit a recipient's noncompliance with Title IX. The Department appreciates that many States, as commenters noted, have laws that address sex discrimination, including sex-based harassment, sexual violence, sex offenses, and other misconduct that negatively impacts students' equal educational access. Nothing in these final regulations precludes a State, or an individual recipient, from continuing to address such matters while also complying with these final regulations. The Department declines the suggestion to exempt a recipient from certain requirements in the final regulations to the extent they already have comprehensive policies and procedures on sex discrimination. The Department believes that the final regulations provide reasonable options for a recipient to comply in ways that are equitable for the parties, while accommodating each recipient's administrative structure, education community, discretionary decisions, community standards, and applicable Federal and State case law and State or local legal requirements. In addition, the Department notes that nothing in the final regulations precludes a recipient from retaining its existing policies and procedures but making modifications as needed to add any requirements from the final regulations.

Generally, a State law would create a conflict with the final regulations if, for example, it requires a recipient to discriminate based on a student's sexual orientation or gender identity. Consistent with the 2020 amendments, in such a circumstance, Title IX or its implementing regulations would preempt the conflicting State law. As the Department explained in 2020:

> Under conflict preemption, a federal statute implicitly overrides state law . . . when state law is in actual conflict with federal law either because it is impossible for a private party to comply with both state and federal requirements or because state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. It is well-established that state laws can be pre-empted by federal regulations as well as by federal statutes. The Supreme Court has held: Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. The Department is acting within the scope of its congressionally delegated authority in promulgating these final regulations under Title IX to address sexual harassment as a form of sex discrimination.

85 FR 30454–55 (internal quotation marks omitted) (citing *Freightliner Corp.* v. *Myrick,* 514 U.S. 280, 287 (1995); *Hillsborough Cnty.,* 471 U.S. at 713; *Geier,* 529 U.S. at 873).

Nonetheless, the Department declines to maintain the preemption provisions from the 2020 amendments. As explained in the July 2022 NPRM, the final regulations revise § 106.6(b) and eliminate preexisting § 106.6(h) to clarify that the preemptive effect of these regulations is neither confined to circumstances in which sex discrimination may have limited a student's or applicant's eligibility to practice any occupation or profession as expressed in preexisting § 106.6(b), nor to the three sections of the Title IX regulations enumerated in preexisting § 106.6(h). 87 FR 41405. Rather, final § 106.6(b) makes clear in a simple and comprehensive statement that Title IX and its implementing regulations ''preempt *any* State or local law with which there is a conflict,'' *see id.* (emphasis in original), which as discussed above, is in accordance with the text and purpose of the statute.

With respect to a commenter's question about the regulations' intersection with conflicting case law on due process, the Department notes § 106.6(d)(2) and (3) specifies that nothing in the Title IX regulations requires a recipient to deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments or restrict any other rights guaranteed against government action by the U.S. Constitution.

Similarly, the Department appreciates comments about the regulations' intersection with the First Amendment and agrees that these final regulations do not preempt First Amendment rights. As discussed above in Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2), these final regulations should not be interpreted in ways that would lead to the suppression of protected speech by a public or private recipient. *See also* 2003 First Amendment Dear Colleague Letter. Additionally, § 106.6(d)(1) makes clear that nothing in the Title IX regulations requires a recipient to restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution. Accordingly, nothing in Title IX or this part would preempt a State law that safeguards speech protected by the First Amendment, including as applied to a private recipient.

However, a recipient's obligation to comply with Title IX and this part is not obviated or alleviated by a conflicting State law that governs speech unprotected by the U.S. Constitution. The Department disagrees with the contention that the First Amendment prohibits Federal law from preempting a conflicting State or local law governing speech. Commenters did not cite, and the Department is unaware of, any such precedent. Instead, commenters cited: inapposite legal authority; [24] cases that hold enforcement

[24] Commenters cited *Louisiana Independent Pharmacies Ass'n* v. *Express Scripts, Inc.,* 41 F. 4th 473, 479 (5th Cir. 2022) (discussing how to establish

of State or local law unconstitutional under the First Amendment;[25] State law that prohibits public and private schools from limiting speech that is protected under the First Amendment;[26] and a court opinion interpreting that State law.[27]

The Department appreciates commenters' input on the proposed exception for State and local laws that provide ''greater protections against sex discrimination,'' including concerns that the language was vague and would be difficult for a recipient to implement. The Department agrees the proposed language could cause confusion and believes the issue of whether the final regulations preempt a State or local law should focus on whether it conflicts with Title IX or the final regulations. Therefore, the Department has removed the ''greater protections'' language from the final regulations. However, nothing in the final regulations prevents a recipient from complying with a State law, including a State law designed to address sex discrimination, as long as compliance would not conflict with any requirement in the final regulations.

The Department acknowledges the request for guidance regarding how the final regulations may preempt particular State and local laws. The Department will offer technical assistance, as appropriate, to promote compliance with these final regulations, but refrains from offering opinions about how the regulations apply to specific facts or specific State and local laws without first conducting an investigation.

Changes: The Department has eliminated the second sentence in proposed § 106.6(b) and modified the end of the first sentence to clarify that preemption applies to any State or local law or other requirement ''that conflicts with Title IX or this part.'' Additionally, the Department has made a technical change to add a reference to ''Title IX,'' to clarify that this provision applies to conflicts with the statute as well as its implementing regulations.

II. Recipient's Obligation To Operate Its Education Program or Activity Free From Sex Discrimination

A. Administrative Requirements

1. Section 106.8(a) Designation of a Title IX Coordinator

Comments: Some commenters supported proposed § 106.8(a) because it would centralize the recipient's compliance efforts, ensure accountability and efficiency, and minimize internal conflicts and confusion that could delay compliance. Some commenters supported proposed § 106.8(a) because it would allow for distribution of a Title IX Coordinator's duties to skilled and knowledgeable designees who can support the Title IX Coordinator in identifying trends, coordinating training, and monitoring and addressing barriers to reporting sex discrimination, thereby promoting effective enforcement of Title IX.

Some commenters expressed concern that the proposed regulations would shift compliance responsibility from the recipient to an individual Title IX Coordinator. Other commenters asked for clarification as to the meaning of the term ''oversight,'' when the regulations permit delegation of the Title IX Coordinator's duties, and when such duties can be delegated to an independent contractor. Some commenters raised concerns about the prescriptiveness and burden of the Title IX Coordinator's role as outlined in the proposed regulations, including with respect to duties contemplated by proposed §§ 106.40(b), 106.44(b), 106.44(f), 106.44(k), 106.45(d)(4)(iii), and 106.45(h)(3).

Some commenters asked the Department to require each school or building within a multi-school or multi-building recipient to designate its own Title IX Coordinator and publicize that person's contact information.

Some commenters suggested the Department provide guidance for Title IX Coordinators after the final regulations are issued.

Discussion: The Department acknowledges commenters' support for § 106.8(a) and agrees that it furthers centralized, accountable, and effective compliance with Title IX.

The Department appreciates the opportunity to clarify that the recipient itself is responsible for compliance with obligations under Title IX, including any responsibilities assigned to the recipient's Title IX Coordinator under these final regulations. Specifically, the final regulations make clear that Title IX and its implementing regulations apply to ''every recipient and to all sex discrimination occurring under a recipient's education program or activity in the United States,'' with only limited exceptions. *See* § 106.11. Additionally, § 106.8(a)(1) of the final regulations underscores that the recipient is ultimately responsible for compliance with the regulations, providing that ''[e]ach recipient'' is responsible for designating a Title IX Coordinator.

Consistent with longstanding regulations and Department policy, these final regulations permit a recipient to designate more than one employee to serve as a Title IX Coordinator, but the recipient is responsible for designating one of its Title IX Coordinators to retain ultimate oversight. The Department explained in the July 2022 NPRM that by having one Title IX Coordinator oversee designees, the Title IX Coordinator would be responsible for ensuring consistent Title IX compliance and would be able to identify trends across the recipient's education program or activity and coordinate training or educational programming responsive to those trends. 87 FR 41424.

With respect to concerns about the meaning of the term ''oversight,'' the Department clarifies that this word is intended to ensure that a single individual is vested with the responsibility for ensuring a recipient's consistent compliance with its responsibilities under Title IX and this part and has revised the final regulations to make that clear. Oversight does not necessarily require a Title IX Coordinator to have a supervisory relationship over other Title IX Coordinators or designees. The Department declines to further specify when a recipient or Title IX Coordinator may delegate Title IX Coordinator duties to another employee or independent contractor. As detailed in the July 2022 NPRM, the decisions about whether and when to delegate will often be recipient- or fact-specific, and depend on things like the number of students enrolled, persons employed, places services are provided, or variety of activities sponsored. 87 FR 41424. In the Department's view, given the number of factors at play, recipients are best situated to determine when delegation is appropriate.

Permission to delegate responsibilities to designees enables a recipient to assign duties to individuals who are best positioned to perform them, avoid actual or perceived conflicts of interest, and align with the recipient's administrative structure. The customizable and adaptable system of

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Federal question jurisdiction over a claim brought in State court).

[25] Commenters cited *Tinker,* 393 U.S. at 511; *Barnette,* 319 U.S. at 642; *Wooley* v. *Maynard,* 430 U.S. 705, 713 (1977); *City of Hoboken* v. *Chevron Corp.,* 45 F.4th 699, 709 (3d Cir. 2022); *Meriwether,* 992 F.3d at 512. *But cf. Meriwether,* 992 F.3d at 511 (stating that a public university's failure to show evidence of a hostile environment indicated that Title IX compliance was not implicated by university's disciplinary action against professor and reversing dismissal of professor's free speech claims).

[26] Commenters cited Cal. Educ. Code §§ 48950, 94367.

[27] Commenters cited *Yu* v. *University of La Verne,* 196 Cal. App. 4th 779, 769, 791 (2011) (denying de novo review because student's claim did not implicate the First Amendment, but holding university violated Cal. Educ. Code § 94367).

delegation set out in § 106.8(a) also addresses commenter concerns regarding prescriptiveness and burden of the Title IX Coordinator's role throughout the final regulations by providing a recipient with greater flexibility to utilize resources in the manner that works best for its school community. Some recipients may need more than one person to coordinate the recipient's compliance with Title IX, but the Department prefers to leave recipients the flexibility to decide how to effectively comply with Title IX and the final regulations. This flexibility also ameliorates concerns that § 106.8(a) is overly prescriptive or burdensome. By allowing a recipient to delegate (or permitting a Title IX Coordinator to delegate) specific duties to one or more designees, final § 106.8(a)(2) affords a recipient the ability to deploy resources in a manner that works best for them. At the same time, however, the final regulations require each recipient to designate at least one employee as its Title IX Coordinator and provide that the Title IX Coordinator must be authorized to coordinate the recipient's efforts to comply with its responsibilities under Title IX and this part. And if the recipient has more than one Title IX Coordinator, the final regulations provide that the recipient must designate one to retain ultimate oversight and ensure the recipient's compliance with those responsibilities. This oversight structure is consistent with the longstanding requirement to designate an employee to coordinate the recipient's Title IX compliance, *see* 40 FR 24139, and with the Department's view, expressed in the 2020 amendments, *see* 85 FR 30464, that a Title IX Coordinator must be authorized to coordinate a recipient's efforts to comply with Title IX.

With respect to comments about requiring each school or building within a multi-school or multi-building recipient to designate its own Title IX Coordinator, in the July 2022 NPRM, the Department explained that proposed § 106.8(a) would permit a Title IX Coordinator to assign a designee to oversee Title IX compliance for a component of a recipient, such as a school or building. 87 FR 41424. The Department's Title IX regulations have never required a recipient to designate a separate employee to oversee the recipient's Title IX compliance with respect to each school or building, and the Department declines to do so through this rulemaking. The Department maintains that decisions of this sort are best left to the recipient given various fact-specific considerations, including whether such designation is necessary to ensure compliance with Title IX's nondiscrimination mandate. In addition, the Department did not propose such a requirement in the July 2022 NPRM and declines to do so in this rulemaking without ensuring that the public has had a full notice and opportunity to comment on such a proposal, especially in light of the potential costs and administrative burdens.

The Department recognizes that it is important for members of a recipient's community to be able to identify a recipient's Title IX Coordinator. To address concerns that students, staff, or parents might not know how to contact the Title IX Coordinator, § 106.8(c)(1)(i)(C) of the final regulations maintains the requirement that a recipient must publish the name or title, office address, email address, and telephone number of the recipient's Title IX Coordinator. Nothing in the final regulations prevents a recipient from publicizing contact information for others appointed to coordinate compliance.

The Department acknowledges that supporting recipients and Title IX Coordinators in implementing these regulations is important. The Department will offer technical assistance and guidance, as appropriate, to promote compliance with these final regulations.

Changes: Section 106.8(a)(1) has been revised to refer to ''a'' Title IX Coordinator rather than ''the'' Title IX Coordinator and to specify that, if a recipient has more than one Title IX Coordinator, the recipient must designate one of its Title IX Coordinators to retain ''ultimate oversight'' and ''ensure the recipient's consistent compliance'' with Title IX. The reference to multiple coordinators has been moved from proposed § 106.8(a)(2) to § 106.8(a)(1) in the final regulations. Consistent with the requirement in § 106.8(a)(1) that one Title IX Coordinator retain ultimate oversight over the recipient's compliance responsibilities, § 106.8(a)(2) has been revised to clarify that the recipient may delegate, or permit a Title IX Coordinator to delegate, specific duties to one or more designees.

2. Section 106.8(b) and (c) Nondiscrimination Policy, Grievance Procedures, and Notice of Nondiscrimination

General Support and Opposition

Comments: The Department notes that proposed § 106.8(c)(i)–(v) have been redesignated as § 106.8(c)(i)(A)–(E) in these final regulations, and the following comment summaries and discussion generally refer to these provisions in their final forms. Several commenters supported proposed changes that would clarify and streamline requirements for a recipient to adopt and publish a policy prohibiting sex discrimination, comprehensive nondiscrimination policies, and grievance procedures for the equitable resolution of complaints of all forms of sex discrimination. Other commenters appreciated proposed changes that would clarify and streamline the administrative requirements around grievance procedures and notices.

Several commenters noted the importance of informing students of their rights and how to assert them as a means of ensuring that students can be free from sex discrimination in a recipient's education program or activity. Some commenters also supported providing information on how to report sex discrimination and how to access grievance procedures, including the name and specific contact information of a recipient's Title IX Coordinator, so that individuals are aware of a recipient's Title IX policies and how to report sex discrimination and can therefore resolve outstanding issues with a recipient.

Some commenters found the proposed requirements that a recipient adopt grievance procedures burdensome and unnecessary. One commenter criticized that recipients have had to adopt lengthier sex-discrimination policies to conform with the Department's changing Title IX regulations and asserted that the Department's changing positions make it difficult for a recipient to ensure its community understands what Title IX requires.

Discussion: Requiring a recipient to adopt, publish, and implement nondiscrimination policies, grievance procedures, and notices of nondiscrimination is critical to ensuring that students and others are protected from sex discrimination. Providing this information, including how to report allegations of sex discrimination and contact the Title IX Coordinator, will make members of recipient

communities safer and more aware of their rights and recipient obligations.

After careful consideration of public comments and based on its own enforcement experience, the Department maintains that requiring one grievance procedure (meaning one, or a set of, recipient procedures that are consistent with the requirements of § 106.45, and if applicable § 106.46) with additional requirements related to sex-based harassment complaints involving a student at a postsecondary institution, is the best approach to ensure that a recipient handles all sex discrimination promptly and equitably while allowing enough flexibility to enable a recipient to account for its educational environment (such as an elementary school, secondary school, community college, online college, or research university).

The Department disagrees that the final regulations related to a recipient's nondiscrimination notice, policies, and grievance procedures are unduly burdensome. Recipients should already have some form of notices and procedures in place because they have been required to maintain nondiscrimination notices and grievance procedures since 1975. 40 FR 24139. The Department appreciates that having clear, preestablished, and publicized policies and procedures is an essential element of ensuring a fair process for all. Congress assigned to the Department the responsibility to ensure full implementation of Title IX, and the authority for the final regulations, including publication of grievance procedures, stems from that congressional allocation of responsibility. The Department appreciates the importance of having regulations that are clear and easy for a recipient to implement. The Department determined that these revisions will help a recipient comply with Title IX, including by ensuring the school community is aware of Title IX rights and obligations. For additional discussion of costs associated with the final regulations, see the *Regulatory Impact Analysis.*

A recipient's obligation does not end with adoption and publication of a nondiscrimination policy and grievance procedure; a recipient must actually implement both. Therefore, the Department revised § 106.8(b)(1) and (2) to refer to implementation. The Department clarifies that the addition of the word ''implement'' is simply to ensure that nothing in § 106.8(b) relieves a recipient of its responsibility to comply with Title IX or its regulations. It does not create additional duties beyond those specified in Title IX or its regulations. In § 106.8(b)(2), the Department changed ''third parties'' to ''other individuals'' to align with the removal, in response to commenter confusion, of the term ''third party'' from the description of who can make a complaint of sex discrimination in final § 106.45(a)(2)(iv). In the interest of clarity, the Department also revised § 106.8(b)(2) to clarify that a recipient's grievance procedures apply to complaints alleging any action prohibited by Title IX ''or'' this part, and that an alleged action need not be expressly prohibited by both the statute and regulations.

Changes: The Department has revised § 106.8(b)(1) and (2) to specify that a recipient must ''implement'' its Title IX nondiscrimination policy and grievance procedures, and § 106.8(b)(2) to state that a recipient's grievance procedures apply to complaints alleging any action prohibited by Title IX ''or'' this part. We also replaced ''third parties'' with ''other individuals'' in § 106.8(b)(2) and simplified the heading for § 106.8 to omit ''adoption and publication of.''

Requests To Add Protected Bases and Other Information in § 106.8(b) and (c)

Comments: Some commenters asked the Department to require a recipient to include additional information in its nondiscrimination policy, grievance procedures, and notice of nondiscrimination, such as additional protected bases (*e.g.,* pregnancy or related conditions, sex-based distinctions related to parental status, gender identity), specific applications of Title IX, and a statement that individuals may have rights under other Federal, State, or local laws. Commenters stated that this additional information would notify individuals of their rights and how to make a complaint under Title IX; inform educators and administrators of their Title IX responsibilities; decrease sex-based harassment; increase student reports of sex discrimination; and increase the effectiveness of recipient responses to reports of sex discrimination.

Discussion: As set forth in § 106.8(c)(1), the notice of nondiscrimination, which must be published in accordance with § 106.8(c)(2), notifies individuals of rights protected by Title IX and how to make a report or a complaint under Title IX. In the Department's view, this notice will sufficiently inform individuals of their rights and how to make a complaint under Title IX. Similarly, the required notice, in addition to training required under § 106.8(d), will sufficiently inform educators and administrators of their Title IX responsibilities and adequately support reporting of sex discrimination, including sex-based harassment, which in turn will help ensure that a recipient can effectively respond. The Department's rulemaking authority is based on Title IX and the Department does not have authority to require a recipient to publish a notice of rights under State or local laws. The Department determined that the interest in having a concise and accessible notice outweighs the interest in including more granular information about Title IX. However, nothing in the final regulations precludes a recipient from enumerating the bases of sex discrimination prohibited by Title IX or State or local laws in its notice of nondiscrimination.

Changes: None.

Requests To Add Additional Information in the Grievance Procedures or Notice of Nondiscrimination

Comments: The Department notes that proposed § 106.8(c)(i)–(v) have been redesignated as § 106.8(c)(i)(A)–(E) in these final regulations, and the following comment summaries and discussion generally refer to these provisions in their final forms.

Some commenters asked the Department to consider requiring additional information in the grievance procedures or notice of nondiscrimination by, for example, addressing the status of postdoctoral trainees, who are not employees; stating that a complainant is not required to exhaust administrative remedies with the recipient before filing a complaint with OCR; and requiring proof of Title IX training. Commenters also suggested changes that they asserted would improve the clarity of § 106.8(b)(2) and (c), such as changing the word ''attempting'' to ''applying'' in reference to third parties who are attempting to participate in the recipient's education program or activity.

Other commenters felt the proposed notice of nondiscrimination was too long.

Discussion: The Department has considered commenters' suggestions to include additional information and make changes to § 106.8(b)(2) and (c). Except as described below, the Department declines these suggestions because they would create unnecessary burdens, would not improve clarity, or are unnecessary to further Title IX's purposes.

The Department appreciates the opportunity to clarify that § 106.8(b)(2) is not limited to employee complaints and requires a recipient to state that its

grievance procedures apply to the resolution of complaints made by students, employees, or by other individuals who are participating or attempting to participate in the recipient's education program or activity. *See* final §§ 106.2 (definition of ''complainant''), 106.8(b)(2), 106.45(a)(2). Whether a postdoctoral trainee is an employee is a fact-specific inquiry, but regardless of the outcome, they would likely still be entitled to make a complaint under a recipient's grievance procedures if they are participating or attempting to participate in its education program or activity. The Department appreciates the opportunity to clarify that Title IX does not require a complainant to exhaust administrative remedies with a recipient prior to filing a complaint with OCR. However, the Department declines to require additional language in the notice of nondiscrimination because § 106.8(c)(1)(i)(B) makes clear that inquiries about the application of the final regulations may be referred to ''the recipient's Title IX Coordinator, the Office for Civil Rights, or both'' and the Department has never required an individual exhaust a recipient's administrative processes before filing a complaint with OCR.

The Department also declines to require proof of training in a recipient's notice of nondiscrimination. A recipient is subject to training requirements under § 106.8(d) of the final regulations, which includes a requirement for periodic and ongoing training. If the Department required the notice of nondiscrimination to include proof of training, a recipient would have to update it frequently to maintain its accuracy, which would be burdensome and unnecessary.

The Department declines the commenter's suggestion to revise the term ''attempting'' in § 106.8(b)(2) to ''applying'' because ''attempting to participate'' better encompasses the broad circumstances in which a person might try to access a recipient's education program or activity. As the Department explained in the 2020 amendments, persons who have applied for admission or have withdrawn from a recipient's program or activity but indicate a desire to re-enroll if the recipient appropriately responds to sex-based harassment allegations may be properly understood as ''attempting to participate'' in the recipient's education program or activity. 85 FR 30198, n. 869. The term ''applying'' would inappropriately narrow the provision's application.

The notice of nondiscrimination in the final regulations appropriately informs the recipient's community of relevant Title IX policies and procedures and how to learn more or enforce their rights. As discussed above, the Department declined commenters' suggestions to include additional information that would be burdensome or unnecessary and maintains that the requirements for the notice strike the right balance between providing necessary information without being overly lengthy and cumbersome. But the Department has considered commenters' suggestions on ways to improve clarity in the notice of nondiscrimination and has determined that reorganizing § 106.8(c) will provide the needed clarity. Specifically, the Department has consolidated the requirements specifying that the notice of nondiscrimination must include information on how to locate the recipient's nondiscrimination policy under § 106.8(b)(1) and the recipient's grievance procedures under § 106.8(b)(2) into the same paragraph—*i.e.,* final § 106.8(c)(1)(i)(D). The Department further reorganized § 106.8(c) to improve clarity by grouping similar topics together and deleted references to §§ 106.45 and 106.46 from § 106.8(c)(1)(i)(D) to avoid redundancy as coverage of these sections is implied by the reference to grievance procedures under 106.8(b)(2).

Changes: The Department has revised § 106.8(c)(1)(i)(D) and (E) (which is similar to § 106.8(c)(1)(iv) and (v) in the proposed regulations) to now contain all notice of nondiscrimination requirements regarding where to find the recipient's nondiscrimination policy and grievance procedures. The Department has further revised final § 106.8(c)(1)(i)(D) to omit the phrase ''§ 106.45, and if applicable § 106.46.''

Free Speech and Religious Exemptions

Comments: Some commenters opposed the requirement that a recipient adopt and publish a notice of nondiscrimination, asserting that it would infringe on the free speech rights of a recipient that follows religious tenets that conflict with the proposed regulations. Some commenters argued that the Department should either require or permit a recipient with a religious exemption to disclose it in the recipient's notice of nondiscrimination. Some commenters argued that failure to acknowledge a religious exemption could cause a notice to be inaccurate or misleading.

Discussion: The Department notes that proposed § 106.8(c)(i)–(v) has been redesignated as § 106.8(c)(i)(A)–(E) in these final regulations, and the following comment summaries and discussion generally refer to these provisions in their final forms.

Title IX's purpose is to eliminate sex discrimination in federally funded education programs and activities. *See Cannon* v. *Univ. of Chi.,* 441 U.S. 677, 704 (1979) (''Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.''). Likewise, § 106.8, which contains the administrative requirements related to Title IX's nondiscrimination mandate, effectuates that purpose and does not require the suppression of speech or expression.

The Department disagrees that the required contents of a recipient's notice of nondiscrimination renders the notice inaccurate for a recipient that qualifies for a religious exemption. A recipient's nondiscrimination obligation may be limited by various exceptions and limitations in the statute, such as limited application of the prohibition on discrimination in admissions, 20 U.S.C. 1681(a)(1), the religious exemption, 20 U.S.C. 1681(a)(3), and the exception for membership practices of social fraternities and sororities, 20 U.S.C. 1681(a)(6). With respect to the religious exemption, Title IX expressly states that it ''shall not apply'' to an educational institution controlled by a religious organization to the extent compliance would be inconsistent with the religious tenets of such organization. 20 U.S.C. 1681(a)(3); *see also* 34 CFR 106.12(a). Under § 106.8(c)(1)(i)(A) of the final regulations, the notice of nondiscrimination appropriately limits its application to the obligations with which a recipient is ''required by Title IX and this part'' to comply. This qualifying language recognizes that some recipients are exempt from Title IX in whole or in part due to statutory and regulatory exemptions, including the religious exemption.

The Department declines commenters' suggestion that the Department amend the regulations to require a recipient to address its eligibility for a religious exemption in its notice of nondiscrimination. Requiring a recipient to include information about a religious exemption in its notice of nondiscrimination would be impractical given the fact-specific nature of the intersection between particular Title IX requirements and particular religious tenets. Such a requirement would be inconsistent with the Department's longstanding

interpretation that the statutory religious exemption applies regardless of whether a recipient has sought advance assurance from OCR or notified the public of its intent to rely on the exemption. *See* 34 CFR 106.12(b); 85 FR 30475–76. For additional information on Title IX's religious exemption, see the discussion of Religious Exemptions (Section VII.C).

The Department recognizes that a recipient's notice of nondiscrimination may include qualifying language if the recipient intends to assert a religious exemption to particular provisions of the Title IX regulations. The Department has therefore added language to make clear that a recipient may, but is not required to, include information about any applicable exemptions or exceptions in its notice.

Changes: The Department has added a provision in § 106.8(c)(1)(ii) to clarify that a recipient is not prevented from including information about any exceptions or exemptions applicable to the recipient under Title IX in its notice of nondiscrimination.

Publication of Notice of Nondiscrimination (§ 106.8(c)(2))

Comments: Some commenters opposed as burdensome, duplicative, and impractical the proposed requirement that a recipient include its notice of nondiscrimination in each handbook, catalog, announcement, bulletin, and application form. Commenters offered a variety of changes to the publication requirement, including other methods to publish the notice of nondiscrimination, which commenters suggested would improve clarity.

Other commenters objected to permitting a recipient to post its notice of nondiscrimination solely on a website, arguing that web-posting would not be accessible to everyone and could prevent low-income, transient, or English language learner populations from accessing this information. Some commenters suggested the Department require a recipient to publish its notice of nondiscrimination and grievance procedures in English and Spanish; in a simple, clear, step-by-step manner at an appropriate reading level; and in an accessible format.

Some commenters suggested the Department require a recipient to provide notice to all stakeholders but not delineate the manner for doing so, so that a recipient can consider varying State law requirements. Other commenters argued that it is impractical for a recipient to include multiple notices required under other Federal and State laws in every announcement or bulletin.

Discussion: A notice of nondiscrimination must be widely accessible to achieve Title IX's objectives, and multiple modes of communication may assist stakeholders in accessing this information. To that end, the final regulations at § 106.8(c)(2) restore the longstanding requirement that existed from 1975 until 2020 that a recipient publish the notice of nondiscrimination in its handbooks, catalogs, announcements, bulletins, and application forms to increase awareness. *See* 87 FR 41427–28. Restoring this until-recently-applicable requirement will enable a recipient to comply with the final regulations with minimal burden and, given this minimal burden, any reliance interest is minimal.

Recognizing commenter concerns about burden, duplication, and impracticability, the Department notes that the final regulations at § 106.8(c)(2) account for space and format limitations and provide a recipient flexibility by giving it the option to provide a shorter version of the notice of nondiscrimination, if necessary. *See* § 106.8(c)(2)(ii). The short-form notice—which may be a one-sentence statement that the recipient prohibits sex discrimination in any education program or activity that it operates and that individuals may report concerns or questions to the Title IX Coordinator, plus a link to the full notice of nondiscrimination on the recipient's website—provides the minimum information necessary to ensure that the recipient's community members are aware of a recipient's Title IX obligations without unduly burdening the recipient. In addition, a recipient may include its notice of nondiscrimination in its handbooks, catalogs, announcements, bulletins, and application forms in the same manner it makes those materials available (*i.e.,* in print if it distributes those materials in print, and electronically if it maintains those materials only electronically).

The Department agrees with commenters who highlighted a recipient's obligations to ensure meaningful access for students, parents, and others with limited English proficiency or who may not have ready access to information on a website. The Department further agrees that individuals with disabilities and those with limited English proficiency may face additional barriers to accessing information related to Title IX. In connection with the concern that people who do not have access to the internet may not be able to access this information, the final regulations adequately ensure access because § 106.8(c)(2) requires a recipient to publish its notice in handbooks, catalogs, announcements, bulletins, and application forms, in addition to its website.

The Department emphasizes that a recipient is responsible for complying with its obligations under all applicable Federal laws, including those prohibiting discrimination on the basis of disability or national origin. Because these other laws are distinct authorities, however, the Department does not specify these separate obligations in its Title IX regulations. Moreover, because a recipient's obligation to provide information that is accessible to individuals with disabilities and those with limited English proficiency is addressed under other laws such as Title VI and Section 504, it is unnecessary and duplicative to include the same or similar obligations under Title IX as well, as some commenters suggested.

The Department acknowledges commenters' suggestion that a recipient be required to use language in their Title IX policy, grievance procedures, and notice of nondiscrimination that is clear and accessible for students and others in the recipient's community. The final regulations leave a recipient discretion in how it drafts its policy, grievance procedures, and notice of nondiscrimination to ensure it is accessible to the school community. Anyone who believes that a recipient is not communicating effectively with individuals with disabilities or limited English proficiency may file a complaint with OCR. While the requirements of § 106.8(c)(2) will provide communities with appropriate notice of a recipient's Title IX obligations, the final regulations do not bar a recipient from additionally posting its notice of nondiscrimination in a public location at each school or building the recipient operates, sharing it at specific events, or re-distributing it annually. Likewise, nothing in these final regulations prohibits a recipient from identifying other ways, in addition to the recipient's website, that students, parents, and others can access the full notice, if only the short-form notice is used in print.

The final regulations' posting requirement is necessary so that students, their parents or guardians, or other legal representatives as appropriate, employees, and others who seek to participate in a recipient's education program or activity have access to information about Title IX whenever they might need it. Section 106.8(c)(2) may be broader than other State or Federal notice requirements

that relate only to employees because a recipient needs to reach the entire school community, including those who join midway through or for only a limited part of the school year. Although recipients may be subject to requirements under other Federal or State laws, the Department has determined that the requirements in § 106.8(c)(2) are necessary to effectuate Title IX's nondiscrimination mandate. While the Department agrees that Title IX does not itself require a recipient to issue notices mandated under any other law, including State laws, it is unnecessary to address obligations under other laws in the final Title IX regulations.

The Department made minor revisions to § 106.8(c)(2)(ii) for improved clarity and precision.

Changes: The Department revised § 106.8(c)(2)(ii) to change the first reference to ''paragraph (c)(2)'' to ''paragraph (c)(2)(i),'' to replace the phrase ''comply with paragraph (c)(2) of this section by including'' with ''include,'' and to change the word ''providing'' to ''provide.''

3. Section 106.8(d) Training

Benefits, Time, and Expense of Training

Background: Section 106.8(d)(1) requires all employees to be trained on the recipient's obligation to address sex discrimination in its education program or activity, the scope of conduct that constitutes sex discrimination under Title IX, including the definition of ''sex-based harassment,'' and all applicable notification and information requirements under §§ 106.40(b)(2) and 106.44. Additionally, § 106.8(d)(2) requires all investigators, decisionmakers, and other persons responsible for implementing the recipient's grievance procedures or who have the authority to modify or terminate supportive measures to also be trained on the recipient's obligations under § 106.44; the recipient's grievance procedures under § 106.45, and if applicable § 106.46; how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and the meaning and application of the term ''relevant'' in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance under § 106.45, and if applicable § 106.46. Under § 106.8(d)(3), facilitators of the informal resolution process must also be trained on the rules and practices associated with the recipient's informal resolution process and how to serve impartially, including by avoiding conflicts of interest and bias. Finally, Title IX Coordinators and their designees must also be trained on their specific responsibilities under §§ 106.8(a), 106.40(b)(3), 106.44(f), 106.44(g), the recipient's recordkeeping system and the requirements of § 106.8(f), as well as any other training necessary to coordinate the recipient's compliance with Title IX.

Comments: Commenters generally supported the training requirements in proposed § 106.8(d), stating that the requirements would ensure uniformity in how recipients recognize and respond to notice of sex discrimination, require all employees to be well-informed about Title IX, help all employees clearly identify incidents of sex discrimination, and help create a safe and supportive learning environment for students.

Some commenters opposed the training requirements, reasoning that they would require significant time and funding, including to change and expand trainings, identify and purchase comparable training sources, track changes to training mandates, revise policy manuals, and identify and train employees.

Some commenters noted that they had recently paid for training updates stemming from the 2020 amendments and would need additional funding for any new updates. Some commenters stated that the training requirements in proposed § 106.8(d), which differ depending on employee role and reporting requirements, are vague and would be confusing and burdensome to implement, particularly given that larger recipients often onboard large numbers of employees within a short period of time and have many employees in temporary roles, and suggested that a recipient be given flexibility to determine which personnel need to be trained. One commenter asked the Department to clarify whether reasonable exceptions for training are allowed for short-term substitute employees, limited term positions, or other special circumstances.

Discussion: The Department acknowledges commenters' support for the training requirements in § 106.8(d), which will enable a recipient and its employees to consistently identify and address sex discrimination in accordance with their responsibilities under Title IX and these final regulations. The Department's own enforcement experience, which commenters reinforced, confirms that inadequate training can lead to improper responses to sex discrimination. The Department acknowledges that the training requirements in the final regulations will require recipients' time and effort to update training materials and conduct additional training. But the Department concludes that the training requirements in § 106.8(d) are necessary to align a recipient's Title IX training responsibilities with the recipient's overall obligations under these final regulations. 87 FR 41428–29.

While the Department understands that recipients will need to dedicate some additional resources to train employees under § 106.8(d), the benefits of comprehensive training outweigh the additional minimal costs. These benefits include ensuring that all employees receive training on aspects of Title IX that are relevant and critical to their specific roles, that those most likely to interact with students in their day-to-day work have the training necessary to understand their role in ensuring a recipient's Title IX compliance, and that all persons involved in implementing a recipient's grievance procedures and the informal resolution process are clearly designated and trained on conducting a fair process. Each of these benefits, in turn, will help ensure that members of a recipient's community are not discriminated against on the basis of sex and have equal access to the recipient's education program or activity. The Department therefore declines to adopt any exceptions to the training requirements. For additional discussion of benefits and costs associated with the training requirements in the final regulations, see the *Regulatory Impact Analysis.*

In accordance with the Regulatory Flexibility Act, the Department has reviewed the potential effects of the final regulations, including the training requirements, on all recipients, including small entities. As discussed in the final *Regulatory Flexibility Analysis,* the Department does not expect that these final regulations will place a substantial burden on small entities. Similarly, these final regulations do not unreasonably burden entities that have a large number of temporary employees, such as adjunct faculty, because such institutions already have to train temporary employees on institutional policies and applicable laws. As discussed above, training on Title IX's requirements to address sex discrimination is of paramount importance, is a condition of a recipient's receipt of Federal funds, and is justified to help a recipient provide an educational environment free from sex discrimination.

The Department acknowledges that some commenters would prefer more flexibility in training obligations but has determined that the benefits of

prescribed training requirements outweigh their concerns. The Department notes that § 106.8(d) provides a recipient flexibility to structure and staff training in the way that works best for its educational community and accounts for its available resources, as long as a recipient meets the training requirements in § 106.8(d). The Department further notes that the regulations do not require a recipient to hire outside trainers or purchase outside training materials, but that a recipient may choose to do so. The Department declines to require certain training practices or techniques, aside from the requirements of § 106.8(d), to allow a recipient flexibility to determine how to meet training requirements in a manner that best fits its unique educational community.

The Department acknowledges commenters' concerns about the time needed to implement new training requirements. As explained in the discussion of Effective Date and Retroactivity (Section VII.F), the Department has carefully considered these concerns, and recognizes the practical necessity of allowing recipients sufficient time to plan for implementing these final regulations, including, to the extent necessary, time to amend their policies, procedures, and trainings. In response to commenters' concerns such as these and for reasons described in the discussion of Effective Date and Retroactivity (Section VII.F), the Department has determined that the final regulations are effective August 1, 2024.

Changes: The effective date of these final regulations is August 1, 2024.

Frequency of Training

Comments: Several commenters asked the Department to clarify how often training must be conducted and whether a recipient would be required to retrain employees when their duties shift. The commenters noted that, for many recipients, employee job duties frequently change.

Discussion: The Department acknowledges commenters' concerns about whether a recipient is required to retrain employees when their duties shift. The purpose of the Department's training requirements is to ensure that all personnel directly involved in carrying out the recipient's Title IX duties are trained in a manner that promotes compliance with Title IX and these final regulations. The Department has therefore concluded that a revision to the proposed regulatory text is necessary to help ensure this compliance and give employees the tools they need to perform their duties as required under Title IX and the final regulations. The Department has revised § 106.8(d) to require employees who receive a change of position that alters their duties under Title IX or the final regulations to receive training on such new duties promptly upon such change of position.

The Department is also persuaded that more specificity is required based on commenters' questions about the timing and frequency of training under § 106.8(d). For this reason, the Department has revised this provision to specify that all persons identified as requiring training under § 106.8(d) must receive training related to their responsibilities promptly upon hiring or change of position, and annually thereafter. The requirement to conduct training promptly upon hiring or change of position and on an annual basis thereafter preserves flexibility for recipients to comply with this provision while also ensuring that all persons who require training remain informed of their obligations and responsibilities under Title IX. The Department notes that this revision is consistent with the Department's assumption, as previously stated in the July 2022 NPRM, that all employees of a recipient receive required trainings each year. 87 FR 41552.

Changes: The Department has revised § 106.8(d) to clarify that persons who must receive training related to their duties under § 106.8(d) receive such training promptly upon hiring or change of position that alters their duties under Title IX or this part, and annually thereafter. For consistency with the other provisions of these regulations, the Department has also modified § 106.8(d)(1)(ii) to include ''Title IX and'' before ''this part[.]'' The Department has also changed ''106.44(f) and 106.44(g)'' to ''106.44(f) and (g)[.]''

Impartiality in the Grievance Process

Comments: Commenters supported proposed § 106.8(d)(2)–(4) for a variety of reasons, including that the training requirements that apply to investigators, decisionmakers, Title IX Coordinators and their designees, and other persons responsible for implementing a recipient's grievance procedures assist a recipient in establishing grievance procedures that are fair and equitable and facilitates the aims of Title IX.

Some commenters expressed concern that proposed § 106.8(d)(2)–(4) would not be sufficient to prevent bias in grievance procedures and protect due process. Commenters asserted that trainings should be factually accurate and should emphasize due process protections to ensure the objectivity of those involved in a recipient's grievance procedures. One commenter expressed concern that training is insufficient to prevent bias in Title IX Coordinators because they believed that individuals drawn to such roles have biases against respondents who are men.

Discussion: The Department agrees that the training required under § 106.8(d)(2)–(4) supports Title IX grievance procedures that are fair and equitable for all parties. The Department also acknowledges commenters' concerns regarding avoiding bias in Title IX grievance procedures and notes that the final regulations mandate that grievance procedures be free from bias and include several requirements, in addition to training to achieve this mandate. For example, §§ 106.44(f)(1)(i) and 106.45(b)(1) require that a Title IX Coordinator and a recipient's grievance procedures treat a complainant and respondent equitably; §§ 106.44(k)(4) and 106.45(b)(2) require that any person designated as a Title IX Coordinator, investigator, decisionmaker, or facilitator of an informal resolution process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent; and § 106.46(i)(1)(iii) requires that an appeal following a grievance procedure or dismissal must be offered if there is an allegation that the Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome.

To be clear, training is an important component of a recipient's obligation to ensure that grievance procedures are impartial. To that end, § 106.8(d) specifically states that training must not rely on sex stereotypes, including for investigators, decisionmakers, and Title IX Coordinators and their designees; § 106.8(d)(2)(iii) requires all investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures be trained on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and § 106.8(d)(3) requires all facilitators of an informal resolution process under § 106.44(k) to be trained on the rules and practices associated with the recipient's informal resolution process and on how to serve impartially, including by avoiding conflicts of interest and bias. In addition to these training requirements, the final regulations adopt §§ 106.44, 106.45, and

106.46 to ensure that a recipient's response to complaints of sex discrimination is free from bias. The Department agrees that trainings should be factually accurate and cover, as applicable to the training, the protections in the grievance procedures to ensure a fair process.

When there is indication that a recipient has failed to comply with any of the requirements in the final regulations, including those related to recordkeeping, training, conflicts of interest or bias, and treating complainants and respondents equitably, a complaint may be filed with OCR. 34 CFR 100.7(b).

The Department has long recognized Title IX to require that training materials and trainers, as well as recipient staff, operate without bias. The Department has addressed such biases when identified in OCR investigations of alleged sex discrimination under Title IX. As discussed above, the Department continues to decline to recommend certain training practices or techniques aside from the requirements of § 106.8(d), leaving flexibility to a recipient to determine how to meet training requirements in a manner that best fits the recipient's unique educational community. The Department notes that § 106.8(f) requires a recipient to make training materials available for public inspection upon request, which provides appropriate public accountability and transparency.

Changes: None.

Additional Training Topics

Comments: Several commenters suggested that § 106.8(d) include training on a variety of additional subjects for employees, Title IX Coordinators, investigators, and those who facilitate informal resolutions.

Some commenters requested that the Department require training on trauma-informed responses to complaints of sex-based harassment, noting that trauma-informed responses can encourage complainants to move forward with the Title IX process, assist with healing, and prevent re-traumatizing a complainant. Other commenters, however, suggested that trauma-informed training can introduce biases in favor of the complainant and opposed such training, particularly for decisionmakers.

Discussion: The Department appreciates commenters' views on whether to expand required training topics in § 106.8(d), such as training on trauma-informed practices. The Department has determined that § 106.8(d) strikes the appropriate balance between requiring training topics that are necessary to promote a recipient's compliance with these final regulations while leaving as much flexibility as possible to a recipient to choose the content and substance of training topics in addition to those mandated by this provision. The final regulations include appropriate protections against conflicts of interest and bias; mandate trainings on impartiality, conflicts of interest, and bias; and preclude training from relying on sex stereotypes. A recipient has flexibility to choose how to meet these requirements in a way that best serves the needs and values of its community, including by selecting best practices, including trauma-informed practices, that meet or exceed the legal requirements imposed by these final regulations.

Changes: None.

Individuals To Be Trained

Comments: Some commenters suggested expanding the categories of staff who must be trained under § 106.8(d) to include, for example, advisors, volunteers, contractors, and third-party agents who provide aid to a recipient, such as athletic coaches or extracurricular coordinators.

Some commenters also requested that the Department require recipients to train students and parents on how to report incidents of sex discrimination and how to support other students experiencing sex discrimination.

Some commenters asked the Department to clarify whether proposed § 106.8(d) would require a recipient to train all employees, or if it would be sufficient to make training available to all employees; how a recipient should treat graduate students; and how a recipient should ensure that all employees receive training, noting that collective bargaining agreements may govern a recipient's ability to require and enforce attendance at a training.

Discussion: Section 106.8(d)(1) requires all employees to be trained on a recipient's obligation to address sex discrimination in its education program or activity, the scope of conduct that constitutes sex discrimination, and all applicable notification and information requirements under §§ 106.40(b)(2) and 106.44; and further requires all personnel directly involved in carrying out the recipient's Title IX duties to be trained in a manner that promotes a recipient's compliance with these final regulations. The Department notes that this would include any advisors, graduate students, contractors, volunteers, or third-party agents who are performing roles that are directly involved in carrying out the recipient's Title IX duties. The Department declines to further mandate training for advisors, graduate students, volunteers, contractors, and third-party agents not directly involved in carrying out the recipient's Title IX duties and who are not employees because the benefit of doing so would not be justified by the cost that training this population would impose on a recipient. But the Department notes that under the wide variety of employment or associational arrangements and circumstances in place across recipients, as well as variations in applicable State employment laws, many of these individuals may constitute employees who must be trained under § 106.8(d). The Department also reiterates that nothing within the final regulations prohibits a recipient from choosing to train volunteers, contractors, third-party agents, or other non-employees if such training will further the recipient's compliance with these final regulations.

For clarity in the first sentence of § 106.8(d), the Department has changed the phrase ''the persons described below'' to ''the persons described in paragraphs (f)(1) through (4) below.''

The Department acknowledges commenters' support for the value of educating parents and students on sex discrimination. The training in these final regulations is limited to training of recipient employees. Nothing in these final regulations impedes a recipient's discretion to provide educational information to students and parents. The Department also notes that information about a recipient's Title IX policies and procedures will be made publicly available in other ways consistent with the requirements of § 106.8(b).

The Department appreciates the opportunity to clarify that § 106.8(d) requires a recipient to train all employees, as opposed to just making training available. While the Department recognizes that some commenters may find this burdensome, the requirement to train all employees serves the important purpose of ensuring that all employees understand their role in the recipient's compliance with its Title IX obligations and understand their responsibilities when they obtain information about conduct that may reasonably constitute sex discrimination under Title IX. For a discussion of the estimated costs of implementation, see the *Regulatory Impact Analysis.*

The Department notes that many recipients are already subject to State laws that require training for all employees on issues such as child abuse prevention, sexual harassment, and

mandatory reporting. As the Department previously stated in the July 2022 NPRM, the Department assumes that all employees of a recipient receive required trainings each year and that the training required under § 106.8(d) is likely to be incorporated into those existing training sessions. 87 FR 41552. For this reason, and other reasons discussed in the *Regulatory Impact Analysis,* the Department anticipates that the requirement to train all employees will not meaningfully change the overall annual burden from the 2020 amendments related to training requirements for recipient employees. The Department disagrees that collective bargaining agreements preclude offering and enforcing training to employees who belong to a union. The Department notes that the 2020 amendments required a recipient to train employees regardless of whether such employees were members of a union. *See* 34 CFR 106.45(b)(1)(iii).

Changes: In the first sentence of final § 106.8(d), the Department has inserted ''in paragraphs (d)(1) through (4)'' in between ''persons described'' and ''below.''

Training on Definition of ''Sex-Based Harassment''

Comments: Several commenters opposed the proposed requirement in § 106.8(d)(1)(ii) that all employees be trained on the definition of ''sex-based harassment.'' Commenters asserted that the Department lacks the statutory authority to mandate such training, particularly for students, and objected to the Department's definition of ''sex-based harassment.''

Discussion: Training on the definition of ''sex-based harassment'' under § 106.8(d)(1)(ii) applies only to employee training and does not require a recipient to provide training or instructional content on the definition of ''sex-based harassment'' or sex discrimination to students. Comments objecting to the definition of ''sex-based harassment'' are addressed in the discussion of the definition of ''sex-based harassment'' in § 106.2. The Department declines to remove the requirement that all employees be trained on the definition of ''sex-based harassment'' under § 106.8(d)(1)(ii) because such training is an essential component of a recipient's ability to identify and address conduct that constitutes sex discrimination.

The Department disagrees that requiring training on the definition of ''sex-based harassment'' exceeds the Department's statutory authority under Title IX. The Department is authorized to promulgate regulations to effectuate the purpose of Title IX, including by requiring training on the definition of ''sex-based harassment.'' *See* 20 U.S.C. 1682. This training requirement furthers Title IX's nondiscrimination mandate and ensures that a recipient appropriately addresses sex discrimination occurring in its education program or activity. *See, e.g., Doe* v. *Fairfax Cnty. Sch. Bd.,* 1 F.4th 257, 267 (4th Cir. 2021) (reasoning that ''Congress's goal of protecting students from sex discrimination in education'' necessarily entails that schools adequately train their staff to identify instances of sexual harassment), *cert. denied,* 143 S. Ct. 442 (2022).

Changes: None.

Training on Notification Requirements for Pregnancy or Related Conditions

Comments: Commenters generally supported the requirement in proposed § 106.8(d)(1)(iii) that a recipient train employees regarding their obligations under § 106.40(b)(2) to students who are pregnant or experiencing pregnancy-related conditions. Some commenters objected to § 106.8(d)(1)(iii), asserting that it would be unduly burdensome, very few employees will receive pregnancy disclosures from students, and the training obligation should be limited to employees in student-facing roles.

Discussion: The Department acknowledges commenters' support of proposed § 106.8(d)(1)(iii), which requires a recipient to train employees on the requirement to promptly provide a student (or person who has a legal right to act on behalf of the student) with the Title IX Coordinator's contact information upon being informed of the student's pregnancy or related conditions. By explicitly requiring a recipient to train its employees regarding the recipient's obligations under §§ 106.40(b)(2) and 106.44, the final regulations will help ensure that students are not discriminated against based on pregnancy or related conditions, that complaints will be handled promptly, and that students who are pregnant or experiencing pregnancy-related conditions [28] have equal access to the recipient's education program or activity as required under Title IX.

Even though Title IX regulations have prohibited discrimination based on pregnancy or related conditions since 1975, feedback that the Department received during its June 2021 Title IX Public Hearing, in meetings held in 2022, and in the comments in response to the July 2022 NPRM, demonstrated that many employees and students were unaware of these protections, and that discrimination based on pregnancy or related conditions persists. *See* 87 FR 41513. For a recipient to address sex discrimination based on pregnancy or related conditions, the Department has determined that some training is warranted for all employees to help ensure that students understand their option to contact a Title IX Coordinator.

The Department acknowledges that not all employees have student-facing roles, but an employee's role can evolve over time and whether a student is comfortable disclosing pregnancy or related conditions, or resulting discrimination or harassment, to any particular employee—student facing or not—will vary. As such, students may disclose pregnancy or related conditions to employees beyond teachers, professors, Title IX Coordinators, and other employees who have traditionally student-facing roles. By requiring all employees to be trained on the limited, but important, notification requirements, any employee will be able to provide a student (or a person who has a legal right to act on behalf of a student) with the same information.

The Department emphasizes that the information that employees must be trained on is modest and can be incorporated into already-required training sessions. For most employees, the training will consist of how to: (1) promptly notify a student who informs them of their pregnancy or related conditions, or a person who has a legal right to act on behalf of a student and who so informs them, that the Title IX Coordinator can take specific actions to prevent sex discrimination and ensure the student's equal access to the education program or activity, and (2) share the Title IX Coordinator's contact information. *See* § 106.40(b)(2).

Changes: None.

Live Trainings

Comments: Commenters requested that the Department clarify whether trainings must be in a live or interactive format, and some requested that the Department require a recipient to conduct live training.

Discussion: As discussed in the 2020 amendments, the final regulations do not require training to be conducted in-person and do not preclude trainings from being conducted online or virtually, either synchronously or asynchronously. 85 FR 30560. The Department declines to mandate a

[28] The Department notes that this preamble uses the terms ''pregnancy or related conditions'' and ''pregnant or experiencing pregnancy-related conditions'' interchangeably to mean any condition covered under the definition of ''pregnancy or related conditions'' in final § 106.2.

particular method of providing training and reiterates its intent to provide recipients with the flexibility to choose how to meet these requirements in a way that best serves the needs of their community. Regardless of the method of presentation, the training must satisfy the requirements of § 106.8(d).

Changes: None.

Supportive Measures

Comments: Several commenters requested modifications to proposed § 106.8(d)(2) to remove the specific requirement to train those with the authority to modify or terminate supportive measures under § 106.44(g)(4) because the commenters perceived proposed § 106.8(d)(2) to require a recipient to train every employee involved in a supportive measure.

Discussion: The Department declines to remove the requirement in § 106.8(d)(2) that individuals with the authority to modify or terminate supportive measures under § 106.44(g)(4) receive training on specified additional topics. Although a variety of recipient employees may be involved in the implementation of supportive measures, § 106.44(g)(4) addresses a narrow category of employees: those who have authority to modify or reverse a recipient's decision to provide, deny, modify, or terminate supportive measures, such as a dean or principal. Because these individuals play a role in implementing the recipient's grievance procedures and have the responsibility and authority to modify or reverse a recipient's decision concerning a supportive measure, it is necessary to ensure that they are properly trained on the additional topics set forth in § 106.8(d)(2).

Changes: None.

4. Section 106.8(e) Students With Disabilities

General Comments

Comments: Commenters supported proposed § 106.8(e) because it would clarify a recipient's Title IX obligations for students with disabilities; recognize that the requirements of Section 504 and the IDEA must be considered throughout the Title IX grievance procedures; and ensure that students with disabilities have access to all aspects of a recipient's education program or activity, including but not limited to Title IX grievance procedures. Many commenters noted that students with disabilities are frequently overlooked and marginalized; are at an increased risk of experiencing sex discrimination, including sexual violence; and may be more vulnerable to accusations of sexual misconduct because their behaviors may be misunderstood.

Some commenters expressed concern that proposed § 106.8(e) would place an undue burden on an elementary school or secondary school recipient and staff members to arrange additional meetings of the IEP team and the Section 504 team beyond those required for compliance with the IDEA and Section 504. Commenters believed this would create confusion as to the applicability of procedural requirements under those laws. Some commenters requested that the Department modify proposed § 106.8(e) to give recipients more flexibility, such as by not requiring consultation with entire IEP teams or Section 504 teams, permitting a recipient to make case-by-case determinations as to whether consultation is necessary, or allowing a staff member other than the Title IX Coordinator to engage in consultations about students with disabilities. Other commenters suggested that the Department specify the circumstances under which the Title IX Coordinator must hold meetings with the IEP team or Section 504 team.

Finally, some commenters asked the Department to provide technical assistance or issue supplemental guidance regarding the interaction of the Title IX regulations, Section 504, and the IDEA, and one commenter asked the Department to clarify the interaction between proposed § 106.8(e) and FERPA.

Discussion: The Department appreciates the range of opinions expressed by commenters about topics related to the intersection of sex and disability in these regulations. As the Department has recognized previously and as noted by many commenters, students with disabilities experience sex-based harassment in significant numbers, with some populations of students with disabilities at an even higher risk than others. *See* 87 FR 41430; 85 FR 30079. The rights of students with disabilities warrant the attention and concern demonstrated by the obligations set forth in § 106.8(e), and the inclusion of this provision in the final regulations will provide clarity for students with disabilities about what to expect from their educational institutions when they are involved in Title IX grievance procedures as complainants or respondents.

The IDEA and Section 504 protect the rights of students with disabilities in elementary school and secondary school. As explained in the July 2022 NPRM, there are distinctions between each statute's requirements that are essential in other contexts. *See* 87 FR 41430. For purposes of Title IX, however, the implementing regulations for the IDEA and Section 504 require that a group of persons, known as the IEP team or Section 504 team, be responsible for making individualized determinations about what constitutes a free appropriate public education (FAPE) for each student with a disability, which includes issues such as the placement, special education, and related services appropriate for that student's needs. 34 CFR 300.17; 34 CFR 104.33. When an elementary or secondary student with a disability is a complainant or respondent, the Title IX grievance procedures may intersect with the decisions made by an IEP team or Section 504 team about placement or other matters involving the provision of FAPE. Consultation with the Title IX Coordinator in all such situations will help ensure that an elementary school and secondary school recipient does not interfere with the rights of students with disabilities while complying with these final regulations. The Department declines to alter the final regulations to permit a recipient to make case-by-case determinations as to whether this consultation is necessary, as the Department has concluded that this consultation will always be necessary when a student with a disability is a complainant or respondent, to ensure compliance with both Title IX and the relevant Federal disability laws.

Section 106.8(e) does not require IEP or Section 504 meetings, does not mandate consultation with full IEP teams or Section 504 teams, does not identify particular individuals within the IEP team or Section 504 team who must be part of the consultation, and does not specify the decisionmaking process, leaving these decisions to the discretion of the recipient. This approach recognizes the differences between elementary school and secondary school recipients, as the logistics surrounding consultation may vary depending on factors such as the recipient's size or structure. Beyond stating that these consultations must occur when an elementary school or secondary school student with a disability is a complainant or respondent, the Department declines to delineate specific circumstances under which the consultations must occur, such as at specific stages of the grievance procedure process, in order to support the flexible approach of § 106.8(e). At the same time, § 106.8(e) will not preclude a recipient from taking actions such as convening additional

IEP or Section 504 meetings or consultation with full IEP teams or Section 504 teams if necessary under the particular circumstances (*e.g.,* to revise a student's IEP or services under Section 504 in order to meet the student's special education and related services needs). Moreover, § 106.8(e) does not impact the rights and procedural safeguards guaranteed to students with disabilities or their parents or guardians under the IDEA or Section 504. Recipients must fully comply with those laws and their implementing regulations in addition to Title IX.

After careful consideration of the public comments received regarding proposed § 106.8(e), the Department clarifies in the final regulations that the Title IX Coordinator is not required to consult with a student's full IEP team or Section 504 team and maintains that the final regulations strike the appropriate balance between ensuring that consultation between the Title IX Coordinator and a student's IEP team or Section 504 team occurs at the elementary school and secondary school level, while not stipulating specific parameters of that consultation. The Department also recognizes that the recipient bears responsibility for ensuring this consultation takes place. Therefore, the Department has altered the final regulations to clarify that the recipient must require that the Title IX Coordinator consult with one or more members of a student's IEP team or Section 504 team, as appropriate. Additionally, the Department notes that the Title IX Coordinator's duties are delegable under § 106.8(a)(2) and that, accordingly, a staff member other than the Title IX Coordinator may engage in the consultation if that responsibility has been assigned to a designee.

In response to commenters' requests that the Department provide more information about the purpose of the consultation, the Department emphasizes that mere consultation with one or more members of an IEP team or Section 504 team does not ensure compliance with the IDEA and Section 504. The Department anticipates that, in many cases, consultation will identify additional measures necessary to ensure compliance with the IDEA and Section 504. Accordingly, the Department has revised this provision to emphasize that the purpose of the consultation is to determine how the recipient can comply with relevant special education laws while carrying out the recipient's obligation under Title IX and these final regulations. The Department also appreciates the opportunity to clarify that consultations should be carried out with an understanding of the sensitivity of the issues involved and consistent with FERPA.

The Department recognizes that sex discrimination can overlap with other forms of discrimination, such as discrimination based on race or disability, and that a recipient's obligations under these final regulations sometimes overlap with a recipient's obligations under other civil rights laws. Sections 106.8(e), 106.44(g)(6), 106.44(h), and 106.44(i), among other sections of these final regulations, recognize the importance of coordinating a recipient's obligations under Federal civil rights laws. Nothing in the final regulations prevents a recipient from adopting additional mechanisms to coordinate compliance with applicable civil rights laws, to maximize protection from discrimination and minimize the potential for redundancy or unnecessary burden on a recipient's students or employees.

The Department also removed the reference to § 106.46 in the first sentence of proposed § 106.8(e) because this sentence only applies to elementary school or secondary school students, so § 106.46 will not apply.

The Department acknowledges that supporting recipients and Title IX Coordinators in implementing these regulations is important. The Department will offer technical assistance and guidance, as appropriate, to promote compliance with these final regulations.

Changes: The Department has revised §§ 106.8(e) and 106.44(g)(6)(i) to clarify that the recipient must require the Title IX Coordinator to consult with one or more members, as appropriate, of a student's IEP team or Section 504 team if a complainant or respondent is an elementary or secondary student with a disability. The Department removed references to ''Section 504 team'' from §§ 106.8(e) and 106.44(g)(6)(i) because such term does not appear in the Section 504 regulations. The Department has revised these sections to provide that the Title IX Coordinator should consult with a student's IEP team or Section 504 team ''to determine how to comply'' with relevant special education laws, and made a parallel change in the sentence regarding postsecondary students. The Department removed the reference to § 106.46 in the sentence applicable to elementary and secondary students.

Access to Accommodations and Auxiliary Aids

Comments: Several commenters suggested that the Department include language in § 106.8(e) regarding students with disabilities' rights to access reasonable accommodations and auxiliary aids. One commenter suggested that the Department minimize barriers to accessing reasonable accommodations, ensure that recipients provide Title IX information and materials in accessible formats, and ensure that recipients' Title IX offices are accessible to students with disabilities.

Discussion: The IDEA, Section 504, and Titles II and III of the ADA and their implementing regulations ensure protections for students with disabilities, including specific provisions safeguarding their rights related to special education and related services and protecting them from discrimination, including the provision of effective communication. These laws and their implementing regulations have their own procedural requirements and provide for accommodations, referred to in this preamble as reasonable modifications, and auxiliary aids and services for students with disabilities. As explained in the July 2022 NPRM, recipients may be required to provide auxiliary aids and services for effective communication and make reasonable modifications to policies, practices, and procedures to ensure equal opportunities for students with disabilities and avoid discrimination on the basis of disability. 87 FR 41466. Title IX and its implementing regulations are limited to addressing sex discrimination; therefore, the Department declines to impose obligations or requirements with respect to rights conferred by the IDEA, ADA, or Section 504 in these final regulations. The Department will continue to enforce the IDEA, Section 504, Title II, and their implementing regulations,[29] and recipients must fully comply with those laws and their implementing regulations, including by providing access to auxiliary aids and services and making reasonable modifications in accordance with their provisions.

Changes: As discussed above, we have revised both sentences of § 106.8(e) to replace ''help comply'' with ''to determine how to comply.''

Postsecondary Students With Disabilities

Comments: Several commenters offered feedback specifically related to students with disabilities at postsecondary institutions. For

[29] The Departments of Justice and Education both have enforcement authority under Title II of the ADA. The Department of Justice is responsible for enforcement and implementation of Title III of the ADA.

example, one commenter asked the Department to require postsecondary institutions to provide advisors for students with disabilities involved in Title IX grievance procedures because they may need additional explanation and supports, and some commenters believed that the Department should require, rather than permit, Title IX Coordinators to consult with the individual or office designated to provide support to students with disabilities.

Discussion: The Department appreciates commenters' input regarding concerns particular to postsecondary students with disabilities. The IDEA does not apply in the postsecondary education context. As explained in the July 2022 NPRM, *see* 87 FR 41430, a postsecondary student with a disability does not have to disclose that they have a disability to their postsecondary institution. Generally, if a postsecondary student with a disability would like an academic adjustment or other modification, they must provide information regarding their disability to the recipient institution, and the institution must consider the request. *See* 34 CFR 104.44. Because a student with a disability may not have established a voluntary relationship with the postsecondary institution's office that serves students with disabilities, § 106.8(e) permits, but does not require, consultation between the Title IX Coordinator and the postsecondary institution's disability services office. Section 106.8(e) is intended to provide flexibility to postsecondary institutions, while helping to ensure that the needs of students with disabilities are met and while maintaining autonomy for students with disabilities regarding their relationship with a postsecondary institution's disability services office. For the same reasons, the Department declines to require postsecondary students to provide advisors for students with disabilities involved in Title IX grievance procedures. The Department notes that nothing in § 106.8(e) prohibits a recipient from consulting additional school officials as appropriate under the circumstances or from providing advisors to students with disabilities, nor does it abrogate a recipient's obligation to comply with other Federal laws that protect the rights of students with disabilities at the postsecondary level. As such, the Department does not believe modifications with regard to postsecondary institutions are warranted.

Changes: None.

5. Section 106.8(f) Recordkeeping

Recordkeeping—Documentation Records (§ 106.8(f)(1) and (2))

Comments: Several commenters were generally supportive of the proposed recordkeeping requirements because they would streamline the recordkeeping process, promote better understanding of the Title IX regulations among organizations, and reduce sex discrimination.

Some commenters asserted that the recordkeeping requirements were too burdensome and complex for recipients and employees. Some expressed support for the recordkeeping provision from the 2020 amendments at § 106.45(b)(10)(i), which one commenter said balanced the due process rights of all parties with recipient discretion.

Commenters suggested additions to the proposed recordkeeping requirements, including requirements to share evidentiary records to assist OCR investigations and litigation and maintain demographic data related to complainants and respondents to monitor patterns of bias and ensure equitable enforcement. Some commenters urged the Department to require a recipient to retain records regarding respondents found responsible for sexual assault and require those respondents to register as sex offenders.

Some commenters, in contrast, suggested that records related to certain categories of allegations, such as discrimination based on gender identity, not be maintained. Other commenters suggested that recipients should delete or correct records when a complaint is dismissed, goes through the informal resolution process without a finding or admission of responsibility, or there is a judicial determination that punishment was unlawfully imposed.

Commenters offered several suggestions related to the record retention period, with some commenters requesting that recipients maintain records for as long as the student is in attendance; for a period that aligns with State laws; or permanently.

One commenter objected to proposed § 106.8(f)(2) because it would be limited to records of which the Title IX Coordinator has notice rather than records of which any appropriate official or responsible employee has notice. The commenter noted that a complainant or other reporting party may not always know how to contact the Title IX Coordinator and urged the Department to revise proposed § 106.8(f)(2) to apply whenever a recipient has actual or constructive notice. One commenter asked the Department to clarify which records and in what circumstances information related to a complaint or informal resolution could be disclosed and another commenter asked the Department to clarify whether a recipient would need to document its prompt and effective response.

Discussion: The Department acknowledges commenters' support for the recordkeeping provision in § 106.8(f)(1) and (2). It is important for a recipient to maintain records regarding its response to complaints or other notification of sex discrimination. The recordkeeping provision is aligned with a recipient's overall obligations under these final regulations. As explained in the July 2022 NPRM, some aspects of the recordkeeping provision in the 2020 amendments are no longer applicable under these final regulations. *See* 87 FR 41431. Except for the website posting requirement for training materials, which is addressed in more detail below, the Department disagrees that the recordkeeping requirements are too burdensome or complex. It is appropriate to require a recipient to maintain records regarding complaints of sex discrimination, the actions the recipient took to meet its obligations in response to notification to the Title IX Coordinator of conduct that reasonably may be sex discrimination, and materials used to provide training under § 106.8(d). Recordkeeping can reveal effective compliance practices and patterns of noncompliance, through which a recipient can assess its own Title IX compliance. In addition, maintaining records for an appropriate period of time ensures that, during an investigation or compliance review, the Department can ascertain a recipient's compliance with the Title IX regulations. *See* 34 CFR 100.6(c), 100.7(a), 100.7(c) (incorporated through 34 CFR 106.81).

The Department notes that a recipient must conduct a fact-specific analysis to determine whether allegations of sex discrimination, including sex-based harassment, violate Title IX. In light of this, the Department declines to exempt records related to any particular category of allegations, such as discrimination based on gender identity, from the recordkeeping requirements in the final regulations, when such information was included in a complaint or shared with the Title IX Coordinator. Excepting allegations from the recordkeeping requirements could interfere with the Department's ability to evaluate whether a recipient has complied with its obligations under the final regulations. The Department notes that the recordkeeping provision in the

final regulations requires a recipient only to maintain such records and does not govern whether and under what circumstances a recipient could disclose such records in court proceedings or whether such records are part of a student's permanent record. The Department notes that FERPA generally provides eligible students, and parents of students who are under 18 years of age and attending an elementary school or secondary school, with the right to access their or their children's education records. The Department also notes that if, after the Title IX Coordinator was notified of conduct that reasonably may constitute sex discrimination, a recipient determined that the allegations did not constitute sex discrimination, or dismissed the complaint, that information would be included in the records a recipient is required to maintain under § 106.8(f). The Department also notes that § 106.44(j) of these final regulations prohibits the disclosure of personally identifiable information obtained in the course of complying with this part, except in limited circumstances. For additional information on this topic, see the discussion of § 106.44(j).

The Department maintains that it is appropriate that the final regulations limit the scope of this recordkeeping provision to maintaining records and making training materials available for public inspection upon request. The Department declines in these final regulations to require a recipient to share evidentiary records to assist in a subsequent lawsuit or OCR investigation and declines to fine a recipient that fails to maintain or share such records. The Department lacks fining authority under Title IX or the authority to require a recipient to share records outside the context of OCR's administrative enforcement. It is not necessary to add language to the recordkeeping provision requiring a recipient to share evidentiary records to assist in an OCR investigation because this is already required under 34 CFR 100.6(c) (incorporated through 34 CFR 106.81). The Department also notes that § 106.44(j) permits a recipient to comply with a disclosure requirement under other Federal laws or Federal regulations, or, to the extent it would not conflict with Title IX or its implementing regulations, a disclosure required by State or local law, or permitted under FERPA. For further explanation of the circumstances under which a recipient is permitted to disclose personally identifiable information obtained in the course of complying with this part, see the discussion of § 106.44(j).

The Department declines to add language requiring a recipient to delete records when a complaint is dismissed, the informal resolution process concludes without a finding or admission of responsibility, or a judicial determination results in a change to the recipient's determination whether sex discrimination occurred. As explained above, maintaining certain types of records, including these, is necessary to demonstrate a recipient's compliance with Title IX. In addition, it is not necessary to add language requiring a recipient to correct such records because the final regulations already require that, for each complaint of sex discrimination, a recipient maintains records documenting the informal resolution process under § 106.44(k) or the grievance procedures under § 106.45, and if applicable § 106.46, and the resulting outcome. Thus, a recipient is already required to maintain information regarding the dismissal of a complaint or an informal resolution process that ends without a finding or admission of responsibility under § 106.8(f)(1). If a judicial determination results in a change to the recipient's determination whether sex discrimination occurred, that change to the determination would also be included as part of the records a recipient is required to maintain under § 106.8(f)(1) because it documents the resulting outcome of the recipient's grievance procedures under § 106.45, and if applicable § 106.46.

With respect to the appropriate length of time that records must be maintained, the Department maintains the position taken in the 2020 amendments that seven years is appropriate. *See* 85 FR 30411. The Department notes that nothing in the final regulations prevents a recipient from retaining records for a longer period if the recipient chooses or because of other legal obligations. Similarly, nothing in the final regulations prevents a recipient from keeping its employee records for a longer period if it is concerned about repeat harassers. The Department declines to tie record retention requirements to the potential need for use in litigation or to base record retention requirements on the length of a student's enrollment because recipients can more easily administer a standard threshold than an enrollment timeframe that varies with each student.

The Department declines to revise § 106.8(f)(2) to apply whenever a recipient has actual or constructive notice of a potential Title IX violation. As explained in the discussion of § 106.44(c), the most effective way to ensure that a recipient operates its education program or activity free from sex discrimination is to explain a recipient's specific obligations when its Title IX Coordinator receives information about conduct that reasonably may constitute sex discrimination. The recordkeeping requirement in § 106.8(f)(2) thus is appropriately tied to notification of information about conduct that reasonably may constitute sex discrimination and no regulatory text changes are necessary. The Department notes that under § 106.44(c), employees are either required to notify the Title IX Coordinator when they have information about conduct that reasonably may constitute sex discrimination, or to provide the contact information of the Title IX Coordinator and information about how to make a complaint of sex discrimination. Thus, even if a complainant or other reporting individual does not know how to contact the Title IX Coordinator, the information will either be shared with the Title IX Coordinator by the employee who received the report, or the employee who received the report would inform the complainant or other reporting individual how to contact the Title IX Coordinator.

The Department also declines commenters' request to require the collection of certain demographic data of complainants and respondents because the Department did not specifically request comments on the collection of demographic data of complainants and respondents, and it would be appropriate to specifically solicit public comment before requiring such data collection. The Department notes that nothing in the final regulations precludes a recipient from collecting demographic data relating to the recipient's Title IX complainants and respondents for nondiscriminatory purposes provided that it does so consistent with its nondisclosure obligations under § 106.44(j) and other Federal, State, and local laws regarding dissemination of data. *See also* 85 FR 30412.

Under the final regulations, a recipient is required to maintain records documenting the grievance procedures under § 106.45, and if applicable § 106.46, for each complaint of sex discrimination. This includes records of complaints in which the respondent is found responsible for sexual assault. The Department does not have the legal authority to require a respondent found responsible for sexual assault to register as a sex offender.

In response to the commenter's question regarding the circumstances under which information related to a complaint or informal resolution could be disclosed, the Department notes that final § 106.44(j) prohibits a recipient from disclosing personally identifiable information obtained in the course of complying with the Title IX regulations except in limited circumstances. Nothing in the recordkeeping provision in the final regulations requires that records be disclosed, but the Department notes that in addition to the recordkeeping obligations in § 106.8(f), a recipient must also comply with its obligations in § 106.45, and if applicable § 106.46, regarding the provision of evidence and the determination of responsibility to the parties. The Department also notes that § 106.45(f)(4)(iii) requires a recipient to take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance procedures.

The Department appreciates the commenter's inquiry regarding whether a recipient must document its prompt and effective response. The final regulations at § 106.8(f)(2) require that for each notification the Title IX Coordinator receives about conduct that may reasonably constitute sex discrimination, including notifications under § 106.44(c)(1) or (2), a recipient must maintain records documenting the actions it took to meet its obligations in § 106.44, including its prompt and effective response. *See* § 106.44(a).

Through its own review of this provision, the Department has revised § 106.8(f)(2) to align with changes made to § 106.44(c) and clarify which records must be maintained.

Changes: In § 106.8(f)(2), the Department has removed the reference to an ''incident of conduct that may constitute sex discrimination under Title IX of which the Title IX Coordinator was notified'' and replaced it with a reference to ''notification the Title IX Coordinator receives of information about conduct that reasonably may constitute sex discrimination under Title IX or this part, including notifications under § 106.44(c)(1) or (2),'' to align with changes made to § 106.44(c).

Recordkeeping—Training Materials (§ 106.8(f)(3))

Comments: Some commenters noted the importance of making training materials available to the public to ensure that complaints are handled fairly and free from bias and to ensure due process in the resolution of complaints. Several commenters urged the Department to remove the website posting requirement for training materials in proposed § 106.8(f)(3), asserting that it is unnecessary, unjustified, burdensome, and may diminish the quality of training provided by recipients. Commenters argued, for example, that the proposed website posting requirement may discourage a recipient from using training provided by third parties due to intellectual property concerns, including video testimonials about individuals' personal experiences, or from tailoring trainings as needed or on a program-by-program basis.

Some commenters proposed alternatives to the website posting requirement. For example, commenters said the Department should allow a recipient to make training materials available upon request for inspection by members of the public or through litigation discovery. One commenter recommended that the Department require a recipient to post a statement on its website that copies of training materials are available upon request through a public records request or email to the Title IX Coordinator.

Some commenters asserted that the website posting requirement is ambiguous and asked the Department to specify how and in what format a recipient should make training publicly available, including whether a recipient must post slides with training content or only a certificate of completion that shows the topic(s) covered and person(s) trained. Some commenters were concerned that providing training materials without additional context could lead to a misunderstanding about the information learned at a training.

Discussion: The Department acknowledges the concerns that the website posting requirement is burdensome, could diminish the quality of training that recipients are able to offer, may violate laws regarding the sharing of third-party proprietary information, and could include video testimonials about individuals' personal experiences used in training materials. The Department is therefore persuaded the proposed requirement should be changed. Although the Department agrees with commenters that ensuring transparency is important, posting training materials on a website is not the only way to promote transparency and ensure that training materials comply with the requirements of Title IX, including that training not rely on sex stereotypes.

In consideration of the issues raised by commenters, the Department has revised § 106.8(f)(3) to remove the requirement that a recipient must post all training materials on its website. The final regulations instead require a recipient to make all materials used to provide training under § 106.8(d) available upon request for inspection by members of the public regardless of whether a recipient maintains a website. Under the 2020 amendments, the requirement for public inspection only applied to a recipient that did not maintain a website. 34 CFR 106.45(b)(10)(D). Requiring a recipient to make all training materials available upon request for inspection by members of the public is practicable and reasonable, especially in light of existing obligations that many recipients already have under public records laws.

In response to commenters' concerns regarding the sharing of proprietary information or video testimonials about individuals' personal experiences used in training materials, the Department acknowledges that the public inspection requirement applies to all training materials, including those that contain proprietary information or include video testimonials about individuals' personal experiences. Consistent with the Federal government's interests in protecting intellectual property that a commenter highlighted, nothing in these final regulations abrogates intellectual property rights. If a recipient seeks to use training from a third-party provider that contains proprietary information, and the third-party provider is unwilling to permit the recipient to make the training materials available for public inspection upon request, the recipient will not be able to use such materials to meet its training obligations under § 106.8(d)(2). *See also* 85 FR 30412. Moreover, if a third-party provider is willing to permit proprietary materials to be available for public inspection upon request, nothing in the final regulations precludes a recipient from formalizing how a public inspection request must be made—and thus exercising discretion in how it facilitates the inspection of such materials and the method in which the public inspection must occur (*e.g.,* at the recipient, with a representative of the recipient present during the inspection). The Department also maintains that sharing these materials through a public inspection request, as opposed to posting them on a website, would allow the recipient to have more control over the manner in which the materials are shared, thereby giving recipients more flexibility to address third-party providers' concerns and protect the privacy interests of

individuals who appear in video testimonials used in training materials.

The Department has determined that removing the website posting requirement, but maintaining the public inspection requirement, provides for public accountability and transparency, and will help alleviate some of the concerns raised by commenters regarding widespread sharing of proprietary information with the public. In addition, nothing in the final regulations precludes a recipient from choosing to post its training materials on a website to fulfill its obligations to make the training materials available for public inspection upon request.

The Department acknowledges some commenters' views that the requirement to make training materials publicly available has not been clearly defined and has led to inconsistent practices across recipients. Although the Department is removing the requirement to post all training materials on a recipient's website, the Department appreciates the opportunity to clarify that the final regulations require a recipient to make all materials used to provide training under § 106.8(d) available to the public upon request. This includes any slides with training content that were used to provide training. It is not sufficient for a recipient only to provide a certificate of completion with the topics covered and the person(s) who attended the training. In addition, if an employee attends an ongoing professional development program to satisfy the recipient's training obligations under § 106.8(d), records from that professional development program would constitute training materials required to be made available for public inspection. The Department notes that nothing in the final regulations precludes a recipient from choosing to provide additional context when making its training materials available for public inspection, to alleviate the concern raised by some commenters that providing training materials without additional context could lead to a misunderstanding about the information learned at a training.

Changes: The Department has removed the requirement in § 106.8(f)(3) for a recipient to make training materials publicly available on its website if it maintains a website and replaced it with a requirement for all recipients to make training materials available upon request for inspection by members of the public, regardless of whether the recipient maintains a website.

Recordkeeping (Pregnancy) (Proposed § 106.8(f)(4))

Comments: The Department received many comments expressing concerns about proposed § 106.8(f)(4). The Department received numerous comments asking for the elimination of proposed § 106.8(f)(4) due to concerns that this proposed provision would violate privacy rights. Commenters were particularly concerned that there would not be sufficient confidentiality protections regarding who could access these sensitive records regarding pregnancy or related conditions and for what purposes.

Many commenters believed that proposed § 106.8(f)(4) would present legal risks for students and employees. Commenters expressed concern that retaining records related to pregnancy or related conditions would have a chilling effect on pregnant students or employees seeking support under proposed §§ 106.40 and 106.57, respectively, and could result in interruptions to equal educational access, such as missed classes.

One commenter emphasized that, if proposed § 106.8(f)(4) is retained, the Department should impose stringent confidentiality requirements regarding the records that would be created under this proposed provision and should ensure consistency with FERPA and HIPAA.

Comments indicated that clarity was needed if proposed § 106.8(f)(4) is retained, as one commenter believed that the proposed provision would require a recipient to notify a student's parents of a student's pregnancy, while another commenter believed it would not. Several commenters asked for clarity regarding the application of FERPA to records that would be maintained under proposed § 106.8(f)(4).

Discussion: After further consideration of the comments, the Department has determined that the recordkeeping requirement in proposed § 106.8(f)(4) is not necessary for OCR to assess whether a recipient has met its obligations to provide reasonable modifications to students and lactation time and space to students and employees. This is because, in many cases, compliance can be determined without documentation. Further, when a student or employee makes a complaint of sex discrimination alleging that a recipient has failed to meet its obligations under §§ 106.40 and 106.57, or a Title IX Coordinator receives information about conduct that reasonably may constitute sex discrimination in the context of §§ 106.40 and 106.57, proposed § 106.8(f)(4) would not be necessary because the recordkeeping requirements of § 106.8(f)(1)–(2) apply. The Department agrees with commenters that the risks, such as a chilling effect on seeking support under Title IX, outweigh the benefits. The Department is persuaded by commenters' concerns and has removed proposed § 106.8(f)(4) from the final regulations. The Department acknowledges commenters' suggestions for further clarification of a recipient's obligations to protect information that it obtains in the course of complying with its obligations under Title IX and addresses that issue in § 106.44(j).

Changes: The Department has removed proposed § 106.8(f)(4) from the final regulations.

B. Action by a Recipient To Operate Its Education Program or Activity Free From Sex Discrimination

Statutory Authority

Comments: Some commenters asserted that the provisions in proposed § 106.44, specifically, proposed § 106.44(a)–(g) and (j), exceed the Department's authority and are inconsistent with both Title IX and established case law under Title IX, the U.S. Constitution, and State law.

Discussion: The Department disagrees that any provisions within § 106.44 exceed the agency's authority or are inconsistent with Title IX, case law interpreting Title IX, or the U.S. Constitution, and the Department is unaware of any conflict between § 106.44 and State law. In adopting § 106.44, the Department is acting within the scope of its congressionally delegated authority under 20 U.S.C. 1682 to ''issu[e] rules, regulations, or orders of general applicability'' to effectuate Title IX. 20 U.S.C. 1682. The Supreme Court has recognized the Department's ''authority [under 20 U.S.C. 1682] to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate,'' including requiring that a recipient take specific steps to respond to sex discrimination in its education program or activity. *Gebser,* 524 U.S. at 292. Moreover, ''Federal departments or agencies with the authority to provide financial assistance are entrusted to promulgate rules, regulations, and orders to enforce the objectives of § 1681, *see* § 1682, and these departments or agencies may rely on 'any . . . means authorized by law' . . . to give effect to the statute's restrictions,'' *Davis,* 526 U.S. at 638–39.

The final regulations govern how a recipient responds to sex discrimination

in the recipient's education program or activity and were promulgated to effectuate the purposes of Title IX and fully implement Title IX's nondiscrimination mandate. *See Cannon,* 441 U.S. at 704 (''Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.''). As discussed further below, each of the provisions of § 106.44 is necessary to effectuate the purposes of Title IX and ensure that a recipient responds to sex discrimination in its education program or activity.

Further, the Department interprets Title IX and the final regulations consistent with the U.S. Constitution. As the Department noted in the July 2022 NPRM, existing § 106.6(d), to which the Department did not propose any changes, states that nothing in the Title IX regulations ''requires a recipient to . . . [r]estrict any rights . . . guaranteed against government action by the U.S. Constitution.'' 87 FR 41415. In addition, nothing in these final regulations would prevent a recipient from honoring contractual obligations to the extent they do not conflict with Title IX or the Department's regulations.

The Department acknowledges that State laws may impose different requirements for training and notification requirements than these final regulations. In most circumstances, a recipient can comply with both State law and the final regulations. For example, when a State has acted on its own authority to adopt specific notification requirements for discrimination on the basis of sex, nothing in the final regulations prevents a recipient from developing notification requirements that comply with § 106.44(c) and align with its State's requirements. These final regulations do not interfere with a recipient's obligation to comply with State law, to the extent such State law does not conflict with Title IX and these final regulations. For a more detailed explanation of preemption in the final regulations, see the discussion of § 106.6(b).

The Department appreciates the opportunity to respond to commenters' assertions that specific provisions in § 106.44 exceed the scope of the Department's authority. Each of the specific provisions is discussed more thoroughly below, but we address here comments related to the Department's statutory authority. With respect to the Department's authority to require monitoring for barriers to reporting sex discrimination under § 106.44(b), the Department notes that it has long emphasized the importance of recipient efforts to address and prevent sex discrimination, *see* 87 FR 41435 (citing 85 FR 30063, 30070, 30126), and § 106.44(b) is necessary to effectuate Title IX, *see* 20 U.S.C. 1682; this is because barriers to reporting in a recipient's education program or activity prevent complainants from coming forward and impede a recipient's ability to address sex discrimination in its education program or activity when it occurs. As a result, the recipient must monitor for such barriers and take steps reasonably calculated to address them, as required in § 106.44(b). Similarly, § 106.44(c) does not exceed the Department's statutory authority because it provides the mechanism through which information about conduct that reasonably may constitute sex discrimination received by a recipient's employee is communicated to the Title IX Coordinator so that appropriate steps can be taken. The Department acknowledges that it is valuable to provide certain avenues for students and employees to disclose information confidentially that will not lead to action by the Title IX Coordinator. Many recipients have confidential employees who provide important services to members of the recipient's community. Section 106.44(d) recognizes the importance of communicating which employees have such confidential status and how to make a complaint to the Title IX Coordinator. The Department also recognizes that students and others may disclose information at public awareness events, which are an important part of a recipient's efforts to prevent and address sex discrimination. Section 106.44(e) addresses disclosures that occur in such public awareness events. Sections 106.44(d) and (e) govern how a recipient responds to information about sex-based harassment in its education program or activity and are promulgated to fully implement Title IX's nondiscrimination mandate.

Likewise, the Department disagrees that § 106.44(f) and (g) exceed the Department's statutory authority and notes that both provisions are consistent with the requirement in current § 106.44(a) that a recipient's Title IX Coordinator take specific action in response to information about sexual harassment. The final regulations, including the Title IX Coordinator requirements in § 106.44(f) and the obligation to offer supportive measures in § 106.44(g), govern how a recipient responds to sex discrimination in the recipient's education program or activity and thereby help effectuate 20 U.S.C. 1681's mandate that no person shall be subject to sex discrimination in a recipient's education program or activity.

Additionally, to the extent that some commenters asserted that § 106.44(j) exceeds the Department's statutory authority or is inconsistent with Title IX, the Department maintains its position, consistent with the 2020 amendments and as explained below in the discussion of this provision, that clear nondisclosure protections are necessary to effectuate Title IX because fear of disclosure chills reporting and participation in the grievance procedures. *See Doe* v. *Mass. Inst. of Tech.,* 46 F.4th 61, 76 (1st Cir. 2022) (explaining that ''destroying . . . confidentiality may throw a wrench into . . . Title IX proceedings''). Thus, § 106.44(j) is within the scope of its congressionally delegated authority under 20 U.S.C. 1682 to ''issu[e] rules, regulations, or orders of general applicability'' to effectuate Title IX.

Changes: None.

Freedom of Speech Considerations

Comments: Some commenters objected to the proposed revisions to § 106.44 on free speech grounds, asserting that the requirements to report anything that may constitute sex discrimination would infringe on academic expression on a range of divisive subjects because students and faculty would self-censor to avoid the threat of an investigation. Some commenters said the proposed regulations would impose a duty on a recipient to monitor and censor potentially offensive speech even when no complaint about the speech is made and to fire or expel individuals with potentially offensive views to ensure that their speech does not contribute to a hostile environment. Some commenters noted that the Department proposed removing the following statement from current § 106.44(a) without explanation: ''The Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.'' These commenters were concerned that the removal of this language would mean that postsecondary institutions could use Title IX ''as an excuse'' to limit student and faculty speech.

Discussion: The Department disagrees that § 106.44 stifles and silences academic expression and disagrees with commenters that recipients will misunderstand or misapply their obligations to address sex discrimination. As discussed above, the Department modified § 106.44(a) in the final regulations to clarify a recipient's duties to address sex discrimination under Title IX. Concerns related to monitoring and censoring speech in § 106.44 are discussed below in connection with § 106.44(b) and (f). The Department removed the sentence commenters referred to because it relates to the deliberate indifference standard, which is not used in these final regulations and was not included in the proposed regulations. The Department explained its reasons for removing the deliberate indifference standard in the July 2022 NPRM. *See, e.g.,* 87 FR 41432–35. The Department clarifies and emphasizes that the removal of the deliberate indifference language in the regulations does not in any way limit current § 106.6(d), which the Department maintained from the 2020 amendments and which states that nothing in the Title IX regulations requires a recipient to restrict any rights that would otherwise be protected from government action by the First Amendment; deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments; or restrict any other rights guaranteed against government action by the United States Constitution. In light of § 106.6(d), the Department determined it was unnecessary to maintain a reference to rights protected under the U.S. Constitution in § 106.44 of the final regulations. Similarly, we also underscore that nothing in these final regulations changes or is intended to change the commitment of the Department, through these regulations and OCR's administrative enforcement, to act in a manner that is fully consistent with the First Amendment and other Constitutional guarantees. For additional discussion regarding the First Amendment, see the discussion of Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2) (Section I.C).

Changes: None.

Termination of Federal Funds

Comments: Some commenters acknowledged that, in the July 2022 NPRM, the Department explained that a recipient would always have an opportunity to take voluntary corrective action prior to the Department seeking to terminate Federal funds, but asserted that such actions typically are costly for a recipient. One commenter stated that a recipient will not know when it has complied with the proposed standard, and further argued that the uncertainty of not knowing whether they may lose Federal funding will cause a recipient to err on the side of finding respondents responsible for sex discrimination.

Discussion: The Department disagrees that a recipient will not know when it has complied with any aspect of these regulations. We emphasize here, as we did in the July 2022 NPRM, *see* 87 FR 41433, 41435, that nothing in the final regulations affects existing safeguards for a recipient in administrative enforcement proceedings. Under Title IX, the Department cannot terminate, refuse to grant, or refuse to continue Federal financial assistance to any recipient until the Department has made an express finding on the record of a failure to comply with a regulatory or statutory requirement, notified the recipient and attempted to voluntarily resolve the noncompliance, and provided an opportunity for hearing and judicial review. 20 U.S.C. 1682–1683. Consistent with this statutory scheme, when OCR seeks to administratively enforce the Department's Title IX regulations through an investigation or compliance review, OCR begins by providing notice to the recipient of the allegations of potential Title IX violations it is investigating; if OCR finds a violation, OCR is required to seek voluntary corrective action from the recipient before pursuing fund termination or other enforcement mechanisms. 20 U.S.C. 1682; 34 CFR 100.7(d), 100.8(c) (incorporated through § 106.81); *see also Gebser,* 524 U.S. at 287–89; 2001 Revised Sexual Harassment Guidance, at iii–iv. During OCR's investigation or compliance review and during the administrative enforcement process laid out above, OCR provides notice of the alleged sex discrimination to the recipient, as well as an opportunity for the recipient to voluntarily resolve any noncompliance at multiple stages throughout the process. *See, e.g.,* OCR's Case Processing Manual, at 16–22. Regarding commenters' concerns that corrective actions can be costly, the Department notes that OCR's resolution of compliance concerns, including any required corrective actions, are fact specific and any resolution agreement is negotiated with the recipient and designed to account for the type of recipient and OCR's investigative findings. These safeguards also protect against commenters' fears about the effects of administrative enforcement as well as their concerns that the Department seeks to hold a recipient to a standard of strict liability for conduct about which it has no knowledge. For additional discussion of strict liability concerns, see the discussion of § 106.44(a) below. In response to concerns that a recipient will err on the side of finding respondents responsible for sex discrimination, the Department notes that the discussions of §§ 106.45 and 106.46 explain the various procedural protections for respondents included in the final regulations.

Changes: None.

1. Section 106.44(a) General

Recipients' Duty To Address Sex Discrimination

Comments: A number of commenters supported proposed § 106.44(a), which they asserted is consistent with Title IX's purpose and would ensure that recipients afford an educational environment free from all forms of sex discrimination, including sex-based harassment. In discussing a recipient's obligation to address sex discrimination, some commenters described sexual misconduct in education as a public health crisis that can have a long-term, detrimental effect on impacted students, and other commenters supported the proposed regulations, stating they would better protect LGBTQI+ individuals. Some commenters supported the proposed regulations because they believed they would hold recipients accountable and require recipients to be more responsive to notices of discrimination, as some commenters stated that recipients do not always take reports of sexual harassment and sexual assault seriously to avoid reputational costs or harms to the respondent.

Some commenters supported the proposed removal of the ''actual knowledge'' and ''deliberate indifference'' standards from the 2020 amendments, which they asserted enable recipients to ignore sexual harassment if it is reported to the wrong employee, or to respond inadequately. Some commenters stated that the deliberate indifference standard undermines the Department's enforcement role, has exacerbated a misunderstanding of Title IX obligations, and is not appropriate for a civil rights statute or required by case law.

Other commenters opposed the proposed removal of the ''actual knowledge'' and ''deliberate indifference'' standards. Some commenters argued that the 2020

amendments appropriately aligned the standard for administrative enforcement with the standard the Supreme Court adopted for civil litigation in certain harassment cases, citing Supreme Court cases including *Cannon,* 441 U.S. 677; *Franklin,* 503 U.S. 60; and *Gebser,* 524 U.S. 274. Some commenters opined that the actual knowledge standard allowed a recipient to respond efficiently and effectively to reports and complaints of discrimination and argued that the removal of the actual knowledge standard exceeds the Department's authority, with some commenters characterizing the proposed standard as ''strict liability,'' and others characterizing it as ''imputed knowledge.'' Citing *Gebser* and *Davis,* some commenters stated that the Supreme Court has held that a recipient is not liable under a Spending Clause statute without actual knowledge.

Some commenters opposed the proposed regulations as unclear, stating that they do not indicate when a recipient must respond to possible sex discrimination and take reasonable steps to ensure its Title IX Coordinator learns of possible discrimination, and some commenters asked the Department to clarify the meaning of ''prompt and effective'' and ''remedy the effects'' in proposed § 106.44(a).

Some commenters said that under proposed § 106.44(a), there is no guarantee of compliance because the requirements are open-ended, and a recipient cannot monitor and control all participants in its education program or activity.

Discussion: Title IX provides that ''[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.'' 20 U.S.C. 1681(a). A recipient therefore must ensure that it operates its education program or activity free from sex discrimination. Section 106.44(a) sets forth a recipient's obligations to respond to sex discrimination in order to fulfill Title IX's mandate.

As a Federal funding agency, the Department must ensure that recipients comply with assurances that they will not use the Department's funds to further sex discrimination. By setting forth clear requirements, § 106.44(a) allows the Department to fulfill its enforcement role, which is prescribed by statute. 20 U.S.C. 1682. To that end, the Department is statutorily obligated to enact regulations that effectuate Title IX, and Federal agencies have authority to define the contours of the Spending Clause contract with recipients through those regulations. *Bennett,* 470 U.S. at 670. Recipients are on notice of applicable regulations when they accept Federal funding from the Department, and the Department holds them accountable for compliance by providing them notice of noncompliance and an opportunity to voluntarily resolve the noncompliance before administrative enforcement action is taken. *See Gebser,* 524 U.S. at 289–90 (recognizing these features of administrative enforcement). For additional explanation of the Department's administrative enforcement process, see the prior section, Termination of Federal funds.

Regarding commenters' Spending Clause concerns, the statutory text of Title IX requires a recipient to operate its education program or activity free from sex discrimination, including sex-based harassment. *Gebser,* 524 U.S. at 281; *Davis,* 526 U.S. at 649–50. As recognized by the Supreme Court in *Davis,* ''the regulatory scheme surrounding Title IX has long provided funding recipients with notice that they may be liable for their failure to respond'' to sex discrimination. 526 U.S. at 643–44. These final regulations provide clear notice of recipients' obligations to respond to all forms of sex discrimination prohibited by Title IX.

In addition to the statutorily authorized administrative enforcement scheme, the Supreme Court has recognized an implied private cause of action under Title IX. *Gebser* and *Davis* defined the standard for private parties to hold recipients accountable for money damages when they fail to address sexual harassment in their education program or activity. That theory of liability is premised on the understanding that in certain circumstances, ''sexual harassment constitutes a school itself discriminating on the basis of sex in violation of Title IX.'' 85 FR 30035. The *Davis* Court noted that the Court in *Gebser* ''concluded that a recipient of federal education funds may be liable in damages under Title IX where it is deliberately indifferent to known acts of sexual harassment by a teacher,'' 526 U. S. at 641 and *Davis* extended that conclusion to when the harasser is a student. *Id.* at 643.

The Department acknowledges some commenters' support for the 2020 amendments, which extended and adapted the *Gebser/Davis* framework from private litigation for monetary damages to the context of administrative enforcement of Title IX. However, the standard for administrative enforcement is not derived from the same implied remedy discussed in *Gebser* and *Davis,* and the Department is not required to adopt the *Gebser/Davis* standard for administrative enforcement purposes. *See, e.g.,* 85 FR 30038, 30043 (stating that ''the Department is not required to adopt the deliberate indifference standard articulated in the *Gebser/Davis* framework''). Indeed, recipients must comply with the Department's administrative enforcement regulations and are subject to the Supreme Court's *Gebser/Davis* standard for private damages liability. Even in 2020, when the Department chose to align its administrative enforcement standard more closely with the *Gebser/Davis* standard, it did not fully adopt the deliberate indifference standard, 85 FR 30035; instead, it adapted that standard to an administrative enforcement context, illustrating clearly how the standards for administrative enforcement and private enforcement are in fact distinct.

Under the 2020 amendments, a recipient is required to respond to sexual harassment when the recipient has ''actual knowledge.'' 34 CFR 106.30(a), 106.44(a). The 2020 amendments defined actual knowledge to mean notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary school or secondary school recipient. 34 CFR 106.30(a). The 2020 amendments also stated that imputation of knowledge based solely on ''vicarious liability'' or ''constructive notice'' would be insufficient to constitute actual knowledge, and that the standard would not be met when the only official of the recipient with actual knowledge is the respondent. 85 FR 30574. Further, the 2020 amendments announced that a recipient with actual knowledge must respond promptly in a manner that is not ''deliberately indifferent,'' and that a recipient is deliberately indifferent only if its response is clearly unreasonable in light of the known circumstances. *Id.* Throughout this discussion, we refer to the ''actual knowledge standard'' and the ''deliberate indifference standard'' as referenced in the 2020 amendments.[30]

In the July 2022 NPRM, the Department proposed removing the actual knowledge standard and the

[30] Section 106.44(a) of the 2020 amendments included other provisions, which are addressed elsewhere in this preamble, such as the meaning of ''education program or activity''; the recipient's responsibility for offering supportive measures; and the recipient's duty to follow the grievance process before imposition of any sanctions.

deliberate indifference standard. *See* 87 FR 41432. The Department further proposed that § 106.44(a) state that a recipient must take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects. Proposed § 106.44(a) also stated that, to ensure that a recipient can satisfy this obligation, a recipient must comply with all of the requirements of proposed § 106.44.

After the 2020 amendments went into effect stakeholders and commenters representing recipients of all educational levels, Title IX Coordinators, State Attorneys General, and advocacy organizations informed the Department of serious problems associated with the actual knowledge and deliberate indifference standards in the 2020 amendments. They did so through the June 2021 Title IX Public Hearing, listening sessions, and public comments in response to the July 2022 NPRM. For example, the commenters said that the 2020 amendments did not require a postsecondary institution to investigate sexual harassment in its education program or activity even if the recipient's leadership had persuasive evidence that harassment was taking place. Instead, they noted that the 2020 amendments only required an investigation if the person who experienced the harassment reported the harassment to a specifically designated employee. As a result, under the 2020 amendments, a complainant who did not report the harassment to the correct individual could be denied access to an educational environment free from sex discrimination. Likewise, after the 2020 amendments, a variety of stakeholders and commenters convincingly maintained that the deliberate indifference standard is inappropriate in the administrative enforcement context because it requires a limited response that does not fully address sex discrimination in the recipient's education program or activity.

The Department shares the serious concern of stakeholders and commenters that the definition of actual knowledge in the 2020 amendments could permit a recipient to ignore sexual harassment simply because allegations of harassing conduct were not reported to ''the right'' employee. With the 2020 amendments, although the Department adopted the view that reports of sexual harassment to any employee of an elementary school or secondary school recipient would constitute ''actual knowledge'' of the recipient, the universe of postsecondary institution employees to whom a report of sexual harassment would constitute ''actual knowledge'' of the recipient was much more limited—only the Title IX Coordinator or any official of the recipient who had authority to institute corrective measures on behalf of the recipient. The Department is now convinced that limiting a postsecondary institution's obligations in this way is not effective for purposes of ensuring Title IX compliance in the administrative enforcement context because all recipients of Federal financial assistance have a duty to operate their education programs or activities free from sex discrimination regardless of the age of the students they serve.

The Department also agrees with stakeholders and commenters that the 2020 amendments did not require recipients to fully address the impact of sexual harassment in their educational environments, and further fell short of imposing sufficient obligations to respond to possible sex discrimination. Indeed the 2020 amendments created a troubling gap in implementing Title IX's prohibition on sex discrimination: a recipient's employee could have information about possible sex discrimination in a recipient's education program or activity, yet the recipient could have no obligation to take any action to address it unless a formal complaint was filed or the recipient's Title IX Coordinator otherwise became aware of it, leaving conduct that violated Title IX to go unredressed by recipients. The Department has concluded that Title IX does not permit a recipient to act merely without deliberate indifference and otherwise allow sex discrimination to occur. Rather, in the administrative enforcement context, in which the Department is responsible for ensuring that its own Federal funds are not used to further discrimination, the Department expects recipients to fully effectuate Title IX.

The Department also agrees with the stakeholders and commenters who pointed out that the Department's application of a different standard of liability for sexual harassment compared to other forms of discrimination raised serious questions regarding equity and rationality. The approach in the 2020 amendments singled out only sexual harassment as subject to the deliberate indifference standard, thereby raising questions as to why the Department was requiring complainants to meet a particular standard for complaints about sexual harassment, but not for other types of prohibited sex-based harassment. Moreover, a number of stakeholders and commenters reported that the deliberate indifference standard imposed by the 2020 amendments erodes efforts to promote and sustain institutional trust by appearing to hold schools to a lower standard for sexual harassment compared to other forms of discrimination. Commenters who supported the 2020 amendments and opposed the proposed regulations did not present convincing answers to those challenging questions, and the Department is not able to justify retaining the 2020 amendments against the range of challenges and complications associated with applying the deliberate indifference standard only to sex-based harassment. The Department determined that the overarching standards for adequately addressing sex discrimination should be more uniform—as well as robust in effectuating Title IX—and accordingly § 106.44(a) in these final regulations broadly covers all forms of sex discrimination.

As proposed in the July 2022 NPRM, these final regulations remove the deliberate indifference standard and instead clearly define steps a recipient must take to address sex discrimination, as set forth in § 106.44. *See* 87 FR 41434–35. In addition, the Department has expanded the knowledge standard from the 2020 amendments so that regardless of the type of recipient, a recipient is deemed to have knowledge of sex-based discrimination in its education program or activity and an obligation to respond consistent with the requirements in § 106.44 when any non-confidential employee has information about conduct that reasonably may constitute sex discrimination. The nature of the response required by § 106.44 depends on the person's role, but a recipient must ensure that all of its employees fulfill the duty to respond. All non-confidential employees of an elementary school or secondary school recipient must notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination. Employees of other recipients who have responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity must do the same. All other non-confidential employees at a recipient that is not an elementary school or secondary school must either notify the Title IX Coordinator or provide the contact information of the Title IX Coordinator and information about how to make a complaint of sex

discrimination to any person who provides the employee with information about conduct that reasonably may constitute sex discrimination. *See* § 106.44(c).

A number of commenters expressed concern that proposed § 106.44(a) appeared to hold recipients to a standard of strict liability under which it could be held liable for any sex discrimination that occurred, even if the recipient had no knowledge of the conduct. The Department did not, and does not intend to impose such a standard, and that is not the effect of these final regulations. The Department has revised the final regulations to clarify that a recipient ''with knowledge'' of conduct that reasonably may constitute sex discrimination must respond promptly and effectively; that does not, however, mean that the recipient is responsible for conduct that occurred before an employee of the recipient becomes aware of the conduct. As discussed above, § 106.44(c) requires all employees of a recipient to take some action when they have information—and therefore knowledge—about conduct that reasonably may constitute sex discrimination. However, if no Title IX Coordinator, including a contractor who has been delegated Title IX responsibilities, or other employee of a recipient has knowledge of conduct that reasonably may constitute sex discrimination, then the recipient cannot respond promptly and effectively. For additional explanation of the revisions to the scope of conduct covered under § 106.44(c), see the discussion below on Scope of Conduct Subject to § 106.44(c).

After three years of enforcement of the 2020 amendments and feedback from stakeholders, the Department considers final § 106.44(a) to be a natural and necessary outgrowth of the 2020 amendments. At that time, although the Department and commenters recognized that some sexual harassment would go unaddressed, the Department made the determination that, in the postsecondary institution context, it would not require a recipient to respond each time an employee has notice of sexual harassment on the ground that doing so respected the autonomy of postsecondary institution students and employees. 85 FR 30106. The Department's enforcement experience and feedback from stakeholders and commenters has persuaded the Department that Title IX requires more from recipients, as set forth in § 106.44(a) and the other paragraphs of § 106.44. The Department maintains that the requirement in § 106.44(a)(1) to respond promptly and effectively and the specific actions outlined in § 106.44(b)–(k) will more effectively ensure that a recipient fully effectuates Title IX's nondiscrimination mandate. As explained in greater detail in the discussion of § 106.44(f), the Department maintains that § 106.44 appropriately accounts for complainant autonomy and a recipient's obligation to operate its education program or activity free from sex discrimination. Section 106.44 also responds to concerns that under the standards set forth in the 2020 amendments, some sexual harassment went unaddressed.

In response to commenters' concerns that the obligation in proposed § 106.44(a) was open-ended and a recipient lacks the ability to monitor and control all participants in its education program or activity, the Department has clarified in § 106.44(a)(1) that a recipient's obligation to respond promptly and effectively is triggered when it has knowledge of conduct that reasonably may constitute sex discrimination. Because the Department is charged with enforcing and effectuating Title IX, we view the standard of liability in § 106.44(a)(1) as a preferable approach to confirm for recipients that they must respond promptly and effectively when they have knowledge of conduct that reasonably may constitute sex discrimination and remain obligated to ensure they comply with the standards set out in *Gebser* and *Davis.* Section 106.44(a)(2), which states that a recipient must comply with § 106.44, clarifies a recipient must take the actions outlined in § 106.44(b)–(k) to comply with Title IX's statutory obligation to operate its education program or activity free from sex discrimination. This responds to commenter concerns that proposed § 106.44(a) imposed obligations on recipients that were too open-ended by giving recipients specific instructions for steps they must take both to ensure they have knowledge of conduct that reasonably may constitute sex discrimination and that they respond appropriately when they have the requisite knowledge.

In addition, to more closely align with the revised language in § 106.44(a) describing recipients' duties and address commenters' concerns regarding the standard of liability that proposed § 106.44(a) appeared to hold recipients to, the Department has revised the language in the title of § 106.44 to clarify that this section covers a recipient's response to sex discrimination as opposed to a recipient's responsibility to operate its education program or activity free from sex discrimination.

In response to commenters' request that the Department clarify the meaning of ''prompt and effective'' and ''remedy the effects,'' the Department notes that these terms are addressed in the discussion of § 106.44(f) below.

Changes: The Department has revised the title of § 106.44 to state that the section covers ''a recipient's response to sex discrimination.'' The Department has also modified § 106.44(a) to state that (1) a recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively; and (2) a recipient must also comply with this section to address sex discrimination in its education program or activity.

Notice of Sex Discrimination

Comments: Some commenters asked the Department to clarify when a recipient would have a legal duty to address possible sex discrimination and when the Department would consider a recipient to have notice of possible sex discrimination. One commenter asked the Department to clarify that a recipient would be responsible for addressing possible sex discrimination when it knew or should have known of the discrimination. Another commenter suggested that the Department modify the second sentence of proposed § 106.44(a) to clarify that a recipient cannot be held liable for failing to address conduct of which the recipient could not be aware.

One commenter asked the Department to address the circumstance in which the only employee of an elementary school or secondary school recipient with information about sex discrimination is the alleged perpetrator.

Discussion: Under § 106.44(a)(1), a recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively. As discussed above, in response to comments expressing concern that § 106.44(a) established a standard of strict liability that would hold a recipient responsible for conduct of which it had no knowledge, the Department has amended § 106.44(a)(1) to clarify that a recipient must respond promptly and effectively only when it has knowledge of conduct that reasonably may constitute sex discrimination. And, as discussed above, a recipient has such knowledge when any non-confidential employee has information about conduct that reasonably may constitute sex

discrimination. In that circumstance, the final regulations make clear that non-confidential employees must respond promptly and effectively by either notifying the Title IX Coordinator or providing the Title IX Coordinator's contact information and information about how to make a complaint of sex discrimination to any person who provides the employee with information about conduct that reasonably may constitute sex discrimination under Title IX or this part, consistent with their obligations under § 106.44(c).

Consistent with the 2020 amendments, the recipient need not have incontrovertible proof that conduct violates Title IX for it to have an obligation to respond; if the conduct reasonably may be sex discrimination, the recipient must respond in accordance with § 106.44. *See* 85 FR 30192 (''the recipient need not have received notice of facts that definitively indicate whether a reasonable person would determine that the complainant's equal access has been effectively denied in order for the recipient to be required to respond promptly''); *see, e.g., Doe* v. *Fairfax Cnty. Sch. Bd.,* 1 F.4th at 263–64 (citing *Davis,* 526 U.S. at 646–52) (holding that ''a school's receipt of a report that can objectively be taken to allege sexual harassment is sufficient to establish actual notice or knowledge under Title IX—regardless of whether school officials subjectively understood the report to allege sexual harassment or whether they believed the alleged harassment actually occurred''). Further, when an employee of the recipient, including the Title IX Coordinator and any contractor who has been delegated Title IX responsibility has information about conduct that reasonably may constitute sex discrimination, they must respond consistent with their obligations under the regulations. The Department declines commenters' request to impose a ''knew or should have known'' standard on recipients in these final regulations because such a standard is not necessary in light of the requirement that employees respond promptly and effectively to information about conduct that may reasonably constitute sex discrimination, including by reporting such information to the Title IX Coordinator.

Under § 106.44(a)(2), a recipient must comply with the other paragraphs of § 106.44 to address sex discrimination in its education program or activity. Some of the recipient's duties under § 106.44 arise when the Title IX Coordinator has knowledge of conduct that reasonably may constitute sex discrimination, but the recipient also has duties before such an occurrence. For example, a recipient must take steps to require all of its non-confidential employees to comply with the notification requirements in § 106.44(c) and its confidential employees to comply with § 106.44(d) through training or otherwise. In addition, a recipient must require its Title IX Coordinator to monitor for and address barriers to reporting under § 106.44(b), which must occur regardless of whether the Title IX Coordinator has received information about conduct that reasonably may constitute sex discrimination.

In response to a commenter's request for clarification, at the elementary school, secondary school, and postsecondary levels, a recipient is not relieved of its Title IX obligations simply because the respondent is the only employee of the recipient with knowledge of possible sex discrimination. However, the Department acknowledges that the recipient may be practically unable to respond until after a complaint is made or the conduct otherwise becomes known to a second non-confidential employee. Upon notification of conduct that reasonably may constitute sex discrimination, a recipient must require its Title IX Coordinator to take action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects under § 106.44(f)(1).

Changes: The Department has modified § 106.44(a) to state that (1) a recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively; and (2) a recipient must also comply with this section to address sex discrimination in its education program or activity.

Liability Standard Under Title VII

Comments: Some commenters opposed having a different standard of liability for Title IX and Title VII. These commenters stated that, under Title VII, an employer is liable for negligence and Title VII requires only reasonably calculated efforts to end harassment, prevent its recurrence, and remedy its effects. Another commenter argued that, unlike Title IX, Title VII was not enacted pursuant to Congress' Spending Clause authority, and that Title VII imposes broad restrictions on employers, including constructive notice of discrimination, that are inappropriate in Title IX enforcement and thus the standards need not align.

Discussion: The Department acknowledges commenters' views on the liability standard under Title VII. Although the Department has taken steps to align these regulations more closely with the standards of Title VII, the Department is not bound by Title VII standards in implementing Title IX. For further discussion of Title VII and Title IX, see the discussions of the Framework for Grievance Procedures for Complaints of Sex Discrimination (Section II.C) and § 106.2 (Definition of ''Sex-Based Harassment''). As explained in those sections, differences between the workplace and educational environments make certain differences in administrative standards of enforcement for Title VII and Title IX appropriate, even accounting for the Department's efforts to promote consistency. The requirements in § 106.44(b)–(k) are designed to impose no more, and no less, than reasonable demands to advance the successful implementation of Title IX. And, as discussed above, the Department has clearly set forth the steps a recipient must take to comply with § 106.44(a), which provides sufficient notice under the Spending Clause.

Changes: None.

Section 504 and the IDEA

Comments: One commenter asserted that removal of the actual knowledge standard would incentivize a recipient to take drastic measures in response to possible sex discrimination, such as removal of a student, that would conflict with its obligations under Section 504 and the IDEA.

Discussion: The Department disagrees with the commenter that the regulations will somehow incentivize a recipient to take measures in response to possible sex discrimination, such as removal of a student, that would conflict with the recipient's obligations under Section 504 or the IDEA. As discussed above, by adding ''with knowledge'' to § 106.44(a)(1), the Department has addressed commenters' concerns regarding strict liability. Although the Department has removed the definition of ''actual knowledge'' from these final regulations, in response to commenters' concerns, the Department has clarified that this revision expands rather than removes a recipient's obligation to respond to conduct of which their employees have knowledge. Nonetheless, nothing in these regulations authorizes a recipient to take any measures that conflict with Section 504 or the IDEA.

As explained in greater detail in the discussion of § 106.8(e), Section 504 and the IDEA protect the rights of students with disabilities, and nothing in § 106.44(a) or any other provision of the final regulations modifies any rights

under those laws or any other Federal civil rights laws. In addition, the Department notes that § 106.44(h), which addresses emergency removal, requires a recipient to undertake an individualized safety and risk analysis to determine whether an imminent and serious threat to the health or safety of a complainant or any students, employees, or other persons arising from the allegations of sex discrimination justifies removal. The respondent must also be provided notice and an opportunity to challenge the decision immediately following the removal, and this provision must not be construed to modify any rights under the IDEA, Section 504, or the ADA.

Changes: None.

Neutrality or Impartiality of Title IX Coordinator

Comments: Some commenters asserted that proposed § 106.44(a) would eliminate neutrality or impartiality from the role of Title IX Coordinators by requiring them to seek out discrimination and harassment. Commenters argued that Title IX Coordinators would seek to initiate a certain number of cases per year.

Discussion: The Department strongly disagrees that § 106.44(a) eliminates neutrality or impartiality from the role of the Title IX Coordinator or will cause Title IX Coordinators to initiate a certain number of complaints per year. Commenters offered no persuasive evidence or reason to draw that conclusion, which lacks foundation in the final regulations themselves. As stated in the July 2022 NPRM, ''the recipient is not in the role of prosecutor seeking to prove a violation of its policy.'' 87 FR 41467. As discussed elsewhere in this preamble, the recipient's role is to ensure that its education program or activity is free of unlawful sex discrimination. Although doing so requires a recipient to adjudicate complaints, both the provisions regarding grievance procedures and other provisions of the final regulations help ensure that all parties are treated fairly and without bias. *See, e.g.,* §§ 106.8(d)(2)(iii), (d)(3) (training requirements), 106.44(k)(4) (informal resolution), 106.45(b)(2) (grievance procedures), 106.46(i)(iii) (appeals). Finally, nothing in the regulations requires the initiation of a certain number of complaints.

Changes: None.

Dual Enrollment Programs

Comments: Some commenters maintained that the proposed regulations did not clarify institutional responsibilities in cases of sex discrimination involving students in dual enrollment programs, *i.e.,* enrolled in high school but taking college classes.

Discussion: The Department appreciates the opportunity to clarify that, in circumstances in which a student is enrolled in two recipient institutions at the same time, each recipient has its own obligations to protect participants from sex discrimination under Title IX. Neither should assume that the other institution is solely responsible for responding to a complaint of sex discrimination from a student participating in both programs, particularly because effective supportive and remedial measures, to the extent appropriate, may implicate both institutions.

Changes: None.

2. Section 106.44(b) Monitoring for Barriers

General Comments

Comments: A number of commenters supported proposed § 106.44(b) because it would encourage recipients to eliminate barriers to reporting sex discrimination, including among historically marginalized communities, and to monitor for specific barriers faced by individuals with disabilities or limited English proficiency.

Some commenters identified a number of barriers to reporting sex discrimination, including the 2020 amendments' requirements; unfamiliarity with a recipient's Title IX Coordinator and grievance procedures; recipients' history of inadequate responses to sex discrimination; staff discouraging and deterring student reports; unreasonably lengthy response times to reports of sex discrimination; and fears of not being believed or of being judged, blamed, or retaliated against for reporting sex discrimination.

Some commenters opposed proposed § 106.44(b), asserting that it was so vague as to expose recipients to litigation risk.

Other commenters asked for examples of steps ''reasonably calculated'' to address barriers. Some commenters suggested modifications to proposed § 106.44(b) to require school staff to follow up with students after they report sex discrimination to see if they are experiencing repercussions because of their reports.

Some commenters suggested that the Department expand proposed § 106.44(b) to require recipients to remedy any hostile environments to prevent ongoing sex discrimination in the recipient's education program or activity; require a Title IX Coordinator to ''proactively'' monitor a recipient's education program or activity; require postsecondary institutions to prevent sex discrimination; require recipients to increase awareness of menstruation-related discrimination and harassment; and include education at the elementary school and secondary school level on healthy relationships.

Discussion: The Department acknowledges commenters' support for § 106.44(b) and agrees that barriers to reporting sex discrimination in a recipient's education program or activity impede recipients from realizing Title IX's promise of an educational environment free from such discrimination. This includes barriers for students with disabilities, individuals with limited English proficiency, and other populations. Section 106.44(b) is therefore a key part of recipients' Title IX compliance obligations.

The Department acknowledges commenters' concerns that in some cases a recipient's Title IX reporting and complaint processes and grievance procedures can create barriers to reporting sex discrimination. Shortcomings such as inaccessible complaint reporting processes, confusing grievance procedures that lack transparency, and difficult-to-reach Title IX Coordinators or staff who discourage individuals from making reports all serve as barriers to reporting sex discrimination under § 106.44(b). The Department also agrees with commenters that poorly managed report and complaint processes, or grievance procedures in which individuals have little confidence due to delays or perceptions of bias, pose serious barriers to reporting sex discrimination that recipients will be required to address to comply with § 106.44(b).

Although recipients may choose to use campus surveys to monitor barriers to reporting, and the Department recognizes that climate surveys are already required by some States and VAWA 2022 as a tool to monitor for barriers to reporting sex discrimination, the Department declines to mandate that recipients take particular steps to monitor for such barriers, including employing surveys. Nothing in these regulations would prevent a recipient from using campus surveys to increase awareness about Title IX's protections. The Department declines to require that elementary schools and secondary schools educate students on healthy relationships. *See generally* 20 U.S.C. 1232a.

Once a recipient becomes aware of a barrier to reporting sex discrimination, the recipient must take steps that are reasonably calculated to address that

barrier. A recipient's response to such reporting barriers should be tailored to the specific impediments and obstacles it identifies, and recipients should choose strategies that work best given factors unique to their educational environment. When a recipient deems it appropriate, a response could include trainings targeted at a particular academic department or other subdivision of the recipient where the barriers were identified; in-depth training for specific program staff; or widespread training for staff and students. Responses contemplated by § 106.44(b) could also include more frequent and prominent publication of the Title IX Coordinator's contact information; relocation of the Title IX Coordinator's office to a more visible, central, and accessible location; provision of adequate staff for the Title IX Coordinator's office; enhanced training for employees with Title IX responsibilities, including training to ensure that they are free of conflicts of interest and do not discourage reporting; and the development and circulation of user-friendly Title IX materials. 87 FR 41436.

The Department acknowledges commenters' recommendation that § 106.44(b) be modified to require recipients to follow up with individuals who report sex discrimination to ensure they are not experiencing further discrimination or retaliation due to their report or complaint. The Department declines to mandate a particular response, however, given the fact-specific nature of identifying barriers and a recipient's need to respond as warranted by those facts. Instead, § 106.44(b) will allow recipients to tailor their response to the circumstances of their educational environment and the identified barriers to reporting. Moreover, because additional discrimination and retaliation are already prohibited by other provisions of these final regulations, including §§ 106.44 and 106.71, it is not necessary to modify § 106.44(b) as requested.

Some commenters may have misunderstood the purpose of § 106.44(b), which is focused on barriers to reporting and does not require monitoring related to sex discrimination more generally. The Department appreciates the opportunity to clarify that the aim of § 106.44(b) is to ensure that recipients require their Title IX Coordinators to monitor for and address barriers in their education programs or activities that would prevent or deter individuals from reporting possible sex discrimination. So, for example, a recipient may set up an online reporting system for sex discrimination complaints; if individuals who wish to report information about possible sex discrimination cannot access the reporting system, however, the lack of access would constitute a barrier to reporting possible sex discrimination. The recipient should therefore monitor the efficacy of this online reporting system for access issues and take steps reasonably calculated to address those issues to fulfill its obligations under § 106.44(b). Aspects of a recipient's campus climate may also discourage or chill students from coming forward to make a report of possible sex discrimination, in which case, a recipient should monitor for and take steps reasonably calculated to address such issues. For example, if a recipient were to learn from staff that some students felt discouraged from reporting sex discrimination or worried about retaliation if they were to make a report, the recipient could conduct student focus groups or survey students about why they feel discouraged from reporting or fear retaliation. Depending on what the recipient learns, the recipient may in response decide to include more readily available information on how to report sex discrimination and emphasize a recipient's prohibition on retaliation in required trainings for all students. Additionally, just as a recipient's obligation to comply with Title IX is ongoing, its obligation to monitor for and take steps reasonably calculated to address barriers to reporting sex discrimination is ongoing.

The Department disagrees that § 106.44(b) is vague. The provision sets out two clear requirements. First, the Title IX Coordinator must monitor the recipient's education program or activity for barriers to reporting information about conduct that reasonably may constitute sex discrimination under Title IX. The Department provides examples of how to monitor such barriers above and in the July 2022 NPRM. 87 FR 41436. Second, when such barriers are identified, the Title IX Coordinator must take steps reasonably calculated to address them. The Department has also provided examples of how to address barriers, above and in the July 2022 NPRM. *Id.* Section 106.44(b) does not require a recipient's Title IX Coordinator to generally monitor *all* conduct in its education program or activity. Rather, the provision imposes a specific duty to monitor the recipient's education program or activity for barriers to reporting sex discrimination, and to take steps reasonably calculated to address those barriers.

In response to comments, the Department has changed the title of this provision from ''Monitoring'' to ''Barriers to Reporting.'' Framing this provision around barriers to reporting sex discrimination serves as a reminder to recipients and their staff that § 106.44(b) is about barriers in the recipient's education program or activity that impede a recipient from ensuring that no individual is subjected to sex discrimination in its education program or activity.

Changes: The Department changed the title of this provision from ''Monitoring'' to ''Barriers to Reporting.''

Reporting Channels

Comments: One commenter asked the Department to confirm that a recipient's Title IX Coordinator would be required only to monitor formal channels to reporting sex discrimination and not informal channels, because, the commenter stated, monitoring informal channels would undermine a recipient's confidential resources and deter individuals from seeking support due to concerns of losing autonomy over their reports. Another commenter characterized the notification requirements in proposed § 106.44(c) as creating a barrier to reporting sex discrimination that would be subject to proposed § 106.44(b).

Discussion: The Department is uncertain what the commenter means by formal channels versus informal channels, but the Department confirms that a recipient would not be permitted to compromise a recipient's confidential resources in order to monitor for barriers to reporting. However, if a recipient learns, for example, that some confidential employees mistakenly believe that discrimination based on sexual orientation or gender identity should not be reported to the Title IX Coordinator and are discouraging individuals from making their own reports of such discrimination to the Title IX Coordinator, then the Title IX Coordinator would be required to take steps reasonably calculated to address such barriers, for example, through publicizing corrected information and training employees. The Department acknowledges that some individuals may be deterred from seeking support due to concerns of losing autonomy over their report. If a Title IX Coordinator learns of such a barrier, the recipient could address the barrier by, for example, developing and circulating user-friendly Title IX materials or provide information sessions that clarify the available support options, including confidential resources.

The Department disagrees that the notification requirements in proposed § 106.44(c) would create a barrier to reporting sex discrimination. To the contrary, the notification requirements will reduce barriers to reporting by ensuring that all employees of a recipient know when and how to respond to reports and other information about conduct that reasonably may constitute sex discrimination.

In response to comments, the Department has determined that, consistent with changes in §§ 106.44(a), (c), (e), (f), (j), and (k) and 106.71 that are discussed more fully below, the final regulatory text for § 106.44(b) should be clarified to state that the Title IX Coordinator must monitor for barriers to reporting related to information about conduct that ''reasonably'' may constitute sex discrimination. This change, in addition to addressing commenters' concerns discussed below, helps clarify § 106.44(b) by being more specific about the monitoring required under the provision. The Department has also added ''or this part'' to reference these regulations, which include definitions that explain what conduct reasonably may constitute sex discrimination.

Changes: Section 106.44(b) is revised to state that a recipient must require its Title IX Coordinator to take the actions specified in paragraphs (b)(1) and (2). Section 106.44(b)(1) is modified to specify that the Title IX Coordinator's required action is to monitor for barriers to reporting information about conduct that ''reasonably'' may constitute sex discrimination under Title IX ''or this part.''

Free Speech and Academic Freedom

Comments: Commenters raised varied concerns that proposed § 106.44(b) would restrict speech, limit constitutional rights, and diminish academic freedom. Some commenters asked the Department to clarify whether proposed § 106.44(b) would require a Title IX Coordinator to monitor for barriers to reporting sex discrimination in the context of academic discourse, including discourse on controversial topics or topics informed by religious or other beliefs. One commenter opposed proposed § 106.44(b) and stated that, contrary to *Mahanoy,* 141 S. Ct. 2038, it would require schools to monitor off-campus speech that typically falls within the zone of parental control. Another commenter asked the Department to clarify how a recipient would know when actions on social media create a hostile environment for purposes of fulfilling its obligations under proposed § 106.44(b).

Discussion: As discussed above, § 106.44(b) requires a recipient to require its Title IX Coordinator to monitor for barriers to reporting sex discrimination in its education program or activity and to address any barriers to reporting the Title IX Coordinator discovers through the monitoring efforts. As stated in the July 2022 NPRM, recipients are not expected to monitor students' online activity, including social media. 87 FR 41440. And § 106.44(b) does not require recipients to monitor the academic discourse of students or teachers in the classroom. The Department has consistently maintained that Title IX is intended to protect students from invidious discrimination, not to regulate constitutionally protected speech. OCR interprets the laws and regulations that the Department enforces consistent with free speech and other rights protected under the First Amendment to the U.S. Constitution. The Department intends these Title IX regulations to be interpreted consistent with rights protected under the First Amendment, and the protections of the First Amendment must be considered if issues of speech or expression are involved, including academic freedom. For additional discussion of the First Amendment, see the discussion of Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2) (Section I.C) (including the discussion of *Mahanoy*) and the discussion of § 106.44(a) above. *See also* 2003 First Amendment Dear Colleague Letter.

The goal of § 106.44(b) is to eliminate actual barriers or impediments that would prevent or deter individuals from reporting possible sex discrimination. Title IX's nondiscrimination mandate is best served when persons are unobstructed in their ability to report conduct that reasonably may constitute sex discrimination because that reporting triggers the recipient's obligation to offer appropriate supportive measures, initiate grievance procedures to determine whether sex discrimination occurred, or allow a complaint to be resolved through an informal resolution process, if available and appropriate. It is doubtful that individual comments occurring in classrooms as part of academic discourse, including speech conveyed as part of an expression of sincerely held religious beliefs, would constitute a ''barrier'' to reporting within the meaning of § 106.44(b). Were a recipient to become aware that speech occurring in classrooms, no matter the viewpoint being expressed, was creating a barrier to reporting, it would be obligated to address those barriers in ways that do not infringe on an individual's otherwise protected First Amendment rights by, for example, clarifying the recipient's policies for reporting possible sex discrimination.

To ensure that recipients and all members of a recipient's education program or activity understand that § 106.44(b) relates to monitoring for barriers to reporting, the Department has changed the title of § 106.44(b) from ''Monitoring'' to ''Barriers to Reporting.''

Changes: The Department has changed the title of § 106.44(b) from ''Monitoring'' to ''Barriers to Reporting.''

Compliance Burdens

Comments: Commenters expressed concerns about compliance burdens, especially for large State university systems or smaller institutions with fewer resources. Some commenters opposed requiring a recipient to monitor for barriers to reporting sex discrimination and asserted that a recipient's duty should be limited to responding to ''actual knowledge'' of sex discrimination.

Some commenters expressed concern that proposed § 106.44(b) would place an undue burden or too much responsibility on Title IX Coordinators, who would be required to monitor conduct and speech regardless of whether a complaint is made or a concern is raised over barriers to reporting sex discrimination.

One commenter asked the Department to modify proposed § 106.44(b) to place the obligation to monitor and address barriers to reporting sex discrimination on the recipient instead of the Title IX Coordinator, whom the commenter asserted should coordinate and review efforts by others at the institution to monitor and address barriers to reporting sex discrimination.

Other commenters asked the Department to clarify that a Title IX Coordinator is only required to monitor for barriers to reporting related to conduct that an individual ''reasonably believes constitutes sex discrimination under Title IX'' and to explain how a recipient would be held accountable if its Title IX Coordinator failed to monitor and address barriers to reporting sex discrimination.

Some commenters encouraged the Department to issue guidance that would provide examples of how to monitor for barriers to reporting sex discrimination under the proposed regulations.

Discussion: The Department acknowledges commenters' concerns

about potential compliance burdens but reiterates that federally funded recipients assume the obligation to provide participants the opportunity to attend education programs and activities free from sex discrimination. To meet that obligation, recipients must ensure that participants are able to share information with the recipient about conduct and practices that reasonably may constitute sex discrimination. Requiring recipients to monitor for barriers to reporting is necessary for recipients to promptly and effectively address sex discrimination when it occurs, and otherwise meet their obligation to ensure that no individual is subjected to sex discrimination in their education program or activity.

The Department also notes that the July 2022 NPRM provided suggestions and examples of how a recipient could comply with § 106.44(b) while acknowledging that recipients vary in size and resources in ways that may impact how they implement this provision. 87 FR 41436. Recipients have the flexibility to determine which strategies would be most appropriate and effective in their educational setting and the Department declines to require specific actions. The Department reiterates the importance of a recipient tailoring efforts to uncover and address barriers to reporting sex discrimination to the methods and strategies the recipient determines are likely to be most effective in the recipient's setting. The Department further discusses the regulations' flexibility elsewhere in this preamble, including in the discussions related to the final regulations at § 106.44(k)(1) (flexibility to determine whether to afford an informal resolution process that best serves the recipient's educational community) and § 106.45(b)(4) (flexibility to determine reasonably prompt time frames for grievance procedures in light of a recipient's unique setting).

Contrary to some commenters' objections, § 106.44(b) does not require a recipient to address barriers to reporting sex discrimination in its education program or activity as a substitute for ''actual knowledge.'' The provision ensures that recipients are proactive about identifying barriers to reporting so that they are well-placed to address sex discrimination in their education programs and activities when it exists. The Department appreciates the opportunity to clarify that the obligation to monitor for barriers to reporting is not triggered only when a concern is raised over barriers to reporting. The Title IX Coordinator must monitor for barriers regardless of whether a concern has been raised about such barriers. The provision is therefore an important part of a recipient's compliance program to ensure that Title IX's nondiscrimination mandate is fulfilled. The Department provides additional background and discussion of the actual knowledge standard adopted by the 2020 amendments in the preamble discussion of § 106.44(a).

The Department acknowledges commenters' concerns that § 106.44(b), alone and together with other provisions in these final regulations, expand the scope of a Title IX Coordinator's duties and responsibilities. These final regulations, including § 106.44(b), provide a role for a recipient's Title IX Coordinator that centralizes duties, promotes accountability, and enables effective Title IX compliance. To address concerns regarding the Title IX Coordinator's capacity, a recipient may authorize its Title IX Coordinator to delegate specific duties to one or more designees as long as one Title IX Coordinator retains ultimate oversight over the assigned duties. *See* § 106.8(a)(2). Additional discussion related to the scope of the Title IX Coordinator's role under these final regulations can be found in the discussion of the Title IX Coordinator requirements under § 106.44(f). Additionally, a discussion of the compliance burdens related to these final regulations can be found in the discussion of the *Regulatory Impact Analysis.*

In response to the commenter who asked the Department to modify proposed § 106.44(b) to place the obligation to monitor and address barriers to reporting sex discrimination on the recipient instead of the Title IX Coordinator, the Department notes that the proposed and final regulations require the recipient to require the Title IX Coordinator to take the prescribed action; the compliance obligation thus falls on the recipient. The Department declines to require the Title IX Coordinator to oversee only institution-wide efforts to address barriers to reporting sex discrimination. Section 106.44(b) appropriately requires recipients, through their Title IX Coordinators, to monitor for barriers to reporting and gives Title IX Coordinators discretion with respect to the manner in which they do so.

In response to the question about recipient accountability, a recipient that fails to ensure that its Title IX Coordinator complies with this duty will not meet the requirements of § 106.44(b) and as such, the recipient would then potentially be the subject of an administrative enforcement action through which the recipient would be provided notice and an opportunity to come into compliance.

The Department agrees that supporting recipients and Title IX Coordinators in implementing these regulations is important. The Department will offer technical assistance, as appropriate, to promote compliance with these final regulations.

Changes: None.

3. Section 106.44(c) Notification Requirements

General Comments

Comments: Some commenters supported the notification requirements because they would ensure that a recipient learns of possible sex discrimination so it can operate its education program or activity free from sex discrimination. Commenters also supported the proposed regulations because it would clarify employee responsibilities, especially for elementary school and secondary school employees. Commenters also supported § 106.44(c) on the grounds that it would make it less burdensome for students, especially students with disabilities, to report sex-based harassment and would not limit actionable reporting to a narrow category of employees.

One commenter stated that proposed § 106.44(c) is a departure from the Department's previous guidance limiting the category of employees with notification requirements. Another commenter stated that the notification requirements would elevate sex discrimination over other forms of discrimination.

Some commenters alleged that mandated reporting chills reporting. Some commenters said institutions receive information from employees and then take little or no action. Other commenters argued that the proposed regulations would discourage complainants from seeking advice or assistance from a trusted employee and others stated that mandatory reporting negatively affects faculty members' ability to support students.

Some commenters expressed concern about the lack of institutional discretion to determine which employees should be mandatory reporters and urged the Department to modify the proposed regulations to give the recipient more discretion to categorize which employees must comply with certain notification requirements. Some commenters objected to the breadth of employees with notification duties.

Some commenters asked for supplemental guidance related to notification requirements.

Discussion: The Department agrees that notification requirements in

§ 106.44(c) will help ensure that a recipient learns of sex discrimination in its education program or activity so it can be addressed. The Department also agrees that it is less burdensome for students to report sex discrimination when more employees have notification responsibilities that further Title IX's nondiscrimination mandate. In response to one commenter stating that proposed § 106.44(c) departs from the Department's prior guidance, the Department has come to view broader notification requirements as more important in the time since the previous guidance was issued and notes that prior guidance interpreted the regulations and existing case law that preceded the 2020 amendments.

The Department disagrees that these notification requirements elevate sex discrimination over other forms of discrimination. Rather, these requirements ensure that employees know what to do when they are in receipt of information about conduct that reasonably may constitute sex discrimination so that a recipient can take action to address it, as is its obligation under Title IX. Nothing in these regulations prevents a recipient from requiring similar notification requirements for other forms of discrimination or harassment. The Department also notes the discussion of different standards for other harassment in the preamble to the 2020 amendments. 85 FR 30528.

The Department disagrees with commenters that the obligations under § 106.44(c) will chill reporting or compromise complainant autonomy, which is accounted for throughout the regulations, including in § 106.44(f). Rather, § 106.44(c) describes a recipient's obligation to require employees (other than confidential employees as addressed in § 106.44(d)) to notify the Title IX Coordinator of conduct that reasonably may constitute sex discrimination or, as applicable, provide contact information for the Title IX Coordinator and information about how to make a complaint of sex discrimination. Commenters presented no persuasive evidence or reasons to believe that this framework will so significantly deter reporting that the provision's potential chilling effect outweighs its important benefits. The Department is convinced that the final regulations will more effectively implement Title IX and its commitment to eliminating sex discrimination in a recipient's education program and activity. In response to commenters who asserted that institutions do not take action even when they receive information from employees, the Department notes that under the final regulations a recipient must require its Title IX Coordinator to take the actions outlined in § 106.44(f)(1) to promptly and effectively end any sex discrimination in its education program or activity, prevent its recurrence, and remedy its effects. The Department is prepared to enforce this requirement when it becomes aware that a recipient has declined to take the required actions.

The Department also disagrees that § 106.44(c) discourages complainants from seeking advice or assistance from a trusted employee or negatively affects faculty members' ability to support students. At elementary schools and secondary schools, all non-confidential employees must notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination. At postsecondary institutions once a student has provided information to non-confidential employees, the employee must either notify the Title IX Coordinator or, as applicable, provide the Title IX Coordinator's contact information and information about how to make a complaint of sex discrimination. A recipient, other than an elementary school or secondary school, has discretion to determine which of these actions employees who do not have authority to institute corrective action or administrative leadership, teaching or advising responsibility must take. 87 FR 41439. A recipient also has the discretion, which the Department maintains is appropriate because recipients vary in size, resources, and administrative structure, to make confidential employees available who do not have notification requirements, and these individuals can also provide confidential support to students. *See* § 106.44(d).

The Department declines to give recipients more discretion to determine which employees should have certain notification requirements. The notification requirements under § 106.44(c) are necessary to provide Title IX Coordinators, and therefore a recipient, with the information needed to respond appropriately to sex discrimination in its education program or activity. Title IX requires that a recipient operate its education program or activity in a manner that subjects no person to discrimination on the basis of sex; allowing a recipient to designate a more limited subset of employees to report discrimination than required under the final regulations would create a risk that individuals in certain aspects of a recipient's education program or activity would suffer from sex discrimination without that discrimination being addressed.

The Department also notes that a recipient may not avoid compliance with § 106.44(c) by requiring reporting to an external third party, as it must still ensure that the report reaches the Title IX Coordinator. If the Title IX Coordinator has delegated its duties by requiring reporting to the external third party, it must still exercise oversight over those delegated responsibilities to ensure a recipient's consistent compliance with its responsibilities under Title IX and this part.

In response to requests for supplemental guidance and technical assistance, the Department agrees that supporting recipients and Title IX Coordinators in implementing these regulations is important. The Department will offer technical assistance, as appropriate, to promote compliance with these final regulations.

As discussed below, the Department was persuaded that the notification requirements should be streamlined and clarified to facilitate compliance, and the Department has done so in the final regulations.

Changes: The notification requirements are streamlined and clarified as explained below, including by dividing § 106.44(c) into subsections to more clearly delineate notification requirements for different categories of employees.

Consistency With State Laws

Comments: Some commenters expressed concern about inconsistency with State laws that already require public school employees to notify their principal or supervisor when they become aware of potential sex discrimination or sex-based harassment instead of the Title IX Coordinator.

Discussion: Nothing in these final regulations precludes a recipient from complying with both these regulations and State and local laws that do not conflict. *See* 87 FR 41404–05; 85 FR 30454. *see also New York,* 477 F. Supp. 3d at 299 (regulation was not arbitrary and capricious when, among other things, the Department appropriately ''concluded that the Rule did not prevent recipients from complying with state and local laws and policies'' and commenters had not raised ''any actual conflicts with state law'').

Employees who are required to report sex discrimination to a supervisor can and should continue to do so. It is not necessarily inconsistent to also require employees to notify the Title IX Coordinator or an appropriate Title IX Coordinator designee. With respect to

State laws that may impose notification requirements related to sex discrimination or sexual harassment, the obligation to comply with Title IX and the final regulations is not obviated or alleviated by any such State or local law or other requirement. *See* § 106.6(b). The commenters did not identify a conflict between these final regulations and the referenced State or local laws, but if one did exist, the recipient's obligations under Title IX remain. *Id.* Whether a conflict exists must be determined based on the facts and the specific requirements under State or local law.

Changes: None.

Scope of Conduct Subject to § 106.44(c)

Comments: Several commenters suggested replacing ''conduct that may constitute sex discrimination under Title IX'' in proposed § 106.44(c) with ''conduct the employee reasonably believes constitutes sex discrimination under Title IX.'' One commenter stated that proposed § 106.44(c) would not require an employee to have a reasonable basis for believing that a disclosure of possible sex discrimination was reliable, which, the commenter argued, would divert resources from meritorious complaints.

Some commenters expressed concern about the scope of reportable conduct. One commenter asserted that the broad array of conduct that must be reported would impose substantial obligations on recipients and urged the Department to clarify the scope of covered sex discrimination in proposed § 106.44(c). Another commenter argued that the scope of reportable conduct would be overly broad because proposed § 106.44(c) would require notification of conduct that ''may constitute'' sex discrimination.

Discussion: The Department is persuaded by commenters that the final regulations should require notification of conduct that ''reasonably'' may constitute sex discrimination under Title IX, as discussed above. Limiting the scope of conduct to that which a recipient must respond based on a reasonable assessment, addresses a commenter's concern that § 106.44(c) as proposed would have diverted resources from meritorious complaints.

The Department acknowledges the concern about the scope of reportable conduct. The Department maintains that employees should be able to assess conduct under a standard that requires them to act based on information about conduct that reasonably may constitute sex discrimination under the recipient's program or activity. As discussed in the July 2022 NPRM, it is not necessary for the employee to have factual information that definitively indicates that sex discrimination occurred in order for the employee's notification requirements under § 106.44(c) to apply. 87 FR 41440. It would be enough for the employee to have information about conduct that could reasonably be understood to constitute sex discrimination under Title IX, including conduct that could constitute sex-based harassment. *Id.* For this reason, the Department has modified § 106.44(c) to refer to conduct that ''reasonably'' may constitute sex discrimination under Title IX.

The Department also notes that under § 106.8(d)(1), a recipient will be required to train all employees on the scope of conduct that constitutes sex discrimination under Title IX, including sex-based harassment. This training requirement will help recipients ensure that employees are able to recognize when information reported to them reasonably may constitute sex discrimination under Title IX. The Department maintains that speculative risk of an investigation of conduct that may not reasonably constitute sex discrimination outweighs the benefit of ensuring that the Title IX Coordinator learns of conduct that reasonably may constitute sex discrimination, including sex-based harassment, under a recipient's education program or activity. The Department does not think it is appropriate to require employees, in the first instance, to make a determination as to whether the conduct reported or the information learned meets every aspect of this regulation's definition of sex discrimination, including sex-based hostile environment harassment. Rather, under the final regulations, an employee must respond to conduct or information that could reasonably meet that definition.

The Department appreciates the opportunity to clarify that if an employee directly witnesses conduct under the recipient's program or activity that reasonably may constitute sex discrimination, including sex-based harassment, the employee will be considered to have ''information about conduct that reasonably may constitute sex discrimination'' under § 106.44(c) of the final regulations. In such circumstances, the employee is required to report the information to the Title IX Coordinator, or, as applicable, provide the Title IX Coordinator's contact information and information about how to make a complaint of sex discrimination to the person who was subjected to the conduct.

Changes: The final regulations require notification to the Title IX Coordinator when the employee has information about conduct that ''reasonably'' may constitute sex discrimination under Title IX ''or this part,'' which encompasses definitions that explain what reasonably may constitute sex discrimination.

Disclosures

Comments: Some commenters raised concerns about recipients disclosing information obtained through the notification requirements in proposed § 106.44(c). One commenter expressed concern that the notification requirements in proposed § 106.44(c) could lead to disclosure of an LGBTQI+ student's identity or expose a student to potential legal consequences for terminating a pregnancy. Some commenters suggested that the Department require recipients to place their reporting protocols online so that employees and students can easily determine who has mandatory reporting duties. Other commenters stated that employees who are not confidential employees should be trained to disclose their reporting requirements in advance and also at the time of a possible disclosure of an alleged incident of sex discrimination.

Discussion: The Department acknowledges concerns about disclosures and notes that the final regulations include § 106.44(j), which prohibits the disclosure of personally identifiable information obtained in the course of complying with this part, except in limited circumstances, such as to a parent, guardian, or other authorized legal representative with the legal right to receive disclosures on behalf of the person whose personally identifiable information is at issue. For additional information on this topic, see the discussion of § 106.44(j). The Department also notes that under § 106.8(c)(1), a recipient must provide a notice of nondiscrimination to students; parents, guardians, or other authorized legal representatives of elementary school and secondary school students; employees; applicants for admission and employment; and all unions and professional organizations holding collective bargaining or professional agreements with the recipient. The notice of nondiscrimination must include information on how to report information about conduct that may constitute sex discrimination under Title IX and how to make a complaint of sex discrimination. Through this process, a recipient may include information about employees' notification requirements and confidential employees, but the Department declines to require

reporting protocols to be posted online, because it prefers to leave recipients with flexibility to meet these requirements.

In response to comments, however, the Department has modified § 106.44(d)(2) to require a confidential employee to explain to any person who informs the confidential employee of conduct that reasonably may constitute sex discrimination under Title IX or this part of the circumstances in which the employee is not required to notify the Title IX Coordinator. The recipient must ensure that all employees are trained on all applicable notification requirements under § 106.44. *See* § 106.8(d).

The Department acknowledges the concern that a non-confidential employee who receives information about conduct that reasonably may constitute sex discrimination may, in the course of carrying out their notification obligations, identify a student as having been subject to sex discrimination based on sexual orientation or gender identity. To the extent disclosure of such information to the Title IX Coordinator is necessary for the recipient to address sex discrimination in its education program or activity, the Department maintains that such disclosure is justified and would be permitted by § 106.44(j)(3) to carry out the purposes of 34 CFR part 106. With regard to concerns about disclosures of personally identifiable information, § 106.44(j) generally prohibits the disclosure of personally identifiable information the recipient obtains in the course of complying with the Title IX regulations, which protects personal information of all students, including LGBTQI+ students and students who are pregnant or experiencing pregnancy-related conditions. As noted above and as explained in the discussion of § 106.44(j), that provision does not prohibit disclosures to a minor student's parent, guardian, or authorized legal representative who has the legal right to receive disclosures on behalf of the person whose personally identifiable information is at issue. For further explanation of the limited circumstances under which personally identifiable information obtained in the course of complying with this paragraph could be disclosed, see the discussion of § 106.44(j).

Changes: None.

Compliance Burdens

Comments: Some commenters questioned whether a Title IX Coordinator would be best positioned to provide emotional support to survivors. One commenter stated that the proposed regulations increase the scope of the Title IX Coordinator's role without considering the Title IX Coordinator's preexisting responsibilities and that, even though they have permission to delegate some duties, Title IX Coordinators remain solely responsible for all administrative tasks.

Some commenters asserted that proposed § 106.44(c) would impose an undue and unworkable burden on recipients, increasing the cost of attendance in higher education. Commenters also referenced the cost of litigation over whether a recipient's mandatory reporting policy implementation was negligent. One commenter asserted that confusion related to proposed § 106.44(c)(2) would incentivize recipients to make everyone a mandatory reporter to minimize risk.

Discussion: The Department recognizes that the final Title IX regulations increase the scope of the Title IX Coordinator's duties. Under § 106.8(a), as discussed elsewhere in this preamble, a recipient may have more than one Title IX Coordinator, and a Title IX Coordinator may designate employees to carry out some of its obligations, but a recipient must designate one of its Title IX Coordinators to retain ultimate oversight over those responsibilities and ensure the recipient's consistent compliance with its responsibilities under Title IX. *See* § 106.8(a)(2). To the extent § 106.44(c) places a burden associated with providing notifications under this provision on recipients, such burdens are justified because the requirements will help recipients meet their obligation to address sex discrimination in their education program or activity.

The Department disagrees that § 106.44(c) would impose an undue and unworkable burden on recipients, which could increase the cost of attendance in higher education. The Department has considered the costs, including potential litigation costs, in the *Regulatory Impact Analysis* and determined the benefits of the notification requirements justify the costs. The Department also has no reason to believe that the costs associated with § 106.44(c) are so great that they are likely to increase the overall cost of attending higher education institutions.

Changes: None.

First Amendment

Comments: Some commenters asserted that the notification requirements in proposed § 106.44(c) would chill protected speech and run afoul of the First Amendment because protected speech will be reported. Some commenters asked the Department to exempt certain disclosures from notification requirements because a student is unlikely to expect such disclosures to trigger notification to the Title IX Coordinator, such as those made at a public awareness event; in an application or other personal statement or interview; and in an anonymous school climate survey. Other commenters recommended exemptions for disclosures within a social media post, an academic assignment, or a research project.

Some commenters expressed concern that notification requirements would result in a conflict with an employee's religious beliefs. For example, one commenter stated that proposed § 106.44(c) would require an employee to notify the Title IX Coordinator of all possible conduct that might create a hostile environment, despite the employee's professional judgment or personal beliefs about the scope of Title IX. The commenter recommended that the Department modify proposed § 106.44(c) to allow an employee to not notify the Title IX Coordinator in certain circumstances.

Discussion: The Department disagrees that the notification requirements in § 106.44(c) will run afoul of the First Amendment and the Department has consistently maintained that Title IX is intended to protect students from invidious discrimination, not to regulate constitutionally protected speech. The notification requirement in § 106.44(c) generally requires employees to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or this part. Consistent with the discussion of First Amendment case law in this preamble, academic discourse of students or teachers generally would not meet this standard. First Amendment considerations are addressed at length in the section on First Amendment Considerations in the definition of ''sex-based harassment'' in § 106.2. The Department is fully committed to freedom of speech and academic freedom, and the Department reaffirms the importance of the free exchange of ideas in educational settings and particularly in postsecondary institutions, consistent with the First Amendment. Thus, nothing in the Title IX regulations restricts any rights that would otherwise be protected from government action by the First Amendment. *See* 34 CFR 106.6(d).

The Department declines to exclude information from notification requirements in some of the circumstances suggested by

commenters, such as in applications, interviews, and personal statements. To the extent these materials may provide a recipient with information about conduct that reasonably may constitute sex discrimination within the recipient's education program or activity, notification is important to allow the recipient to address the discrimination. In contrast to applications, interviews, and personal stories, public awareness events serve many benefits including empowering and informing students and thus it is appropriate to include a limited exception to the required action that a postsecondary institution must take in response to notification of information about conduct that reasonably may constitute sex-based harassment shared at such events. Public awareness events are discussed further in the discussion of § 106.44(e), which provides a limited exception to the required action that a postsecondary institution must take in response to notification of information about conduct that reasonably may constitute sex-based harassment.

The Department notes and references the discussion of religious liberty in the discussion of Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2) (Section I.C). As stated above and reflected in § 106.6(d), the Title IX regulations do not require a recipient to restrict any rights protected from government action by the First Amendment, including the freedom of speech, the free exercise of religion, or the freedom of association. In addition, the Department notes that Title IV of the Civil Rights Act of 1964, which is enforced by the Department of Justice's Civil Rights Division, specifically authorizes the Attorney General to respond to certain complaints alleging religious discrimination against students in public schools and higher education institutions, and Title VII prohibits religious discrimination in employment. The Department declines to modify its Title IX regulations to exempt individual employees from the notification requirements of Title IX when there may be a conflict with an employee's religious beliefs because Title IX imposes obligations on recipients as opposed to employees. The Title IX statute allows the Department to implement the statute's qualified exemption for certain religious institutions, but the statute contains no comparable exemption for individuals. 20 U.S.C. 1681(a)(3). It is within the Department's regulatory authority to define the scope of Title IX regulations consistent with the statute, and an individual employee's personal beliefs about the scope of Title IX cannot alleviate the recipient's responsibilities to comply with the regulations.

Changes: None.

Due Process

Comments: Some commenters critiqued the proposed regulation's broad reporting requirement as inadequately protective of a respondent's due process rights. In the view of these commenters, the proposed regulations would lead to over-reporting, which would harm respondents because they would be subject to investigations and face discipline.

Discussion: The Department disagrees that § 106.44(c) is not protective of respondents' due process rights or that it will lead to over-reporting. As discussed above, employees have a duty to act only upon information that reasonably may constitute sex discrimination in the recipient's education program or activity—not allegations of sex discrimination that do not meet this standard. Notification under these circumstances does not impair a respondent's due process rights, but rather may lead to processes designed to protect those rights. Not all reports pursuant to § 106.44(c) will result in investigation, and not all investigations will result in grievance procedures against respondents. For those that do, the grievance procedures in § 106.45, and if applicable § 106.46, provide respondents with a fair process, as explained in the discussions of the various provisions of §§ 106.45 and 106.46 and in Framework for Grievance Procedures for Complaints of Sex Discrimination (Section II.C).

Changes: None.

Complainant Autonomy and Mandatory Reporting

Comments: Some commenters argued that mandatory reporting violates the autonomy of complainants and their ability to request confidentiality and decide when to initiate grievance procedures.

Some commenters expressed concern that the efficacy of mandatory reporting is not supported by empirical evidence and cited numerous studies. As an example, commenters stated that researchers have found that a policy that requires an employee to report all incidents of suspected sex discrimination against a student to a Title IX Coordinator, even when the student neither expects nor wants the employee to do so, forces the employee to betray the student's trust, violates student autonomy, and could subject the student to grievance procedures they explicitly preferred to avoid. One commenter stated that often recipients fail to act when they receive a report either because the complainant declines to participate in grievance procedures or the recipient determines that the conduct does not violate any policy. The commenter stated that these trends indicate that mandatory reporting is ineffective.

Some commenters suggested that employees should be required to provide information about confidential employees to complainants and some expressed concern that delineating responsibility between confidential employees and non-confidential employees may result in incidents going unaddressed.

Discussion: The Department has heard commenters' concerns that the proposed regulations would violate the autonomy of complainants. The Department clarifies that even after a Title IX Coordinator is notified of conduct that reasonably may constitute sex discrimination under § 106.44(f), complainants retain autonomy over whether to make a complaint. Only in very limited circumstances do the regulations contemplate that a Title IX Coordinator may initiate a complaint after a complainant has declined to do so. *See* § 106.44(f)(1)(v). Notably, § 106.44(f)(1)(v)(A)(*1*) includes a complainant's request not to proceed with a complaint investigation as a factor the Title IX Coordinator must consider when determining whether to initiate a complaint of sex discrimination. The Department has determined that complainant autonomy and the ability to seek out confidential resources is better supported through requirements for confidential employees under § 106.44(d) and requirements for Title IX Coordinators under § 106.44(f), rather than by limiting the category of employees who must notify the Title IX Coordinator of conduct that reasonably may constitute sex discrimination under Title IX or this part. It is critical for the Title IX Coordinator to receive notice of such conduct for the recipient to address sex discrimination in its education program or activity.

The Department understands, as noted by commenters, that complainants may not always disclose their experiences with the intent to initiate grievance procedures and may be seeking support and guidance. The Department appreciates the opportunity to clarify that, regardless of whether a complainant seeks to initiate the grievance procedures, § 106.44(f)(1)(ii) will require the Title IX Coordinator to offer and, if accepted, coordinate

supportive measures under § 106.44(g), as appropriate, for the complainant. In addition, § 106.44(f)(1)(iii)(A) requires the Title IX Coordinator to notify the complainant or, if the complainant is unknown, the individual who reported the conduct, of the grievance procedures under § 106.45, and if applicable § 106.46, as well as the informal resolution process under § 106.44(k), if available and appropriate.

The Department also notes that, under § 106.8(c)(1)(i)(E), a recipient must include information about how to report information about conduct that may constitute sex discrimination under Title IX and how to make a complaint of sex discrimination in its notice of nondiscrimination and under § 106.8(c)(1)(i)(D) a recipient must include how to locate its nondiscrimination policy and grievance procedures in its notice of nondiscrimination. A recipient may include information about employees' duties to notify the Title IX Coordinator when they have information, including through a report from a complainant, about conduct that reasonably may constitute sex discrimination under Title IX as part of the description of how to report information about conduct that may constitute sex discrimination in its notice of nondiscrimination or in its nondiscrimination policy.

The Department acknowledges the articles and research cited by commenters regarding the efficacy of mandatory reporting. As discussed in the July 2022 NPRM and the 2020 amendments, the extent to which a universal mandatory reporting system is beneficial or detrimental to complainants is difficult to determine and research to date is inconclusive. *See, e.g.,* 87 FR 41438. Moreover, some of the articles and research cited by the commenters do not directly support the commenters' assertions regarding mandatory reporting, while others provide a more nuanced view, with conflicting evidence on mandatory disclosure.[31] The Department has assessed the conflicting evidence provided by the commenters and has concluded that the reporting requirements in § 106.44(c) are appropriate. *See, e.g., Associated Fisheries of Me., Inc.* v. *Daley,* 127 F.3d 104, 110 (1st Cir. 1997) (''When an agency is faced with conflicting scientific views and chooses among them, its decision cannot be termed arbitrary or capricious.''). Also, while some commenters cite to articles discussing the concept of institutional betrayal in support of their position that mandatory reporting may violate a student's autonomy and betray their trust in the institution, a review of the articles cited by the commenters provides a more fulsome description of the myriad reasons that survivors of sexual assault may experience institutional betrayal, some of which may be alleviated, rather than exacerbated, by the notification requirements in the final regulations.[32] For example, an institutional environment that is conducive to sexual assault; an institution's failure to adequately address reports of sexual assault, including lack of follow-up; and an institution's harmful response to reports of discrimination, such as blaming or punishing survivors for the violence committed against them.[33] These institutional failings illustrate the need to consider recipients' duty to address sex discrimination in their education programs and activities alongside complainant autonomy, which, as discussed elsewhere in this preamble, the final regulations were constructed to carefully consider.

Respecting complainant autonomy while also ensuring an adequate response to sex discrimination can be achieved, in part, by requiring postsecondary institutions to provide clarity regarding ''confidential employees,'' whom students may confide in without automatically triggering a report to the Title IX Coordinator. *See* 85 FR 30043. Notably, some of the literature referenced by commenters opposing mandatory reporting describes the importance of clarity in communicating information about confidential resources as well as mandatory reporters so that complainants can make informed decisions. Section 106.44(d)(1) requires a recipient to notify all participants in the recipient's education program or activity of how to contact its confidential employees, and a recipient must require a confidential employee to explain to any person who informs the confidential employee of conduct that reasonably may constitute sex discrimination of the employee's confidential status, how to contact the Title IX Coordinator, and that the Title IX Coordinator may be able to offer and coordinate supportive measures, as well as initiate an informal resolution process or an investigation under the grievance procedures. *See* § 106.44(d)(2). Although some individuals who contact confidential employees may choose not to make a complaint, designating some employees as confidential employees supports the recipient's overall responsibility to address sex discrimination. The Department disagrees that reporting to confidential employees will result in incidents going unaddressed; rather, such reporting allows incidents to be addressed in a manner consistent with a complainant's desires by facilitating the complainant's ability to seek supportive measures or initiate a complaint when and if the complainant desires to do so.

As discussed in the July 2022 NPRM, the Department has determined that complainant autonomy would be better supported by including a definition of ''confidential employee'' and providing requirements for such employees, than by limiting the scope of non-confidential employees who must notify the Title IX Coordinator of conduct that may constitute sex discrimination. 87 FR 41439. Nevertheless, a complainant's desire to pursue a complaint or not should be relevant in a recipient's determination whether to initiate a Title IX complaint as provided under § 106.44(f)(1)(v)(A)(*1*) and explained in the discussion of § 106.44(f) below. The Department maintains that the final regulations carefully balance complainant autonomy and the need to address sex discrimination so all students, employees, and others can participate in a recipient's education program or activity without fear of sex discrimination.

Changes: None.

Training Regarding Notification Requirements

Comments: Some commenters expressed concern that employees who would have notification requirements under proposed § 106.44(c) would not be appropriately trained to respond to a disclosure of possible sex discrimination because the various notification requirements under proposed § 106.44(c) would make it too challenging and overly burdensome to train employees.

[31] *See, e.g.,* Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting,* 85 Tenn. L. Rev. 71, 103–05 (2017); National Academies of Science, Engineering, & Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine,* 105–107 (2018).

[32] *See, e.g.,* Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma,* 26 J. Traumatic Stress 119 (2013); Nicole Bedera, Settling for Less: How Organizations Shape Survivors' Legal Ideologies Around College Sexual Assault (2021) (Ph.D. dissertation, University of Michigan).

[33] *See, e.g.,* Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma,* 26 J. Traumatic Stress 119 (2013); Nicole Bedera, Settling for Less: How Organizations Shape Survivors' Legal Ideologies Around College Sexual Assault (2021) (Ph.D. dissertation, University of Michigan).

Discussion: As described in more detail below, the Department is persuaded that the notification requirements proposed in the July 2022 NPRM should be simplified. The details of revised § 106.44(c) are discussed below. The Department maintains that the revised notification framework will make it easier for recipients to implement and train on the requirements and address sex discrimination in its education program or activity.

Changes: The changes to the notification requirements are described under the paragraphs of § 106.44(c), below.

General Comments Related to § 106.44(c)(1)

Comments: Some commenters supported mandatory reporting for younger children under Title IX, noting that these students are not informed about which employees have the authority to address sex discrimination, including sex-based harassment, and likely think it will be addressed by anyone who receives the disclosure. Commenters noted that elementary school and secondary school employees may also have obligations to report possible sexual abuse under mandatory State reporting laws, and some commenters stated that elementary school and secondary school employees can reasonably be trained to identify sex discrimination.

Some commenters objected to proposed § 106.44(c)(1), stating that it would create a new duty for employees in elementary school and secondary schools.

Discussion: Under these regulations, the notification requirement applies to conduct that reasonably may constitute sex discrimination, including sex-based harassment, for the same universe of employees at elementary schools and secondary schools that applied under the 2020 amendments—all employees—except that § 106.44(c)(1) exempts confidential employees from the requirement to notify the Title IX Coordinator.

The final regulations for an elementary school or secondary school recipient are similar to that which was proposed, with the addition of ''reasonably'' to describe the conduct that is subject to the notification requirement, and the addition of ''or this part'' to reference these regulations, which address definitions that explain what reasonably may constitute sex discrimination.

Changes: The Department has revised § 106.44(c)(1) to state that an elementary school or secondary school recipient must require all of its employees who are not confidential employees to notify the Title IX Coordinator when they have information about conduct that ''reasonably'' may constitute sex discrimination under Title IX ''or this part.''

Employee Complainants—§ 106.44(c)(1)

Comments: Some commenters recommended that the Department consider modifications to proposed § 106.44(c)(1) to treat disclosures of possible sex discrimination involving an employee complainant differently from disclosures involving a student complainant, arguing that an adult employee can notify the Title IX Coordinator themselves.

Discussion: The Department considered commenters' suggestion that § 106.44(c)(1) treat disclosures from students and employees differently. The Department has determined, however, that employees—just like students—may not always realize that they have been subjected to discrimination; that the recipient has a duty to address such discrimination; and that a Title IX Coordinator is available to help the recipient do so. In addition, based on the comments to the July 2022 NPRM, the Department has determined that simplifying the notification requirements will better serve the purpose of addressing sex discrimination in recipients' education programs and activities. The Department has accordingly removed a distinction between students and employees in § 106.44(c)(2) and declines to add such a distinction in § 106.44(c)(1). As commenters noted, when complaints are not reported to and addressed by the Title IX Coordinator, allegations of sex discrimination can go unaddressed and the grievance procedure requirements in these regulations will not be effective.

Changes: As described below, the Department has removed the distinction between students and employees in § 106.44(c)(2).

Law Enforcement

Comments: One commenter stated that, in elementary schools and secondary schools, typically law enforcement is contacted to investigate without considering the wishes of the student complainant and that administrator-initiated investigations do not typically involve the Title IX Coordinator and tend to be disorganized and lack transparency.

Discussion: The Department does not have the authority to control situations in which law enforcement is required to be involved as those situations are generally covered by State, local, or other Federal laws and involve requirements and processes that are separate from Title IX. As for Title IX, which the Department does have the authority to enforce, including through these final regulations, the Department has put in place the protections described above.

Changes: None.

Age-Appropriateness

Comments: One commenter expressed concern that proposed § 106.44(c)(1) would fail to account for the likely immaturity of minor students in an arbitrary and capricious manner. The commenter provided an example of a second-grade girl excluded by a group of boys from their kickball team. The commenter asserted that if the girl were to tell a teacher what happened, the teacher would be required to report the matter to the Title IX Coordinator.

Discussion: The Department disagrees that proposed § 106.44(c)(1) fails to account for the immaturity of minor students. The determination whether sex discrimination, including sex-based harassment, has occurred in a recipient's education program or activity is necessarily dependent on the context. The Department notes that the determination whether conduct constitutes hostile environment sex-based harassment requires the consideration of the parties' ages, which would account for the maturity level of minor students, among many other contextually specific factors. The Department clarifies that the regulations do not preclude a teacher from drawing on their required training under § 106.8(d)(1)(ii) and exercising their judgment and taking into account the parties' ages—and indeed the regulations require them to do so—in assessing whether the alleged conduct reasonably may constitute sex discrimination under Title IX or this part. The Department has also added ''or this part'' to reference these regulations, which address definitions that explain what conduct reasonably may constitute sex discrimination.

Changes: The final regulations require all employees of an elementary school or secondary school who are not confidential employees to notify the Title IX Coordinator when they have information about conduct that ''reasonably'' may constitute sex discrimination under Title IX ''or this part.''

General Comments Related to § 106.44(c)(2)

Comments: Some commenters stated that proposed § 106.44(c)(2) was too

complex, would confuse complainants and non-confidential employees about notification requirements, risk complainants not having the information they need, require extensive training, and be impossible to monitor. Commenters urged the Department to simplify proposed § 106.44(c)(2) to help both students and employees easily understand who has notification requirements and when. Some commenters urged the Department to modify proposed § 106.44(c)(2) to succinctly and clearly designate specific categories of employees who must notify the Title IX Coordinator of information related to sex discrimination and provide a recipient flexibility to impose notification requirements on additional employees. Commenters asserted that proposed § 106.44(c)(2) will confuse employees and students and be inefficient and difficult for a recipient to implement. Some commenters noted that an employee could fall under various categories in proposed § 106.44(c)(2) due to fluctuating job duties and responsibilities and questioned the feasibility of requiring a recipient to retrain each employee any time their duties shifted.

Some commenters disagreed with the assertion in the July 2022 NPRM that postsecondary students may be less capable of self-advocacy than employees as a justification for the Department's proposal of different notification requirements for when a student as opposed to an employee is being subjected to sex discrimination.

Some commenters said that many postsecondary institutions currently require any non-confidential employee to notify the Title IX Coordinator of any case of possible sex discrimination.

Commenters offered a number of alternatives to proposed § 106.44(c)(2). For example:

- Eliminate proposed § 106.44(c)(2) so that proposed § 106.44(c)(1) would apply to any recipient.
- Modify proposed § 106.44(c)(2)(i)–(ii) to apply only to any employee who a student could reasonably believe has the authority or ability to address a sexual harassment complaint.
- Require notification to the Title IX Coordinator if the potential target of discrimination is a minor, and provision of the contact information for the Title IX Coordinator if the potential target of discrimination is an adult.
- Modify proposed § 106.44(c) so that only an employee in an administrative or leadership position must notify the Title IX Coordinator of possible sex discrimination.
- Categorize employees as one of (1) confidential employees, (2) employees providing support, or (3) officials required to report as a model that the Department could adopt in final regulations.
- Align proposed § 106.44(c)(2)'s notification requirements with the Clery Act and require training based on the likelihood that an employee will receive disclosures related to sex discrimination.
- Restrict mandatory reporting obligations to a group of designated reporters that is determined in consultation with faculty governance processes, collective bargaining, and collaborative engagement with students and others invested in addressing campus inequities, and consistent with any other Federal or State reporting requirements.
- Expand the categories of employees who are required to comply with § 106.44(c) to include resident assistants, science lab monitors, tech lab monitors, athletic and workout facility workers, volunteers and contractors who provide significant aids and benefits, including athletic coaches, extracurricular coordinators, and other individuals whose duties and interactions with students foster close relationships with students.
- Expand reportable conduct under proposed § 106.44(c)(2)(ii) so that a covered employee would be required to notify the Title IX Coordinator of any conduct that may constitute sex discrimination regardless of whether the person subjected to the conduct is a student or employee.

Discussion: The Department is persuaded by commenters that § 106.44(c)(2) should be streamlined and simplified to avoid confusion and to clearly delineate notification responsibilities at recipients other than elementary schools and secondary schools. As stated in the July 2022 NPRM, in the elementary school and secondary school setting, school administrators, teachers, and other employees exercise a considerable degree of control and supervision over a recipient's students, in addition to being mandatory reporters of child abuse under State laws. 87 FR 41437. Therefore, requiring all non-confidential employees in these schools to notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination under Title IX or this part would implement Title IX's guarantee of protection against sex discrimination in a manner that best serves the needs and expectations of those students. *Id.* In the postsecondary school context, however, the Department has adopted a more nuanced approach that gives greater weight to complainant autonomy and reflects the more complex administration of postsecondary institutions. 87 FR 41438–39.

Specifically, under paragraph (c)(2), all recipients other than elementary schools and secondary schools, including postsecondary institutions, must distinguish between two categories of employees who are not confidential employees: (1) those who either have authority to institute corrective measures on behalf of the recipient or responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity (''Category 1''); and (2) all other employees who are not confidential employees and not covered under Category 1 (''Category 2''). Category 1 employees must notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or the regulations. This requirement is the same as that which applies to non-confidential employees at elementary schools and secondary schools, which is appropriate because of the authority and leadership roles Category 1 employees hold, as discussed further below. Category 2 employees must either notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or the regulations, or provide the contact information of the Title IX Coordinator and information about how to make a complaint of sex discrimination to any person who provides the employee with information about conduct that reasonably may constitute sex discrimination under Title IX or the regulations. The recipient will have discretion to determine which of these two actions Category 2 employees must take or whether to leave the discretion to those employees.

In response to commenters' concerns, the final regulations no longer differentiate obligations based on whether the employee is receiving information from a student or another employee. The Department has determined that it is simpler, easier to understand, and more effective for employees to know what they must do or say under any circumstance, rather than requiring them to alter their actions based on the employee or student status of the person sharing the information. This change also addresses commenters' objection to the distinction in the July 2022 NPRM between students and

employees and their ability to self-advocate. *See* 87 FR 41438.

A recipient has discretion to further simplify the notification requirement by requiring all employees to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX, or it can follow the framework with two categories of employees and undergo a straightforward set of inquiries to determine whether the employee is in Category 1 and must report the information to the Title IX Coordinator. If the employee has authority to institute corrective measures on behalf of the recipient or has responsibility for administrative leadership, teaching, or advising in the education program or activity, then the employee is in Category 1.

As discussed in the July 2022 NPRM, requiring employees with the authority to institute corrective measures to notify the Title IX Coordinator when they have information about conduct that reasonably may constitute sex discrimination under Title IX is generally consistent with the definition of ''actual knowledge'' in § 106.30(a) in the 2020 amendments. 87 FR 41438. However, it is not sufficient to limit notification requirements to these individuals because most students—and employees—are not in a position to know whether a particular employee has the authority to institute corrective measures. Likewise, students do not necessarily know which employees are in administrative or leadership roles or which employees have responsibilities under the Clery Act.

The other employees in Category 1 are responsible for providing aid, benefits, or services to students, and therefore it is likely that a student would view these employees as persons who would have the authority to redress sex discrimination or obligate the recipient to act. The same is true for employees with administrative roles who are not student-facing (*e.g.,* a director of an employee benefits program). 87 FR 41438. The Department's position, as stated in the July 2022 NPRM, which is consistent with the Department's position in the 2020 amendments, is that whether an employee has the authority to institute corrective measures on behalf of a recipient is a fact-specific determination that rests on the recipient's own policies. 87 FR 41439. The Department's view of which employees have responsibility for administrative leadership, teaching, and advising remains the same as the July 2022 NPRM. *Id.*

The Department acknowledges commenters' suggestions for other notification frameworks, but the Department has determined that the framework adopted in the final regulations best fulfills Title IX's nondiscrimination mandate. A recipient's employees who have information about conduct that reasonably may constitute sex discrimination under Title IX are not permitted to ignore such conduct. And it is not workable or appropriate for employees to make decisions about Title IX reporting based on a student's age; such a requirement could introduce unnecessary complexity. The Department no longer believes it is appropriate to leave the determination of who must report to the Title IX Coordinator to recipients—other than allowing a recipient to determine whether Category 2 employees must report to the Title IX Coordinator or may instead provide only the contact information of the Title IX Coordinator—because an effective compliance program requires that all employees know how to respond appropriately to information about conduct that reasonably may constitute sex discrimination.

The Department declines to enumerate all of the job titles of employees who are covered by sub-paragraph (c)(2). All non-confidential employees have some duty under this provision, and it is up to the recipient to reasonably determine based on the facts whether a particular employee is in Category 1 or 2. Regarding employees who may have fluctuating job duties and responsibilities such that they may move between Category 1 and Category 2 and need updated training, as discussed more fully in the section on training in § 106.8(d), the Department has revised § 106.8(d) to clarify that training must occur promptly when an employee changes positions that alters their duties under Title IX or the final regulations and annually thereafter.

The Department continues to exempt confidential employees from the notification requirements in § 106.44(c)(2) and clarifies that ''confidential employee'' is defined in § 106.2, and that the reference to ''advising'' in § 106.44(c)(2)(i) does not change the definition of confidential employee. An advisor who meets the definition of ''confidential employee'' would not have notification requirements.

Changes: The Department has modified § 106.44(c)(2) regarding recipients that are not elementary schools or secondary schools to state that such recipients must, at a minimum, require: Any employee who is not a confidential employee and who either has authority to institute corrective measures on behalf of the recipient or has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or this part. All other employees who are not confidential employees are required to either: notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or this part; or provide the contact information of the Title IX Coordinator and information about how to make a complaint of sex discrimination to any person who provides the employee with information about conduct that reasonably may constitute sex discrimination under Title IX or this part.

Safety Threats

Comments: One commenter suggested that the Department modify the proposed regulations to state that when any employee learns about conduct that poses a safety threat to the disclosing individual or others, the employee should immediately report the conduct to the Title IX Coordinator, regardless of whether the disclosing individual wants to report the conduct to the Title IX Coordinator.

Discussion: The Department acknowledges recipients' responsibility to respond to safety threats on campus and reminds commenters that employees' specific reporting obligations are governed by the recipient's policies and, for postsecondary institutions only, the Clery Act. For that reason, the Department declines in these regulations to establish additional requirements pertaining to reporting of safety threats. Nothing in these regulations precludes a recipient from requiring all non-confidential employees to also immediately report safety threats that relate to sex-based conduct to the Title IX Coordinator. For additional discussion of safety threats, see the section on the definition of ''confidential employee'' and the requirements imposed upon such employees. The Department also notes that there are other provisions of the final regulations that address safety threats. *See, e.g.,* §§ 106.44(e), (f), and (h), 106.46(c).

Changes: None.

Study Abroad Programs

Comments: Some commenters expressed concern that students in study abroad programs will not know the contact information of the Title IX Coordinator, which could deter a complainant from exercising their Title IX rights.

Discussion: As an initial matter, § 106.8(c)(1)(i) requires that the name or title, office address, email address, and telephone number of the recipient's Title IX Coordinator must be included in the recipient's notice of nondiscrimination. As stated in § 106.11, Title IX applies to every recipient and to all sex discrimination occurring under a recipient's education program or activity in the United States. A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States. Conduct occurring in a study abroad program is not governed by these regulations. However, if a student returns to the United States and conduct that occurred in a study abroad program contributes to a hostile environment in the United States, that conduct may be relevant and considered by the recipient so that it can address the sex discrimination occurring within its program in the United States. Nothing in these regulations precludes a recipient from adopting procedures that address conduct that occurs outside of the United States, but Title IX does not apply outside of the United States. For additional discussion of study abroad programs, see the section on Extraterritoriality under § 106.11.

Changes: None.

Employment Discrimination

Comments: One commenter opposed proposed § 106.44(c)(2)(iii) because they believed that any discrimination an employee experiences in the course of their employment should be governed by the employment contract. The commenter asserted that the Equal Employment Opportunity Commission and the recipient's human resources department have jurisdiction over sex discrimination within a recipient's workplace, and that neither Title IX nor the Department have jurisdiction over such matters.

Discussion: Title IX states that ''no person in the United States'' shall be subject to sex discrimination under any education program activity receiving Federal financial assistance. Since its enactment, Title IX has been understood to cover employment discrimination. *See N. Haven Bd. of Educ.,* 456 U.S. at 520 (''Section 901(a)'s broad directive that 'no person' may be discriminated against on the basis of gender appears, on its face, to include employees as well as students.''). The Title IX regulations have also covered discrimination on the basis of sex in employment since 1975. *See* 40 FR 24143–44 (subpart E). The Department notes that the EEOC may also have jurisdiction over some Title IX complaints filed with OCR. *See* OCR Case Processing Manual, at 26–27.

Changes: None.

Information About How To Make a Complaint

Comments: One commenter recommended that the Department delete ''and information about how to report sex discrimination'' from proposed § 106.44(c)(2)(iv)(B) because this information should come from the Title IX Coordinator. The commenter argued that the Title IX Coordinator is better equipped than an employee to discuss ''incident specifics,'' provide information on supportive measures, explain a recipient's grievance procedures, and assess safety considerations or concerns.

Discussion: The Department declines to delete ''and information about how to report sex discrimination'' from § 106.44(c)(2)(ii)(B) because that is an important part of the alternative option for Category 2 employees, but has modified the text for clarity so that it now reads ''how to make a complaint of'' sex discrimination, consistent with the Department's intent. However, this requirement does not require more than stating that the Title IX Coordinator will provide information about the grievance procedures, supportive measures, and how to make a complaint of sex discrimination. Category 2 employees are not required by these regulations to explain a recipient's grievance procedures or supportive measures. Indeed, in order to promote consistency of information, the Title IX Coordinator is responsible for providing this information as part of their obligations under § 106.44(f)(1).

Changes: The Department has modified § 106.44(c)(2)(ii)(B) to state that one of the options for Category 2 employees is to provide the contact information of the Title IX Coordinator and information about how to make a complaint of sex discrimination to any person who provides the employee with information about conduct that reasonably may constitute sex discrimination under Title IX or this part.

Comments Related to § 106.44(c)(3)

Comments: Some commenters urged the Department to provide guidelines outlining proposed § 106.44(c)'s application to student employees, such as work-study participants.

Discussion: The Department recognizes that a person may be both a student and an employee of a postsecondary institution. In such cases a postsecondary institution would need to reasonably determine whether the requirements of § 106.44(c)(2) would apply. Proposed § 106.44(c)(3) set out two factors: whether the person's primary relationship with the postsecondary institution is to receive an education and whether the person learns of conduct that reasonably may constitute sex discrimination under Title IX while the person is performing employment-related work. However, after further considering the issue, the Department is removing these factors in the final regulations in recognition of the fact that a recipient may have different bases upon which it reasonably determines a student-employee's status. Because employment laws vary by State, recipient discretion is appropriate in this context and a recipient should give notice to its student-employees of the circumstances under which a person who is both a student and an employee is subject to the requirements of paragraph (c)(2). A recipient is free to consider the factors that were provided in the proposed regulations, but it is not required to do so and has the flexibility to consider those or other factors when determining whether a person who is both a student and an employee is subject to the requirements of § 106.44(c)(2).

Changes: The Department has revised proposed § 106.44(c)(3) to state that a postsecondary institution must reasonably determine and specify whether and under what circumstances a person who is both a student and an employee is subject to the requirements of paragraph (c)(2) of this section.

Comments Related to § 106.44(c)(4)

Comments: Some commenters supported proposed § 106.44(c)(4) because it would emphasize complainant agency and recognize that a recipient does not have notice if an employee complainant chooses not to disclose sex discrimination they experienced. Other commenters urged the Department to modify proposed § 106.44(c)(4) to state that a recipient does not have notice of or an obligation to respond to sex discrimination if the only employee with actual knowledge of the conduct is the respondent, which

would be consistent with the 2020 amendments at § 106.30(a) (definition of actual knowledge).

Discussion: The Department maintains that it would be inappropriate to require an employee to notify the Title IX Coordinator of information about conduct that reasonably may constitute sex discrimination under Title IX when the only employee with the information is the employee complainant. An employee's decision as to whether to notify the Title IX Coordinator that the employee was subjected to sex discrimination or make a complaint of sex discrimination, including sex-based harassment, should be left up to the employee complainant. 87 FR 41441. However, if the employee complainant tells another employee, then the employee who receives the information would have notification requirements under § 106.44(c)(1) and (2). The Department is persuaded, after reviewing the comments, that additional clarity is appropriate and has revised § 106.44(c)(4) to clarify that the notification requirements in § 106.44(c)(1) and (2) do not apply to an employee who has personally been subject to conduct that reasonably may constitute sex discrimination under Title IX or this part.

The Department declines to modify § 106.44(c)(4) to state that a recipient does not have notice of or an obligation to respond to sex discrimination if the only employee with actual knowledge of the conduct is the respondent for the reasons explained in the section on Notice of Sex Discrimination above.

Changes: The Department has revised proposed § 106.44(c)(4) such that the final regulations state that ''the requirements of paragraphs (c)(1) and (2) of this section do not apply to an employee who has personally been subject to conduct that reasonably may constitute sex discrimination under Title IX or this part.''

4. Sections 106.2 and 106.44(d) ''Confidential Employee'' Requirements and Definition

Sections 106.2 and 106.44(d) Definition of ''Confidential Employee'' and General Requirements

Comments: A number of commenters expressed general support for the definition of ''confidential employee'' at § 106.2 and for the requirements related to confidential employees at § 106.44(d). Commenters noted that confidential employees or confidential resources help complainants in various ways, including safety planning, explaining the complainants' rights and legal options, helping complainants regain a sense of control over next steps, and providing referrals to on- and off-campus resources.[34]

Several commenters stressed the importance of services provided by community-based organizations like rape crisis centers. Some commenters asked the Department to explain any distinction between ''confidential employee'' as defined in proposed § 106.2 and the term ''confidential resource'' in proposed § 106.45(b)(5). Other commenters urged the Department to designate specific types of individuals as confidential employees, such as teachers, victim advocates, or employees of offices providing mental health services or resources for minority groups.

One commenter raised concerns that having different responsibilities for confidential and non-confidential employees would result in inadvertent failures to address incidents.

Some commenters asked the Department to make multiple confidential resources available to students, to require recipients to collaborate or contract with community-based organizations, or to inform students about such organizations. Some commenters asked for clarification regarding how the regulations related to confidential employees interact with VAWA 2013 and VAWA 2022, the Clery Act, Title VII, and other State and Federal laws. Other commenters asked the Department to modify the definition of ''confidential employee'' in proposed § 106.2 or to otherwise make clear that postsecondary institutions are not permitted to designate non-employees as mandatory reporters or campus security authorities.

Another commenter asked the Department to confirm that confidential employees are subject to proposed § 106.40(b)(2)'s requirements to, upon receiving a disclosure about a student's pregnancy, provide certain information to the individual making the disclosure.

Discussion: The Department acknowledges commenters' support for § 106.2, which defines ''confidential employee'' and § 106.44(d), which specifies the requirements for these employees. Section 106.44(d) makes clear that a confidential employee is not required to notify the Title IX Coordinator when a person informs them of conduct that reasonably may constitute sex discrimination under Title IX or this part. Instead, § 106.44(d) requires a recipient to notify all participants in the recipient's education program or activity of how to contact its confidential employees, if any, subject to a limited exclusion discussed below. In addition, the final regulations mandate that a recipient require a confidential employee, in response to a person who informs that employee of conduct that reasonably may constitute sex discrimination under Title IX, to: explain the employee's status as confidential for purposes of Title IX and the Title IX regulations, including the circumstances in which the employee is not required to notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination (*e.g.,* when the person is providing confidential services and not in circumstances when the employee is performing another role, such as teaching or coaching, *see* 87 FR 41441–42); provide that person with contact information for the Title IX Coordinator; explain how to make a complaint of sex discrimination; and explain that the Title IX Coordinator may be able to offer and coordinate supportive measures as well as initiate an informal resolution process or an investigation under the grievance procedures.

As discussed in the July 2022 NPRM, OCR received information through listening sessions and the June 2021 Title IX Public Hearing that stressed the importance of access to confidential employees for persons who have been subjected to sex-based harassment, including sexual violence. *See* 87 FR 41441. The comments in support of the proposed confidential employee provisions underscore the importance of a confidential reporting mechanism to allow students to learn about how to obtain supportive measures without disclosing their identity to their alleged harasser or initiating a Title IX investigation. In addition, requiring confidential employees to share information about how to contact the recipient's Title IX Coordinator and make a complaint of sex discrimination assists the recipient in its ability to respond to sex discrimination in its education program or activity. Ensuring that some employees are able to receive confidential reports of sex discrimination is a longstanding priority for the Department and is consistent with the practices of many recipients both before and since the 2020 amendments. *See, e.g.,* 2001 Revised Sexual Harassment Guidance, at 17–18;

[34] Please note that certain commenters referred to ''confidential resources'' rather than ''confidential employees,'' and some of these commenters explained they used the former term to encompass non-employees. This discussion uses the term ''confidential resource'' when describing comments that use this term. However, as explained below, the term ''confidential employee'' in the final regulations only covers employees of a recipient.

2014 Q&A on Sexual Violence, at 18–23; 85 FR 30039–40. The Department disagrees that the use of confidential employees will lead to an inadvertent failure to address incidents, and commenters did not offer persuasive evidence in support of that assertion. Rather, the Department agrees with those commenters who expressed that confidential employees allow individuals to feel more comfortable seeking the support they need and ultimately make the recipient aware of incidents that may otherwise have gone unreported.

The Department appreciates the opportunity to clarify that, for purposes of these Title IX regulations, a confidential employee refers to an employee of the recipient. The Department understands that non-employees, such as individuals who provide services in community-based organizations, may serve as valuable confidential resources, providing confidential support for students and employees. Confidential resources include those who provide privileged and confidential support, such as physicians and clergy, regardless of whether they are employed by a recipient. Confidential resources also include individuals who are employed by a recipient and meet the definition of ''confidential employee'' in § 106.2, including those designated by the recipient to provide confidential services to individuals who may have experienced or been accused of engaging in conduct that may constitute sex discrimination. The Department nonetheless declines to expand the confidential employee provisions to cover non-employees. Section 106.44(d)(2) requires a recipient to ensure that any confidential employees provide certain disclosures to individuals who inform them of conduct that reasonably may constitute sex discrimination under Title IX, and a recipient may not be able to require non-employees to comply with these requirements. Importantly, § 106.44(c) does not require a recipient to impose any reporting requirements on non-employees, and there is accordingly no need to designate certain non-employees as exempt from Title IX's reporting requirements.

Confidential employees remain subject to § 106.40(b)(2)'s requirement to provide information to a student, or a person who has a legal right to act on behalf of the student, when the student or person with a legal right informs the employee of the student's pregnancy or related conditions. This obligation does not apply when the confidential employee—as with other employees—reasonably believes the Title IX Coordinator has already been notified.

The Department declines to require a recipient to make multiple confidential employees available to students or to collaborate or enter into memoranda of understanding with specific entities that may provide confidential services, such as community-based rape crisis centers, as requested by some commenters. While such organizations can provide important resources, recipients are in the best position to determine whether such collaborations would be helpful in their unique circumstances.

In response to an inquiry about how the regulations regarding confidential employees relate to other Federal and State laws, as explained in the July 2022 NPRM, the confidential employee reporting exceptions in § 106.44(d) are limited to Title IX and do not exempt a recipient's confidential employees from complying with any obligations under Federal, State, or local law to report sex discrimination, including sex-based harassment. *See* 87 FR 41442. While § 106.44(j) generally prohibits disclosures of personally identifiable information obtained in the course of complying with this part, such disclosures are permissible if required by Federal law or regulations. Additionally, if a State or local law obligates a confidential employee to report sex discrimination, that disclosure is permitted by § 106.44(j) as long as it does not otherwise conflict with Title IX or this part. A disclosure pursuant to a State law requiring confidential employees to report sexual assault of a child, for example, is not prohibited by § 106.44(j) or by any other provision of these regulations. In addition, § 106.6(f), to which the Department did not propose making any changes, makes clear that the requirements in the Title IX regulations do not alleviate a recipient's obligations to its employees under Title VII. *See id.* The Department declines to modify § 106.44(d) to address disclosure responsibilities under the Clery Act or to opine on whether a postsecondary institution can designate non-employees as campus security authorities under the Clery Act because these final regulations relate to requirements of Title IX, not the Clery Act. Consistent with the Department's position in the preamble to the 2020 amendments, these final regulations do not alter requirements under the Clery Act or its implementing regulations. *See* 85 FR 30384; 87 FR 41442. The requirements related to confidential employees under these regulations do not pose any inherent conflict with the Clery Act regulations defining a campus security authority to include, among other things, an individual identified in an institution's statement of campus security policy as an individual or organization to which students and employees should report criminal offenses. 34 CFR 668.46(a).

The confidential employee requirements in these final regulations appropriately balance the need for recipients to learn about and promptly take action in response to sex discrimination, including discrimination that may pose a threat to safety, and the importance of ensuring that individuals can access confidential services without prompting a report to the Title IX Coordinator. Therefore, the Department declines to require confidential employees to immediately report conduct that poses a safety threat. The Department notes that in all circumstances, a confidential employee is required to explain to the individual disclosing the sex discrimination how to contact the Title IX Coordinator and how to make a complaint of sex discrimination and to explain that the Title IX Coordinator may be able to offer and coordinate supportive measures, as well as initiate an informal resolution process or an investigation under the grievance procedures. In addition, if a Federal, State, or local law requires a confidential employee to report conduct that poses a threat to the safety of the disclosing individual or others, the confidential employee generally may do so in accordance with § 106.44(j). As explained above, while § 106.44(j) generally prohibits disclosure of personally identifiable information obtained in the course of complying with this part, such disclosures are permissible if required by Federal law or regulations, or if the disclosures do not otherwise conflict with Title IX or this part and are either required by State law or permitted by FERPA. The Department notes that under § 106.44(d), the confidential employee would be required to explain the employee's status as confidential for purposes of the Title IX regulations—and, implicitly, the purposes for which the employee's status is not confidential, including due to reporting obligations under other Federal, State, or local laws—to any person who informs the confidential employee of conduct that reasonably may constitute sex discrimination. In addition, nothing in the final regulations prohibits a recipient from also requiring a confidential employee to explain the circumstances under which other Federal, State, or local laws require the employee to notify individuals other than the Title IX Coordinator of conduct

that reasonably may constitute sex discrimination.

The Department notes that § 106.45(b)(5) addresses a recipient's obligation to take reasonable steps to protect privacy, as long as such steps do not restrict a party's ability to, among other things, consult with ''confidential resources.'' The Department clarifies that the reference to ''confidential resources'' in § 106.45(b)(5) is not synonymous with ''confidential employee,'' as defined in § 106.2, although certain individuals may qualify as both. Unlike a confidential employee, a confidential resource does not need to be an employee of the recipient or fall under one of the three categories of confidential employees set out in § 106.2. A confidential resource who is not a confidential employee also does not need to comply with the notification requirements in § 106.44(d)(2).

The Department declines to designate specific types of individuals as confidential employees in the regulations, as requested by commenters, because such a categorical designation does not provide the necessary flexibility and discretion to account for variations among recipients with regard to specific individuals' assigned duties, which could lead to inaccurate designations under the facts specific to a particular employee. However, the Department notes that several of the examples raised by commenters are likely to be confidential employees. For example, a victim advocate could fall under either the first or second category of the definition of ''confidential employee'' in final § 106.2. We further discuss the three categories of confidential employees below.

Changes: Changes to the definition of ''confidential employee'' and to § 106.44(d) are discussed below.

Section 106.2 First Category of ''Confidential Employee''—Employee Whose Communications Are Privileged Under Federal or State Law

Comments: One commenter urged the Department to modify the first category of the proposed definition of ''confidential employee'' in § 106.2 by revising the reference to communications that are ''privileged'' under Federal or State law to instead refer to communications that are ''privileged or confidential'' under Federal or State law. The commenter explained this revision would encompass employees who are covered by confidentiality provisions from State, territorial or Tribal constitutions, or statutes that do not rise to the level of a formal legal privilege. Another commenter suggested aligning the definition with the Clery Act (regarding professional or pastoral counselors).[35]

Some commenters raised concerns that certain confidential employees may be required by law to disclose certain communications they receive. For example, one commenter noted that school psychologists are required by mandatory reporting laws to disclose certain types of sexual misconduct involving minors. Some commenters asked the Department to clarify in the regulatory text that confidential employees are not exempt from compliance with mandatory reporting obligations.

Discussion: The Department acknowledges the suggestions from commenters regarding revisions to the first category in the definition of ''confidential employee'' as proposed in § 106.2. The Department agrees that modifying this category to refer to an employee whose communications are ''privileged or confidential'' aligns with the Department's rationale for protecting communications with confidential employees as described in the July 2022 NPRM, 87 FR 41441–42, and appropriately encompasses employees whose communications are confidential under law even if they do not fall within a specific legal privilege.

The Department further agrees with commenters' suggestions to clarify the scope of the confidential employee's status as confidential under the first category by using an approach similar to that of the Clery Act. Accordingly, the Department has revised the first category in the definition of ''confidential employee'' to state that an employee's confidential status for purposes of the Title IX regulations is only with respect to information the employee receives while functioning within the scope of their duties to which privilege or confidentiality applies.

The Department acknowledges commenters' concerns that some individuals who are confidential employees for purposes of Title IX may nonetheless be required to disclose certain information by law, such as by mandated reporting laws that apply in the elementary school and secondary school context. To address potential confusion on this point, the Department has revised the language in the first category to clarify that the definition identifies employees who are confidential employees ''for purposes this part,'' and that the employee's confidential status is ''only with respect to information received while the employee is functioning within the scope of their duties to which privilege or confidentiality applies.'' These revisions sufficiently clarify that communications are only confidential for purposes of these Title IX regulations to the extent the employee is functioning within the scope of their duties to which privilege or confidentiality applies, and, more generally, that communications with such employees may not be confidential for all purposes. Confidential status of an employee means that the employee need not report conduct that reasonably may constitute sex discrimination to a recipient's Title IX Coordinator, and a recipient is not considered to have knowledge of conduct that reasonably may constitute sex discrimination if the only employee who knows about such conduct is a confidential employee. Other laws, however, may require that information about conduct that reasonably may constitute sex discrimination be disclosed to persons other than a Title IX Coordinator, such as to law enforcement agencies in certain cases. The fact that an employee is ''confidential'' for purposes of ''this part'' does not foreclose a confidential employee from disclosing the information in question for other purposes if required to do so by, for example, State law, if such a disclosure is permitted by § 106.44(j). As discussed above, if State law requires a disclosure, such as mandated reporting laws regarding sexual assault of children, the disclosure is permissible under Title IX unless it would otherwise conflict with Title IX or this part. For more information about the circumstances in which disclosures of personally identifiable information obtained in the course of complying with this part are permissible, see the discussion in § 106.44(j).

The Department has also removed the reference to an employee's ''role'' in the first and second categories of the definition of confidential employee. The Department views the reference to the employee's ''duties'' as sufficient, rendering a reference to the employee's ''role or duties'' as unnecessary.

Changes: The Department has expanded the first category within the definition of ''confidential employee'' at § 106.2 to use the phrase ''privileged or confidential'' in place of the phrase ''privileged.'' In addition, the Department has revised the first category to clarify when information provided to a confidential employee is

[35] The commenter cited U.S. Dep't of Educ., Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting,* at 4–7 (2016).

confidential by replacing the phrase ''associated with their role or duties for the institution'' with a sentence stating that ''[t]he employee's confidential status, for purposes of this part,'' applies only to information received while that employee ''is functioning within the scope of their duties to which privilege or confidentiality applies.'' The Department also has removed the reference to the employee's ''role'' as unnecessary, given the reference to the employee's duties.

Section 106.2 Second Category of ''Confidential Employee''—Employee Designated To Provide Services Related to Sex Discrimination

Comments: One commenter urged the Department to revise the second category of confidential employees to refer to an employee of a recipient whom the recipient has designated as a confidential resource ''while'' providing services to persons in connection with sex discrimination. The commenter asked the Department to remove the language that if the employee also has a role or duty not associated with providing these services, the employee's status as confidential is limited to information received about sex discrimination in connection with providing these services. The commenter suggested moving this language to § 106.44(d)(2) to place the burden on the recipient to make sure that designated confidential employees act in accordance with their designations.

One commenter asked the Department to clarify who falls within the second category and whether there is a limit on the number of employees that a recipient can designate as confidential.

Another commenter recommended adding language to the second category to note that, at the K–12 level, confidential employees in this category are likely to qualify as mandated reporters for suspected child abuse and neglect and have associated reporting obligations.

Discussion: The Department views the second category of the definition as sufficiently conveying that if an employee is designated as confidential for the purpose of providing services to persons in connection with sex discrimination and that employee also has duties unrelated to providing those services, the employee's confidential status only applies to information received in connection with the employee providing services to persons related to sex discrimination. The Department therefore has concluded that it is unnecessary to replace ''for the purpose of providing services'' with ''while providing services'' when defining employees covered by the second category of confidential employees. The Department disagrees that the language qualifying the employee's status as a confidential employee is better suited for § 106.44(d)(2); rather, retaining this limitation as part of the definition of ''confidential employee'' at § 106.2 will avoid unnecessary confusion.

The employees who qualify as a ''confidential employee'' under the second category will vary by recipient and based on the employee's assigned duties. These confidential employees may include, but are not limited to, guidance counselors, organizational ombuds, or staff within an on-campus sexual assault response center. The Department also confirms that these final regulations do not impose any limit on the number of employees a recipient can designate as confidential.

The Department recognizes that some individuals who are confidential employees as defined in proposed § 106.2 may nonetheless be required to disclose certain information by law, such as mandatory reporting laws applying to the elementary school and secondary school context. In addition to the revisions to the first category to address this concern, described above, the Department has added ''under this part'' to the definition in the second category to emphasize that employees who are designated as confidential by the recipient are so designated for purposes of the Title IX regulations and may not be considered confidential for purposes of other laws.

As noted in the discussion of comments on the proposed definition of ''confidential employee'' generally, some commenters asked the Department to clarify the distinction between ''confidential employee'' as defined by § 106.2 and ''confidential resources'' as used in § 106.45(b)(5). The Department notes that the second category of the proposed definition of ''confidential employee'' referred to an employee designated by the recipient as a ''confidential resource.'' The Department acknowledges that the use of the phrase ''confidential resource'' within the definition of ''confidential employee'' may have caused confusion, and that the two unrelated uses of the phrase ''confidential resource'' within the Title IX regulations may have caused further confusion. To enhance clarity and minimize the risk of confusion, the Department has made a non-substantive revision to use the phrase ''designated as confidential'' rather than ''designated as a confidential resource'' and thereby remove the reference to a confidential resource. The Department has also made other non-substantive revisions to reduce superfluous language, adopt clearer language, and use consistent phrasing throughout the second category of the definition of confidential employee. *See* discussion of § 106.45(b)(5) for further explanation of a confidential resource.

Changes: In the second category of the definition of a ''confidential employee,'' the Department has replaced the phrase ''designated as a confidential resource'' with the phrase ''designated as confidential.'' The Department has also added ''under this part'' to clarify the applicability of the employee's confidential status. The Department has also made the following non-substantive revisions: replacing the phrase ''in connection with'' with the phrase ''related to''; replacing the phrase ''role or duty'' with ''duty''; replacing the word ''these'' with the word ''those''; replacing the phrase ''limited to'' with ''only with respect to''; and replacing ''status as confidential'' with ''confidential status.''

Section 106.2 Third Category of ''Confidential Employee''—Employee of a Postsecondary Institution Conducting an Institutional Review Board-Approved Research Study

Comments: Some commenters asked the Department to confirm that the third category covers an employee of a postsecondary institution who is conducting a human-subjects research study designed to gather information about sex discrimination that is approved by the Institutional Review Board (IRB) of another postsecondary institution (*i.e.,* not the institution that employs the individual who is conducting the study).

Some commenters urged the Department to expand the third category to cover employees of research institutions that conduct IRB-approved research through a contract with a recipient, to cover any individual or entity (*i.e.,* not limited to employees of postsecondary institutions) that conducts IRB-approved research, or to cover an employee of a postsecondary institution who is conducting research studies that are exempt from the requirement for IRB approval, such as an employee who conducts sexual harassment climate surveys.

One commenter urged the Department to remove the third category of confidential employees because IRB employees require consent from study participants and share information with recipients.

Discussion: The Department appreciates the opportunity to clarify

that the third category of the definition of ''confidential employee'' includes researchers who are employed by one recipient and are conducting research studies that were approved by another recipient's IRB.

The Department acknowledges the suggestion to expand the third category of the definition of ''confidential employee'' to include employees of research institutions that are not affiliated with a recipient but that are collecting IRB-approved research as part of a partnership or contract with a recipient. However, the obligations under Title IX are limited to a recipient and would not cover research institutions that are not affiliated with a recipient. Thus, as noted in the section discussing the definition of ''confidential employee'' generally, the Department declines to expand the confidential employee provisions to cover non-employees generally, or to cover employees of research institutions that are not affiliated with a recipient. Section 106.44(c) does not require a recipient to impose any reporting requirements on non-employees (unless the Title IX Coordinator has delegated some of the Title IX Coordinator's obligations to a non-employee), and so there is no need to exempt non-employees who conduct IRB studies from Title IX's reporting requirements.

The Department recognizes that valuable information can be obtained through climate surveys and similar research and that some students may be reluctant to participate in such surveys or research if they fear the information they share could be disclosed. The Department also recognizes that designating the employees who conduct these surveys as confidential could significantly impede the recipient's ability to learn about and take appropriate actions to address concerns raised in the climate survey or similar study. In the July 2022 NPRM, the Department identified climate surveys as an example of a strategy a recipient could use to monitor for barriers to reporting sex discrimination. *See* 87 FR 41436. The Department notes that a recipient may take steps to protect the privacy of information shared on climate surveys, such as by making the surveys anonymous with an option for students completing the survey to disclose their names. For these reasons, the Department declines to expand the third category to include employees who conduct climate surveys.

The Department also declines to remove the third category in the definition of ''confidential employee'' as one commenter suggested. The fact that studies require participants to consent or the fact that certain information from studies may be shared with the recipient does not obviate the need to exempt employees who are conducting IRB-approved human subjects research studies related to sex discrimination from the notification requirements of § 106.44(c). Neither an individual's consent to participate in a study nor the agreement of the employees conducting the study to share information with the recipient will necessarily encompass the sharing of information or conduct involving specific individuals with a Title IX Coordinator, so protections for such individuals are still necessary even in these circumstances.

Finally, the Department has made a minor revision to the third category of the definition of ''confidential employee'' to use consistent phrasing throughout the three-part definition of ''confidential employee.''

Changes: The Department has revised the third category of the definition of a ''confidential employee'' to replace the phrase ''limited to'' with ''only with respect to.''

Section 106.44(d)(1) Recipient's Requirement To Identify Any Confidential Employees

Comments: A number of commenters supported proposed § 106.44(d)(1)'s requirement that a recipient inform participants of the identity of any confidential employee. However, these commenters urged the Department to strengthen the provision by requiring a recipient to designate at least one confidential employee, rather than merely allowing a recipient to do so, because they believe some institutions will not do so unless required.

Relatedly, several commenters stated that lack of access to confidential resources can chill reporting and asserted that access to confidential resources is necessary for effectuating Title IX. In addition, some commenters asked the Department to require recipients to increase the hiring of confidential employees or expand confidential services.

Some commenters asked the Department to encourage or require recipients to designate a diverse group of employees to serve as confidential employees to try to address barriers to accessing confidential resources for diverse students, including students of color, students with a disability, LGBTQI+ students, and pregnant students. Some commenters urged the Department to require recipients to designate at least one confidential employee with specific training and skills, such as trauma-informed training.

Other commenters raised concerns about the applicability of confidential employee requirements to an elementary school or secondary school, including one commenter who suggested that elementary schools and secondary schools have discretion to decide whether they have sufficient resources to designate, train, and oversee confidential employees.

Some commenters asked the Department to specify in proposed § 106.44(d)(1) how a recipient must provide notice of the identity of any confidential employee. Some commenters urged the Department to require a recipient to publish the identities of the confidential employees who fall within the first and second categories of the definition through a general notice in a recipient's Title IX policy or catalog. Other commenters viewed providing a list of employees in the first category as unreasonably burdensome for a school district. Commenters also suggested alternatives for how to identify confidential employees that would avoid the need to update this information with every job change.

Other commenters urged the Department to modify proposed § 106.44(d)(1) to require a recipient to notify participants of the confidential employees who are in the best position to help those experiencing sex discrimination (*e.g.,* employees in a postsecondary institution's counseling center). These commenters argued that the requirement to provide notice of all confidential employees poses an unnecessary burden, is not tailored to meet the participants' needs, and could lead to confusion. The commenters added that it might not be appropriate to direct complainants to some employees who qualify as confidential resources under State law, such as an athletic trainer whose privilege might only apply when treating patients and not to disclosures by non-patients.

Some commenters suggested that the Department remove the requirement that postsecondary institutions notify all participants of the identities of all researchers conducting studies on sex discrimination who are considered confidential employees because giving such notice would be difficult due to the dynamic nature of research teams and studies, which change over time.

Discussion: The Department agrees with the commenters who noted the many important benefits of making confidential employees available to complainants, particularly confidential employees who can support diverse student populations. The Department also agrees with commenters that

making a diverse group of confidential employees available may help to address barriers to accessing confidential employees.

However, the Department declines to require recipients to designate confidential employees. The Department recognizes that some recipients—particularly smaller schools, elementary schools, and secondary schools—may not have an employee who meets § 106.2's definition of ''confidential employee'' under the first or third category of that definition and that requiring such recipients to designate one or more confidential employees under the second category of that definition could be unduly burdensome or infeasible for reasons specific to that recipient. These regulations require a recipient, including an elementary school or secondary school recipient, to treat any employees who fall within the first or third categories of the definition of ''confidential employee'' as confidential employees for purposes of Title IX.

At the same time, the Department emphasizes that nothing in these final regulations prevents a recipient from providing information about off-campus sources of support.

The Department acknowledges commenters' suggestion to require recipients to train confidential employees on certain topics. However, the Department declines to add additional training topics beyond the requirements of § 106.8(d), leaving flexibility and discretion to recipients to determine how to meet training requirements in a manner that best fits the recipient's unique educational community. The training topics required under § 106.8(d)(1) are sufficient for confidential employees to fulfill their obligations. The Department declines to require specific trauma-informed practices because the final regulations already include provisions that prevent reliance on stereotypes and otherwise incorporate some of the important underlying principles of trauma-informed care. In addition, it is important to provide flexibility to recipients to choose how to meet the training requirements under § 106.8(d)(1) in a way that best serves the needs, and reflects the values, of a recipient's community.

In response to concerns and confusion related to notifying participants of the identity of any confidential employee, the Department has revised proposed § 106.44(d)(1) to instead require a recipient to notify participants of how to contact its confidential employees, if the recipient has any. This change gives the recipient the flexibility and discretion to decide what information to provide (*e.g.,* whether to identify a confidential employee by name, title, office, or phone number), while still ensuring that the recipient provides sufficient information for participants to be able to contact the confidential employees.

In addition, the Department has revised proposed § 106.44(d)(1) to clarify that a recipient does not need to notify participants of any confidential employees who fall within the third category of the definition of ''confidential employee''—that is, any employee whose confidential status is only with respect to their conducting an IRB-approved human-subjects research study designed to gather information about sex discrimination. The Department agrees with commenters that the confidential status of such employees may change over time due to the dynamic nature of academic research; thus, requiring a recipient to notify participants of this category of confidential employee could create confusion. The Department also notes that the limited scope of these researchers' confidential status makes it unlikely that students would be able to seek them out to make confidential disclosures, and that students who are participating in the IRB-approved research studies may receive information about the treatment of their disclosures as part of the informed consent process.

The Department acknowledges the suggestions from commenters to specify how a recipient should notify participants in its education program or activity about any confidential employees. The Department declines, however, to prescribe a method for notifying participants about confidential employees, as a particular method may be inapplicable, unsuitable, or unduly burdensome for a specific recipient, depending on the circumstances.

The Department declines the suggestion of some commenters to require a recipient to notify participants in its education program or activity of only those confidential employees who are in the best position to help those experiencing sex discrimination. Identifying all employees who fall within the first and second categories in the definition of ''confidential employee'' in § 106.2 will be less burdensome for recipients and less confusing to students than it would be for recipients to attempt to delineate between their confidential employees. The Department is also concerned that adopting this limitation would require subjective determinations about which confidential employees are best positioned to provide assistance and that this limitation could also disincentivize employees who qualify as confidential but are not identified as such from fulfilling their responsibilities under Title IX. Additionally, the commenters' concern regarding the inapplicability of certain employees' confidential status is clarified by the revisions that the Department has made to the first category of the definition of ''confidential employee'' in § 106.2. Those revisions are discussed above. The Department also declines to require a recipient to identify confidential employees as complainant- or respondent-supporting, as certain confidential employees may support both complainants and respondents. The Department notes that nothing prohibits a recipient from providing additional information about confidential employees.

Changes: The Department has replaced the requirement in § 106.44(d)(1) for a recipient to notify all participants in the recipient's education program or activity of the identity of any confidential employee with the requirement to notify all participants about how to contact the recipient's confidential employees, if any, with the exclusion of any employee whose confidential status is only with respect to their conducting an IRB-approved human-subjects research study that is designed to gather information about sex discrimination.

Section 106.44(d)(2) Requirements of Confidential Employees

Comments: Some commenters asked the Department to require a recipient to provide additional information to participants regarding exceptions to an employee's confidential status, such as State mandatory reporting laws, and to proactively inform students and employees about the distinction between legal privilege and confidentiality. Other commenters suggested that students receive information in writing about what types of information would be kept confidential. Some commenters opposed proposed § 106.44(d)(2) based on their belief that it would be unenforceable because a recipient would have no way of knowing when a confidential employee received information about sex discrimination.

In contrast, other commenters urged the Department to require confidential employees who learn about possible sex discrimination to provide information to the individual about how to report the conduct and how the Title IX Coordinator can help. One commenter stated that some students recommended

requiring confidential employees to give students the option of whether to keep the disclosure confidential or to have the confidential employee report it to the Title IX Coordinator, viewing this as a middle ground approach that would allow for greater trust of confidential employees and encourage more reporting.

Other commenters asked the Department to require researchers with confidential employee status to provide the Title IX Coordinator's contact information and information about how to make a report to all research study subjects during the studies' informed consent process or in another way if informed consent is not required.

Some commenters provided suggestions related to confidential employees in elementary schools and secondary schools, such as requiring confidential employees to assist students with reporting or requiring confidential employees to disclose information connected to sex discrimination involving a minor child to that child's parent or guardian immediately, unless disclosure to the parent or guardian is prohibited by State or Federal law.

Some commenters urged the Department to amend proposed § 106.44(d) and (g) to require, or at minimum permit, a recipient to involve confidential employees and confidential resources when offering and coordinating supportive measures.

One commenter expressed concern about the lengthy list of information that an employee must provide in response to a disclosure of sex discrimination. The commenter recommended that employees simply be required to report the alleged conduct to the Title IX Coordinator, which the commenter viewed as involving less employee training, management, and oversight.

Discussion: The Department appreciates the opportunity to reiterate that nothing in § 106.2's definition of ''confidential employee'' or § 106.44(d) exempts a recipient's employees—including confidential employees—from complying with any obligations under Federal, State, or local law to report sex discrimination, including sex-based harassment. As discussed above and in the discussion of § 106.44(j), disclosures of personally identifiable information obtained in the course of complying with this part are generally prohibited, but there are exceptions for limited circumstances, including when required by Federal law and, if not otherwise in conflict with Title IX or this part, when required by State or local law or permitted by FERPA. The Department acknowledges commenters' concerns that some individuals who are confidential employees may be required to disclose certain information by law, and that some students may be unaware of this fact. The Department declines to incorporate mandated reporting requirements into the regulatory text because they vary by State and by type of recipient; however, the Department has revised proposed § 106.44(d)(2) to require a confidential employee to explain their status as confidential for purposes this part. For a confidential employee to do so effectively, it would be appropriate for the employee to explain the purposes for which their status is not confidential, including when they may have reporting obligations under applicable Federal, State, or local mandatory reporting laws. The revised language in § 106.44(d)(2)(i) also specifically requires a confidential employee to explain to anyone who informs them of conduct that reasonably may constitute sex discrimination the circumstances in which the employee is not required to notify the Title IX Coordinator about such conduct. These clarifications will help students better understand whether the employee will be able to keep a disclosure confidential, will enable the disclosing individual to make an informed decision about whether and what to disclose to the confidential employee, and will facilitate a trusting relationship. The Department disagrees with the views expressed by one commenter that the requirements in § 106.44(d)(2) are too onerous and thus that all employees should be required to report conduct to the Title IX Coordinator.

The Department further understands commenters' desire that the Department require a recipient to proactively notify students and employees, including confidential employees, about the implications of differences between legal privilege and confidentiality, and require confidential employees to similarly advise students. The Department has revised § 106.44(d)(2) to require the confidential employee to explain the circumstances in which the confidential employee is not required to notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination. This change adequately addresses the commenters' concerns, without implementing regulations that are unduly prescriptive or potentially ill-suited to the circumstances of a particular confidential employee.

The Department disagrees with the assertion of some commenters that a recipient cannot enforce § 106.44(d)(2) and maintains that a recipient can manage compliance with § 106.44(d)(2) through training and supervision of confidential employees. The Department notes that § 106.8(d)(1) requires all employees to be trained on the recipient's obligation to address sex discrimination in its education program or activity, the scope of conduct that constitutes sex discrimination under these regulations (including the definition of ''sex-based harassment''), and all applicable notification and information requirements under §§ 106.40(b)(2) and 106.44, which includes the requirements of § 106.44(d)(2). As explained in the July 2022 NPRM, the training requirements for a recipient's employees cover both confidential and non-confidential employees. *See* 87 FR 41429. In addition, nothing in the final regulations precludes a recipient from requiring a confidential employee to verify the employee's compliance with the requirements of § 106.44(d)(2) in a manner that does not require disclosure to the recipient of details that are confidential. For example, a recipient could request that confidential employees self-attest that they provided the required information upon being informed of conduct that reasonably may constitute sex discrimination. The Department also acknowledges one commenter's concern that a confidential employee's failure to comply with § 106.44(d)(2) could result in OCR complaints or litigation for the recipient. However, the Department notes that the recipient could face the same consequences if it fails to address sex discrimination in its education program or activity, and that the requirements in § 106.44(d)(2) may help the recipient learn of sex discrimination it needs to address because, as noted in the July 2022 NPRM, making confidential employees available may also result in more individuals feeling comfortable to seek the support they need and ultimately find the confidence to make the recipient aware of incidents that may otherwise have gone unreported. *See* 87 FR 41441.

The Department disagrees with a commenter's concern that the list of information a confidential employee must provide is too lengthy. The Department both disagrees with the characterization of the required information as lengthy and separately maintains that the important benefits of providing this information justify any burden on confidential employees. The alternative option suggested by the commenter—requiring employees to report alleged conduct to the Title IX Coordinator—would eliminate

individuals' ability to make confidential reports of sex discrimination.

The Department declines to adopt a commenter's suggestion to give students the option of whether to have a confidential employee keep a disclosure confidential or have that employee report it to the Title IX Coordinator. The Department is concerned that this approach could create confusion among students and employees as to whether and when a confidential employee has received appropriate consent to report to the Title IX Coordinator. The Department notes that final § 106.44(d)(2), as revised, requires a confidential employee to provide sufficient guidance to enable the student to report to the Title IX Coordinator by providing the student with information about how to contact the Title IX Coordinator and how to make a complaint of sex discrimination.

The Department agrees with commenters who suggested that confidential employees who are informed about possible sex discrimination must explain to the disclosing individual how to report the conduct to the Title IX Coordinator and how the Title IX Coordinator can help. The Department has incorporated these suggestions in final § 106.44(d)(2)(ii), regarding how to contact the Title IX Coordinator and make a complaint of sex discrimination, and final § 106.44(d)(2)(iii), regarding the Title IX Coordinator's ability to offer and coordinate supportive measures, initiate an informal resolution process, or initiate an investigation under the grievance procedures. This information will assist complainants in considering their options, as well as counter any misconceptions that the only action a Title IX Coordinator can take in response to a report is to initiate an investigation. The requirements of § 106.44(d)(2) apply to all three categories of confidential employees, including researchers who qualify as confidential employees under the third category of the definition. The Department declines to specifically require researchers who fall within the third category of confidential employees to provide the information required by § 106.44(d)(2) as part of their informed consent process because doing so would, in the Department's opinion, inappropriately interfere with the researchers' independence and professional judgment in carrying out their studies, though the Department notes that nothing prohibits these employees from doing so.

The Department acknowledges the special considerations that some commenters have raised regarding how confidential employees assist minor children in the elementary school and secondary school context. The additional requirements in final § 106.44(d)(2) will assist confidential employees in responding to disclosures by all participants in a recipient's education program or activity, and the Department declines to articulate further requirements for confidential employees in the elementary school and secondary school context because of the importance of flexibility and discretion under the circumstances. As stated above, nothing in this provision exempts a confidential employee from complying with other Federal, State, or local laws that mandate reporting, and the Department notes that, consistent with § 106.6(g), nothing in this provision may be read in derogation of any legal right of a parent, guardian, or other authorized legal representative to act on behalf of a complainant, respondent, or other person.

In response to comments regarding the ability of confidential employees to offer, provide, or coordinate supportive measures, the Department has added § 106.44(d)(2)(iii) to specifically address supportive measures. Section 106.44(d)(2)(iii) requires confidential employees to explain that the Title IX Coordinator may be able to offer and coordinate supportive measures, and the Department notes that nothing in these final regulations prohibits a confidential employee from providing additional information about the supportive measures that may be available. The Department also recognizes that certain confidential employees, such as a recipient's mental health counselor, may be involved in implementing supportive measures. Under these final regulations, a recipient must require its Title IX Coordinator to offer and coordinate supportive measures under § 106.44(f)(1)(ii); however, § 106.8(a) of these final regulations permits a recipient to designate more than one employee to serve as a Title IX Coordinator and also provides a recipient with the flexibility and discretion to delegate specific duties of the Title IX Coordinator to one or more designees, or to permit a Title IX Coordinator to delegate such duties to one or more designees. Thus, as described in greater detail in the discussion of § 106.44(g), although the final regulations require a Title IX Coordinator to retain ultimate oversight for offering and coordinating supportive measures, nothing in the final regulations otherwise restricts how these duties of offering and coordinating supportive measures may be delegated to other personnel.

The Department has revised § 106.44(d)(2) to refer to conduct that reasonably may constitute sex discrimination, rather than conduct that may constitute sex discrimination, to align with parallel references throughout the final regulations. For additional discussion, see the section of this preamble on § 106.44(c). The Department has also made some non-substantive revisions, including organizational edits, to § 106.44(d)(2) to improve clarity and readability.

Changes: The Department has made several revisions to § 106.44(d)(2). First, the Department has replaced the requirement in proposed § 106.44(d)(2) that a confidential employee explain their confidential status with the more detailed requirement in § 106.44(d)(2)(i) that a confidential employee explain their status as confidential for purposes of this part, including the circumstances in which the employee is not required to notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination. Second, the Department has revised § 106.44(d)(2) to refer to conduct that reasonably may constitute sex discrimination, rather than conduct that may constitute sex discrimination. Third, the Department has replaced the requirement in proposed § 106.44(d)(2) that the confidential employee provide contact information for the recipient's Title IX Coordinator and explain how to report information about conduct that may constitute sex discrimination with the more detailed requirements at § 106.44(d)(2)(ii)–(iii) to explain how to contact the recipient's Title IX Coordinator, explain how to make a complaint of sex discrimination, and explain that the Title IX Coordinator may be able to offer and coordinate supportive measures, as well as initiate an informal resolution process or an investigation under the grievance procedures.

Interaction Between Confidential Employees and Requirements of the Title IX Grievance Procedures

Comments: Some commenters urged the Department to revise proposed § 106.45(b)(7) to exclude records provided to confidential employees from investigations or to prohibit use of this evidence unless the disclosing person provides voluntary, written consent for use in the recipient's investigation. One commenter stated that students would not expect confidential resources to provide records as part of an investigation, warning that this treatment of the

records could undermine trust in confidential resources.

Some commenters asked the Department to make clear that confidential employees are not required to act as advisors during the grievance procedures or that the recipient is not permitted to appoint a confidential employee as the advisor unless requested by a party or, as some commenters suggested, by the complainant specifically. One commenter noted that requiring a confidential employee to serve as a student's advisor could negatively impact the legal privileges that protect their confidential communications with the student.

Discussion: The Department agrees with commenters' concerns about the need to protect information that is shared with a confidential employee from being used in an investigation without consent from the person who is disclosing information to the confidential employee. Without such protection, a recipient could be obligated to gather records in an investigation from confidential employees or attempt to interview confidential employees during the investigation. The Department has thus revised proposed § 106.45(b)(7)(i) to exclude evidence provided to a confidential employee unless the person to whom the confidentiality is owed has voluntarily waived that confidentiality. This revision protects against the use of information obtained from confidential employees in investigations that would likely undermine trust in the confidential employee and discourage students from seeking this important source of support. The final regulations incorporate the revisions proposed by commenters, with streamlining edits and other modifications for clarity or consistency with language used elsewhere in the section.

Confidential employees are not required by these regulations to act as advisors during the grievance procedures. While a party may choose to have a confidential employee serve as their advisor of choice under final § 106.46(e)(2), a postsecondary institution may not appoint or otherwise require an individual who is currently a confidential employee or an individual who received information related to the particular case as a confidential employee to serve as the advisor to ask questions on behalf of a party when the party lacks their own advisor of choice. Accordingly, the Department has revised proposed § 106.46(f)(1)(ii)(B) to state that in the instances in which a postsecondary institution is required to appoint an advisor to ask questions on behalf of a party during a live hearing, a postsecondary institution must not appoint a confidential employee. This approach respects the party's autonomy to choose an advisor and avoids conflicts of interest that may arise from requiring a confidential employee to act as an advisor for a live hearing.

Changes: The Department has revised proposed § 106.45(b)(7)(i) to add that a recipient must exclude evidence provided to a confidential employee unless the person to whom the confidentiality is owed has waived the confidentiality voluntarily. The Department has also added § 106.46(f)(1)(ii)(B), which clarifies that if a postsecondary institution chooses to use a live hearing, in those instances in which a postsecondary institution is required to appoint an advisor to ask questions on behalf of a party, a postsecondary institution must not appoint a confidential employee to be the advisor.

5. Section 106.44(e) Public Awareness Events

Comments: Some commenters opposed the proposed public awareness event exception in § 106.44(e). For example, one commenter proposed that a recipient should be required to respond to all known incidents of sex discrimination. Other commenters asserted that the exception would be inconsistent with what they viewed as the Department's position that a recipient must respond to possible sex discrimination, even over the objection of a complainant. Some commenters were concerned that the public awareness event exception would incentivize students to publicly defame others. Other commenters stated that the Department lacks the authority to require a postsecondary institution to use the information to inform its efforts to prevent sex-based harassment.

Some commenters expressed concern about how information disclosed at a public awareness event would impact an employee's notification requirements in proposed § 106.44(c) and asked the Department to permit postsecondary institutions to exempt such information from the notification requirements.

Some commenters urged the Department to make clear that the Title IX Coordinator is not required to attend public awareness events in order to comply with § 106.44(b).

Other commenters urged the Department to broaden the public awareness event exception. For example, some commenters asked the Department to also exempt from a recipient's obligations under § 106.44 information shared among members of sororities at confidential sorority events if there is no ongoing risk of harm.

One commenter suggested that the Department require postsecondary institutions to post information at public awareness events about how to report sex-based harassment and receive supportive measures and post a disclaimer about how information shared at a public awareness event will be used by the postsecondary institution.

Some commenters stated that the public awareness event exception should not apply to information about sex-based harassment that creates an immediate and serious threat to the community. One commenter asked the Department to require a postsecondary institution to act when information reveals an ongoing threat to the health or safety of any students, employees, or other persons instead of an imminent and serious threat.

One commenter requested that the Department define ''public event'' and specify whether a public event qualifies under this provision if the event is within the recipient's education program or activity but held off campus or in a community space rather than on campus or online. The commenter also asked the Department to define ''sponsored'' and ''raise awareness.''

Another commenter asked the Department to clarify how a recipient should respond to disclosures made in the context of an academic assignment and whether disclosures on social media may fall under the public awareness event exception.

Discussion: The Department acknowledges the views of some commenters that a postsecondary institution should be required to respond to all known incidents of sex discrimination even if they are disclosed at a public awareness event. By maintaining an exception, however, the final regulations will account for the many benefits provided by public awareness events including empowering and informing students, and will avoid discouraging student participation that may involve disclosure of personal experiences with sex-based harassment. *See* 87 FR 41442–43. As explained in the July 2022 NPRM, the Department's position is that given the many benefits of public awareness events, it is appropriate to include a limited exception to the required action that a postsecondary institution must take in response to notification of information about conduct that reasonably may constitute sex-based harassment. *See id.*

The exception only applies to a public awareness event held on a

postsecondary institution's campus or through an online platform sponsored by a postsecondary institution to raise awareness about sex-based harassment. In addition, even under this exception, a postsecondary institution must still respond to notifications of sex discrimination other than sex-based harassment and to notifications of information about conduct that reasonably may constitute sex-based harassment that indicates an imminent and serious threat to the health or safety of a complainant, any students, employees, or other persons. A postsecondary institution must also still respond to notifications of sex discrimination, including sex-based harassment, if required by legal obligations other than Title IX, such as Title VII. Moreover, the postsecondary institution must still use the information to inform its efforts to prevent sex-based harassment. Thus, the public awareness exception represents a balanced approach to a relatively narrow yet valuable set of on-campus and online sponsored events, and it will assist postsecondary institutions in complying with their obligation to effectuate Title IX's nondiscrimination mandate.

The Department disagrees it lacks the authority to require a postsecondary institution to use information about sex-based harassment disclosed at a public awareness event to inform its efforts to prevent sex-based harassment. In enacting Title IX, Congress conferred the power to promulgate regulations to the Department. 20 U.S.C. 1682. The Supreme Court has noted that ''[t]he express statutory means of enforc[ing] [Title IX] is administrative,'' as [t]h[at] statute directs Federal agencies that distribute education funding to establish requirements that effectuate the nondiscrimination mandate, and permits the agencies to enforce those requirements through 'any . . . means authorized by law[.]' '' *Gebser,* 524 U.S. at 280–81 (quoting 20 U.S.C. 1682). When a recipient learns of sex-based harassment occurring in its education program or activity at a public awareness event, it is well within the Department's authority to require a recipient to use this information in its efforts to prevent further sex-based harassment. Moreover, nothing in § 106.44(e) obligates a postsecondary institution to take specific actions based on information disclosed during a public awareness event. Instead, as explained in the July 2022 NPRM, a postsecondary institution has discretion to determine how to incorporate information from such events into its prevention training. *See* 87 FR 41443.

The Department also disagrees that the public awareness event exception incentivizes students to publicly defame others or make public accusations of harassment. As discussed above, the Department's view is that public awareness events provide opportunities for students to share information about their experiences and raise awareness of sex-based harassment and thus are directly related to the goal of eliminating sex discrimination. The commenters did not provide any examples of defamation occurring at such events, and nothing in the public awareness event exception is designed to encourage students to defame others.

The Department declines to permit a postsecondary institution to develop its own employee notification requirements, including deciding whether an employee must report information disclosed at a public awareness event. In order to ensure consistency in recipients' obligations under Title IX in response to a notification of sex discrimination, including sex-based harassment, and provide clarity for postsecondary institutions, it is preferable to set out the employee notification requirements with respect to public awareness events, as opposed to permitting a postsecondary institution to develop its own requirements.

As explained above, although it is important to enable students to share information about sex-based harassment at a public awareness event without obligating a postsecondary institution to respond under § 106.44, the Department determined that it would not be appropriate to permit a postsecondary institution to ignore such information. Thus, the Department declines to exempt such information from the employee notification requirements in § 106.44(c), and such information must be reported to the Title IX Coordinator. The Title IX Coordinator would then determine whether the information indicates that there is an imminent and serious threat to the health or safety of a complainant, any students, employees, or other persons as well as coordinate the recipient's use of the information disclosed to inform its efforts to prevent sex-based harassment (*e.g.,* by increasing lighting on school grounds or offering transportation options after dark).

In response to commenters' concerns about privacy and autonomy, the Department has revised the public awareness event exception to remove the references to §§ 106.45 and 106.46 to avoid the impression that, when information disclosed at a public awareness event indicates an imminent and serious threat to health or safety, the Title IX Coordinator must automatically make a complaint and initiate the postsecondary institution's grievance procedures under § 106.45 and, as appropriate, § 106.46 without first conducting a fact-specific analysis. Rather, in such circumstances, the Title IX Coordinator must comply with the obligations under § 106.44(f), including conducting a fact-specific analysis under § 106.44(f)(1)(v) to determine whether the Title IX Coordinator must initiate a complaint that complies with the postsecondary institution's grievance procedures under § 106.45, and if applicable § 106.46.

As explained in the July 2022 NPRM, nothing in § 106.44(e) would require a postsecondary institution's employees to attend a public awareness event. *See* 87 FR 41443. The Department clarifies here that the reference in the July 2022 NPRM to ''employees'' was intended to include the Title IX Coordinator. In response to commenters' concerns, the Department has revised the public awareness event exception to state that nothing in Title IX or part 106 of the Department's regulations obligates a postsecondary institution's Title IX Coordinator or any other employee to attend such public awareness events.

The Department acknowledges commenters' suggestions for broadening the public awareness event exception but declines to do so. As explained above, the Department intentionally limited the public awareness event exception to information about conduct that reasonably may constitute sex-based harassment. The Department notes that the language in § 106.44(e) was changed from ''conduct that may constitute sex-based harassment'' to ''conduct that reasonably may constitute sex-based harassment'' to align with changes made to § 106.44(c) as explained more fully in the discussion of § 106.44(c). The Department has determined that the benefits of public awareness events justify creating an exception for this type of information only and declines to cover information about potential sex discrimination beyond sex-based harassment.

The Department also declines to cover disclosures made in other settings. As explained in the July 2022 NPRM, the public awareness event exception is appropriately limited to public awareness events that meet certain criteria. *See* 87 FR 41443. The Department's position is that information regarding conduct that reasonably may constitute sex-based harassment must generally be provided

to the Title IX Coordinator in order to enable a postsecondary institution to operate its education program or activity free from sex discrimination with only limited exceptions. The Department notes that nothing in the final regulations prohibits a postsecondary institution from informing its community as to when information about conduct that reasonably may constitute sex-based harassment shared in other settings, including in sororities, must be reported to the postsecondary institution's Title IX Coordinator and from informing members of sororities of the availability of public awareness events and confidential reporting options.

The Department declines to dictate the type of information a postsecondary institution must provide at a public awareness event. Declining to mandate the sharing of specified information allows postsecondary institutions to design public awareness events in a way that will be most accessible to their educational communities and most effectively encourage participation. The Department notes that nothing in the final regulations prohibits a postsecondary institution from sharing the contact information of the recipient's Title IX Coordinator or information about how to report or make a complaint of discrimination, including sex discrimination, at a public awareness event. In addition, nothing in the final regulations prohibits a postsecondary institution from informing its community how information shared during a public awareness event will be used.

The Department further declines to revise the public awareness event exception to require a postsecondary institution to act when the information reveals an ongoing threat to the health or safety of the campus community. As explained in the July 2022 NPRM, it is appropriate to align the language regarding a threat to health or safety in the public awareness event exception with the language in § 106.44(h) regarding emergency removals. *See* 87 FR 41443. Accordingly, the Department has revised ''immediate and serious threat to the health or safety'' to ''imminent and serious threat to the health or safety'' in the public awareness event exception to align with a similar change the Department made to § 106.44(h). The Department's reasons for this change are addressed in the discussion of § 106.44(h) in this preamble. The Department also revised the language in § 106.44(e) regarding the threat to students or other persons in the postsecondary institution's community to instead reference ''a complainant, any students, employees, or other persons'' to align with the language in § 106.44(h).

The Department does not agree that it is necessary to provide additional definitions for any of the terms used in the public awareness event exception. As explained in the July 2022 NPRM, the public awareness event exception covers events that are hosted by postsecondary institutions or organized independently by a postsecondary institution's students to raise awareness about sex-based harassment, such as Take Back the Night events or other events at which a postsecondary institution's students may disclose experiences with sex-based harassment. 87 FR 41443. To alleviate any confusion regarding what type of public awareness events are covered, the Department has removed language implying that the exception only applies to public awareness events to raise awareness about sex-based harassment ''associated with a postsecondary institution's education program or activity.'' The removal of this language aligns with the Department's intent to cover public awareness events to raise awareness about sex-based harassment in general and not to limit the exception only to public awareness events focused on sex-based harassment associated with the postsecondary institution's education program or activity. The Department appreciates the opportunity to clarify that, as explained in the July 2022 NPRM, the public awareness event exception applies to public awareness events held on a postsecondary institution's campus or through an online platform sponsored by a postsecondary institution, *id.*—and the exception does not cover events held off campus or in a community space and does not cover disclosures made in the context of an academic assignment or via social media. The Department maintains that the public awareness event exception should not apply to off-campus events, such as events held in spaces in the community surrounding a postsecondary institution, because a recipient's employees are less likely to attend those events, and hence there is a smaller chance that, in the absence of the exception, the recipient's Title IX Coordinator would be required to respond to disclosures of conduct that may reasonably constitute sex discrimination. *See* 87 FR 41443.

The Department also maintains that the public awareness event exception should not apply to disclosures made through academic assignments or via social media. Academic assignments for a particular class and an individual's social media posts generally do not serve the important function of facilitating a broad public discussion about sex-based harassment in the same way as public awareness events within the meaning of § 106.44(e). The Department thus maintains that the underlying rationale for the exception—reducing the likelihood of chilling student participation in the events—is less applicable to these circumstances.

Changes: In final § 106.44(e), the Department has changed ''conduct that may constitute sex-based harassment under Title IX'' to ''conduct that reasonably may constitute sex-based harassment under Title IX or this part,''; and changed ''unless the information reveals an immediate and serious threat to the health or safety of students or other persons in a postsecondary institution's community'' to ''unless the information indicates an imminent and serious threat to the health or safety of a complainant, any students, employees, or other persons.'' The Department also removed the phrase ''associated with a postsecondary institution's education program or activity'' and the references to §§ 106.45 and 106.46. The Department has added at the end of § 106.44(e) the statement that ''nothing in Title IX or this part obligates a postsecondary institution to require its Title IX Coordinator or other any other employee to attend such public awareness events.'' The Department has also made revisions to the order of words for clarity, moving ''to raise awareness about sex-based harassment'' so that it immediately follows ''public event'' and states ''a public event to raise awareness about sex-based harassment.''

6. Section 106.44(f) Title IX Coordinator Requirements

In the discussion of § 106.44(a) above, the Department explained that the framework it adopted in § 106.44(a) of these final regulations for Title IX compliance requires a recipient to respond promptly and effectively when the recipient has knowledge of conduct that reasonably may constitute sex discrimination. To align with this framework and other provisions in these final regulations, the Department reorganized the Title IX Coordinator requirements into three parts. First, § 106.44(f) clarifies that the Title IX Coordinator is responsible for coordinating a recipient's compliance with its obligations under Title IX and this part. Second, paragraphs § 106.44(f)(1)(i)–(vii) describe the actions a recipient must require its Title IX Coordinator to take, upon being notified of conduct that reasonably may constitute sex discrimination, in order

to promptly and effectively end any sex discrimination in the recipient's education program or activity, prevent its recurrence, and remedy its effects. Third, § 106.44(f)(2) establishes that a Title IX Coordinator is not required to take any of the specific actions outlined in paragraphs (f)(1)(i)–(vii) if the Title IX Coordinator reasonably determines that the conduct as alleged could not constitute sex discrimination under Title IX or this part. The Department explains the requirements of each part of § 106.44(f) in the discussion sections below.

The Department engaged in a thorough review of the 2020 amendments as well as comments received through the Title IX Public Hearing and in its listening sessions, and carefully considered the comments received in response to the July 2022 NPRM. In light of that review, the Department has determined that the final regulations best effectuate Title IX's nondiscrimination mandate related to the role and responsibilities of a Title IX Coordinator to coordinate a recipient's compliance with Title IX. As a result of its comprehensive review, the Department determined that a Title IX Coordinator must take the required actions set out under § 106.44(f)(1)(i)–(vii) to promptly and effectively end any sex discrimination in a recipient's education program or activity, prevent its recurrence, and remedy its effects.

Comprehensive Title IX Coordinator Requirements and Scope of the Title IX Coordinator Role

Comments: Some commenters supported proposed § 106.44(f) as affording a comprehensive response to sex discrimination that would align with the purpose of Title IX and more fully effectuate its nondiscrimination mandate, including by addressing what commenters described as the inadequate response to sex discrimination under the 2020 amendments. Commenters stated proposed § 106.44(f) provided greater flexibility to recipients and clear guidance that would likely ensure a nondiscriminatory educational environment by requiring a recipient's Title IX Coordinator to intervene early in response to possible sex discrimination; provide equitable treatment and support to individuals impacted by sex discrimination, including supportive measures for complainants and respondents; offer resources to end sex discrimination and prevent its recurrence; and respond to patterns, trends, and risk factors to prevent future discrimination.

Other commenters were concerned that proposed § 106.44(f) would expand the Title IX Coordinator role beyond coordinating compliance, including to involve broad enforcement and oversight responsibility. Other commenters objected to the Department imposing specific requirements directly on a recipient's Title IX Coordinator rather than the recipient itself. One commenter expressed concern that the proposed regulations would impede a recipient's ability to address concerns about specific actions taken by the Title IX Coordinator. The commenter asserted that, because of the various obligations assigned to the Title IX Coordinator under the proposed regulations, the Title IX Coordinator would have a conflict of interest and would not be able to neutrally evaluate whether the actions the Title IX Coordinator took to respond to sex discrimination were effective.

Some commenters raised concerns about the burden and impact on Title IX Coordinators of expanding their responsibilities. Some commenters expressed concern that an expanded Title IX Coordinator role would diminish other individuals' sense of institutional responsibility for Title IX compliance and asserted that recipients might have other administrators or offices that could better satisfy some of the requirements of proposed § 106.44(f), such as offering and coordinating supportive measures.

Some commenters expressed concern about anticipated compliance costs and the administrability of proposed § 106.44(f). For example, commenters asserted that the Department failed to account for differences among recipients, underestimated the resources required to implement the proposed regulations, and overestimated recipients' ability to employ and retain Title IX Coordinators who would be equipped to comply with the proposed requirements. Some commenters asserted proposed § 106.44(f) would disempower complainants, resulting in fewer reports of sex discrimination. Other commenters stated recipients would face litigation risk when their Title IX Coordinators initiate a complaint against a complainant's wishes.

Discussion: The Department acknowledges commenters' support for § 106.44(f) and agrees that the requirements of § 106.44(f) of these final regulations will ensure that Title IX Coordinators play a central role and are responsible for coordinating recipients' comprehensive compliance with their obligations under Title IX. The Department agrees with commenters who described the structure of § 106.44(f) as necessary to require Title IX Coordinators to respond to patterns, trends, and risk factors. Together, the Title IX Coordinator's oversight of a recipient's response to individual reports and the action required to address and prevent future sex discrimination for all participants in a recipient's education program or activity, will help recipients provide an educational environment free from sex discrimination as required by Title IX.

The Department agrees with commenters that § 106.44(f) sets out clearly defined requirements that will ensure a recipient addresses conduct that reasonably may constitute sex discrimination as its Title IX Coordinator becomes aware of it, through the Title IX Coordinator's coordination of early intervention efforts in response to possible sex discrimination; consistent, equitable treatment of complainants and respondents; and provision of supportive measures and resources to end sex discrimination and prevent its recurrence.

The Department also agrees with commenters that § 106.44(f) provides recipients greater flexibility and Title IX Coordinators clearer instructions than § 106.44(a) from the 2020 amendments regarding how to respond to information about conduct that reasonably may constitute sex discrimination. As explained in the discussion of § 106.44(a), under the 2020 amendments, a recipient with actual knowledge of sexual harassment in its education program or activity was, in the absence of a formal complaint, required only to ''treat complainants and respondents equitably by offering supportive measures'' and ''explain to the complainant the process for filing a formal complaint.'' 34 CFR 106.44(a). However, the Department determined that the 2020 amendments may in some cases have led to sex discrimination in a recipient's educational environment not being fully addressed. To address this concern, § 106.44(f) gives recipients and their Title IX Coordinators the guidance and flexibility they need to meet their obligation under § 106.44(a) by specifying how Title IX Coordinators must respond to information about any conduct that reasonably may constitute sex discrimination, not only sexual harassment, in a recipient's education program or activity.

The Department acknowledges that some commenters expressed concern that the proposed Title IX Coordinator requirements could have improperly shifted responsibility for Title IX compliance from a recipient to its Title IX Coordinator. This was not the Department's intention. As explained in

the discussion of § 106.8(a), a recipient is responsible for compliance with obligations under Title IX, including the Title IX Coordinator requirements set out in § 106.44(f), and the Department will hold the recipient responsible for meeting all obligations under these final regulations. The Department is persuaded that changes should be made to final § 106.44(f) to clarify that a recipient is ultimately responsible for compliance with these final regulations. Therefore, the Department has revised final § 106.44(f) to include a statement that the Title IX Coordinator is responsible for coordinating the recipient's compliance with its obligations under Title IX and the Department's implementing regulations. This added text indicates that the Title IX Coordinator's role stems from ''the recipient's'' obligations, emphasizing that it is the recipient that remains responsible for ensuring compliance with its obligations under Title IX. At the same time, the reference to coordinating the recipient's obligations ensures that Title IX Coordinators retain their unique oversight role and their ability to serve as a trusted institutional resource, which commenters asked the Department to preserve.

The Department understands commenters' concerns that § 106.44(f), together with other requirements in § 106.44(b)–(k) and other provisions in these final regulations, increases the scope of the Title IX Coordinator's duties, which some commenters argued would confer enforcement or ''extrajudicial authority'' on the Title IX Coordinator and which others argued would overburden the Title IX Coordinator. Although the Department's Title IX regulations have long granted authority to the Title IX Coordinator to coordinate a recipient's Title IX compliance, as well as the power to initiate a complaint under limited circumstances, the Department disagrees that Title IX Coordinators may use this authority to deprive individuals of protected rights and freedoms. For a full explanation of the intersection of Title IX with rights and freedoms such as free speech rights, see the discussions of § 106.2 (Definition of ''Sex-Based Harassment'') and § 106.44(a). Since regulations under Title IX were first issued, *see* 40 FR 24128, 24139 (June 4, 1975), recipients have had to designate an employee to coordinate a recipient's compliance with Title IX, and the Department's enforcement experience since that time does not lead it to believe that increasing the scope of the Title IX Coordinator's oversight duties in certain respects will result in inappropriately aggressive enforcement of Title IX's requirements. Rather, in its enforcement experience, the Department has observed that recipients often rely on their Title IX Coordinators to oversee the recipient's compliance with Title IX, but do not always afford their Title IX Coordinators sufficient and appropriate authority to effectively coordinate all aspects of that compliance.

The Department has considered the comprehensive and robust nature of the Title IX Coordinator role and agrees that it is an important role that attracts dedicated professionals, but does not agree that these final regulations will deter individuals from serving in the role of Title IX Coordinator or fulfilling their obligations. The Department recognizes that recipients face competing demands for limited resources. However, as the Department explained in the July 2022 NPRM, a recipient must nonetheless ensure that the Title IX Coordinator is effective in their role by giving the Title IX Coordinator the appropriate authority, support, and resources to coordinate the recipient's Title IX compliance efforts. 87 FR 41424–25. This was recognized in the preamble to the 2020 amendments as well, where the Department emphasized that a recipient must not designate a Title IX Coordinator ''in name only'' and instead must fully authorize them to coordinate the recipient's efforts to comply with Title IX. 85 FR 30464 (internal quotation marks omitted). Recipients retain flexibility to determine how to structure and support the Title IX Coordinator role but must do so in a way that ensures that a Title IX Coordinator can effectively coordinate the recipient's compliance with Title IX. A Title IX Coordinator's effectiveness also depends on the relationships and trust that they build within a recipient's community. The Department disagrees that the additional requirements § 106.44(f) places on Title IX Coordinators will impair a Title IX Coordinator's ability to build trust or will discourage reports of sex discrimination. Instead, the Department views these requirements as facilitating greater institutional effectiveness in responding to reports of sex discrimination. The Department agrees with commenters who indicated that ineffective responses to reports of sex discrimination contribute to a lack of trust and decrease reporting, and further agrees that effective implementation of Title IX's protections against sex discrimination will build trust in the Title IX Coordinator and will not deter individuals from making complaints. The Department addresses commenters' concerns about preserving complainant autonomy in the discussion of Title IX Coordinator-initiated complaints below.

The Department recognizes that § 106.44(f) and other provisions of these final regulations may add to Title IX Coordinators' existing duties and responsibilities. However, the Department disagrees that § 106.44(f) restricts how recipients allocate responsibility for the various Title IX Coordinator requirements and agrees with commenters that recipients should decide how best to meet these requirements, including by distributing them among employees of a recipient's other offices or programs that are well equipped to fulfill certain requirements. As the Department explained in the discussion of § 106.8(a), these final regulations permit a recipient to designate more than one employee to serve as a Title IX Coordinator. Section 106.8(a) also provides recipients with the flexibility and discretion to delegate specific duties of the Title IX Coordinator to one or more designees or permit a Title IX Coordinator to delegate such duties to one or more designees. In the case of supportive measures, the Department's discussion of § 106.44(g) explains that under these final Title IX regulations, a Title IX Coordinator may delegate responsibilities under § 106.44(f)(1)(ii) related to offering and coordinating supportive measures to designees. Such delegation enables a recipient to assign duties to personnel who are best positioned to perform them; to avoid actual or perceived conflicts of interest; and to align with the recipient's administrative structure. *See* discussion of § 106.44(g). The Department understands commenters' concerns about the human capital needed to comply with § 106.44(f) and other provisions of these final regulations. However, the Department is not persuaded that a Title IX Coordinator would not have the capacity to oversee other individuals or offices that may assist in performing any delegated Title IX Coordinator requirements. Through its enforcement experience, OCR has worked with recipients of different sizes and structures, including public and private, K–12, and postsecondary institutions, and has observed a range of administrative oversight structures and other organizational approaches for ensuring Title IX compliance. The Department understands from this experience that the human capital and other resources recipients devote to structuring Title IX compliance efforts vary greatly and often involve

coordination among offices such as the dean of students, office of academic affairs, office of student conduct, human resources office, counseling and psychological services, and the individual or office designated to provide support to students with disabilities. Coordinating these administrative structures is no different than the coordination required of other high-level employees and officials who oversee other aspects of a recipient's operations, such as a dean or vice president of academic affairs. In some situations, it may be helpful to designate specific employees to coordinate on certain Title IX issues, such as gender equity in academic programs, athletics, pregnancy or related conditions, sex-based harassment, or complaints from employees.

The Department disagrees that two sources cited by some commenters support their argument that these final regulations impose obligations on Title IX Coordinators that they are not equipped to meet. In Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses,* 8 Behavioral Sci. 4 (2018), the authors summarized the results of a study that compiled anonymous survey responses from almost 700 Title IX Coordinators at four- and two-year postsecondary institutions in 42 States. The article reported that the majority of the Title IX Coordinator survey respondents indicated that they ''felt that they were well-trained to do their jobs.'' The article recommended full-time roles and greater staff support for Title IX Coordinators to perform their duties. The second article cited by the commenters, Sarah Brown, *Life Inside the Title IX Pressure Cooker,* Chronicle of Higher Education (Sept. 5, 2019), relied in part on survey data reported in the first article, in addition to interviews with Title IX Coordinators who reported feeling overburdened and under-resourced to fulfill their duties. Both articles were published before the 2020 amendments. Because these final regulations afford Title IX Coordinators and recipients a clearer understanding of Title IX Coordinators' responsibilities, and recipients' ultimate responsibility for Title IX compliance, recipients are better positioned to provide the resources needed to ensure their Title IX Coordinators can meet their obligations. Moreover, the Department's final regulations are consistent with the first article's recommendation that recipients employ full-time Title IX Coordinators and specifically allow Title IX Coordinators to delegate duties to other recipient staff, which further supports Title IX Coordinators in fulfilling their responsibilities. Finally, the Department acknowledges that some commenters stated the requirements of § 106.44(f) are consistent with steps that some recipients are already obligated to take to satisfy State law, which further demonstrates that these final regulations do not impose requirements that exceed the capacity of a well-trained and fully supported Title IX Coordinator.

The Department does not agree with the commenter who asserted that a Title IX Coordinator cannot both oversee a recipient's compliance with its Title IX obligations and perform any of the underlying duties that are necessary to comply with these final regulations because the Title IX Coordinator would have a conflict of interest. While it is true that the Title IX Coordinator must oversee the recipient's compliance with requirements such as providing reasonable modifications for a pregnant student or providing supportive measures, *see* §§ 106.40(b)(3)(ii) and 106.44(f)(1)(ii), if a question were to arise regarding the efficacy of a recipient's reasonable modifications or supportive measures, the Title IX Coordinator would generally be in a position to address such concerns. The Department also acknowledges, however, that if a concern is raised questioning the efficacy of the Title IX Coordinator's efforts to coordinate the provision of reasonable modifications or supportive measures, the recipient would likely need to ensure that an alternative individual resolves the concern to avoid a conflict of interest or a biased determination. Section 106.8(a)(2) specifically allows a recipient to delegate specific duties to employees other than the Title IX Coordinator, and one of these delegees could be tasked with providing input on whether a particular action taken by the Title IX Coordinator was effective. Finally, § 106.8(d)(2)(iii) and (4) require a recipient to train its Title IX Coordinator on, among other things, bias and impartiality to ensure that the Title IX Coordinator can identify situations in which they may be biased or conflicted out of taking a particular action.

The Department also disagrees that § 106.44(f) will increase recipient costs because a Title IX Coordinator's ability to initiate a complaint against a complainant's wishes will expose recipients to greater litigation risk. As explained above, the Department's Title IX regulations have long permitted a Title IX Coordinator to initiate complaints. Rather than increasing a risk that they will do so against a complainant's wishes, the final regulations provide clear instructions to make it more likely that Title IX Coordinators will honor complainant wishes as much as possible and initiate complaints on their own only in a very specific and limited set of circumstances. *See* § 106.44(f)(1)(v). The Department has considered the costs, including potential litigation costs, in the *Regulatory Impact Analysis* and concluded that the Title IX Coordinator requirements, including the provision regarding Title IX Coordinator-initiated complaints, are necessary to ensure a recipient addresses conduct that reasonably may constitute sex discrimination in its education program or activity and thereby fulfills its obligations under Title IX.

Finally, the Department disagrees with the commenter who asserted that the Title IX Coordinator requirements would diminish other employees' sense of institutional responsibility for Title IX compliance. As noted above, the Title IX Coordinator role is not new, and the Department views collaboration among employees to carry out Title IX obligations as critical to Title IX compliance. For example, in OCR's enforcement experience, recipients often encourage cooperation between a Title IX Coordinator and other employees to ensure consistent enforcement of recipient policies. The Title IX Coordinator may have to work closely with many different members of the school community whose job responsibilities relate to the recipient's Title IX obligations, including administrators, counselors, athletic directors, advocates, and legal counsel. These final regulations enable a recipient to ensure that all employees whose work relates to Title IX communicate with one another and have the necessary support. *See,* for example, § 106.8(c) and (d), which require a recipient to provide a notice of nondiscrimination and training for specific employees, and § 106.44(c), which clarifies that all employees have some notification responsibilities.

Changes: The Department has revised proposed § 106.44(f) to state that a recipient's Title IX Coordinator is responsible for coordinating a recipient's compliance with its obligations under Title IX and this part.

Prompt and Effective Action Necessary To Remedy the Effects of Sex Discrimination

Comments: Some commenters asked the Department to clarify the meaning of ''prompt and effective'' and ''remedy the effects'' in proposed § 106.44(a).

Some commenters opposed the proposed Title IX Coordinator requirements, which the commenters asserted would divert a Title IX Coordinator's attention and a recipient's resources, away from where they are most needed, *i.e.,* responding to complaints of discrimination.

Discussion: The Department appreciates the opportunity to further explain what it means by ''prompt[ ] and effective[ ]'' action and action to ''remedy [the] effects'' of sex discrimination in § 106.44(f)(1). As explained in the discussion of § 106.44(a) above, there are important differences between the judicial and administrative enforcement of Title IX. The Department's focus in the administrative enforcement context is on a recipient's responsibility under the Title IX statute and the Department's regulations to take prompt and effective action to prevent, eliminate, and remedy sex discrimination occurring in its education program or activity. 87 FR 41432. A recipient's duty to take prompt and effective action is a standard familiar to recipients from the Title IX regulations issued in 1975 as well as OCR's prior guidance and decades of the Department's enforcement of Title IX predating the 2020 amendments. *See* 40 FR 24128, 24139 (June 4, 1975); 1997 Sexual Harassment Guidance; 2001 Revised Sexual Harassment Guidance.

As the Department explained in the July 2022 NPRM and reaffirms here, there is not a specific timeframe for ''prompt'' action to end sex discrimination. 87 FR 41434. The Department's views regarding how to evaluate prompt action are consistent with the Department's views in the 2020 amendments. A reasonably prompt response to sex discrimination ''is judged in the context of the recipient's obligation to provide students and employees with education programs and activities free from sex discrimination.'' 87 FR 41434 (quoting 85 FR 30269 (discussing a recipient's grievance process)). The Department continues to believe that ''prompt'' action to end sex discrimination in a recipient's education program or activity is necessary to further Title IX's nondiscrimination mandate, including with respect to alleged sex discrimination that is addressed outside of a recipient's Title IX grievance procedures. *Id.* Therefore, an unreasonable delay by a recipient's Title IX Coordinator to take the required action under § 106.44(f)(1) to end sex discrimination in a recipient's education program or activity, prevent its recurrence, and remedy its effects, would not meet Title IX's obligation.

With respect to effective action, the Department considers effective action to mean that a Title IX Coordinator, upon learning of conduct that reasonably may constitute sex discrimination, takes reasonable steps calibrated to address possible sex discrimination based on all available information. And when a Title IX Coordinator's oversight and coordination of a recipient's response through the specific actions required under § 106.44(f)(1)(i)–(vii) are not effective at ending sex discrimination and preventing its recurrence, the prompt and effective response requirement means that the Title IX Coordinator must reevaluate the response and take additional steps to end sex discrimination in the recipient's education program or activity.[36] If a Title IX Coordinator fails to do so, the recipient fails to meet its obligations under § 106.44(a) and (f) and does not demonstrate compliance with the requirements of Title IX and this part. The Department describes the effective actions a Title IX Coordinator is required to take in the discussion of § 106.44(f)(1), below. Additional discussion of ''other appropriate prompt and effective steps'' that a Title IX Coordinator is required to take under § 106.44(f)(1)(vii) that are outside of a recipient's grievance procedures is provided below.

The Department also reaffirms and clarifies the duty of a Title IX Coordinator under § 106.44(f)(1) to remedy the effects of any sex discrimination that occurred in a recipient's education program or activity. When a recipient determines that sex discrimination occurred, it must provide and implement remedies to the complainant or other person the recipient identifies as having had equal access to the recipient's education program or activity limited or denied by sex discrimination. This requirement is consistent not only with the definition of ''remedies'' in final § 106.2, which are provided to restore or preserve equal access to a recipient's education program or activity, but with the Title IX statute itself. *See* 20 U.S.C. 1681(a) (''No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]''). Similarly, if a recipient determines that its own response to a complaint of sex discrimination (*e.g.,* a report to the Title IX Coordinator or a request for modification for a pregnant student) discriminated based on sex because of either the recipient's policies or the way it implemented those policies, the recipient would be required to provide remedies for its own discrimination based on sex and take any additional action necessary to prevent the recurrence of sex discrimination. 87 FR 41433–34.

The Department disagrees with commenters who asserted that proposed § 106.44(f) would improperly divert the focus of Title IX Coordinators from responding to sex discrimination complaints to seeking out possible sex discrimination. The obligations that § 106.44(f)(1) places on a recipient's Title IX Coordinator relate directly to the Title IX Coordinator's duty to coordinate the recipient's response to sex discrimination, including a recipient's obligation to respond to complaints of sex discrimination and its obligation to address information about conduct that reasonably may constitute sex discrimination. The Department disagrees that either obligation should be prioritized over the other. Thus § 106.44(f)(1)(i)–(iii) require a recipient to ensure that the Title IX Coordinator treats the complainant and respondent equitably, offers supportive measures, and provides information about a recipient's grievance procedures; these duties are consistent with what a Title IX Coordinator must do under § 106.44(a) of the 2020 amendments. These obligations ensure that a Title IX Coordinator responds to complaints and information about conduct that reasonably may constitute sex discrimination in an unbiased manner that supports individual complainants and respondents; they do not distract from the Title IX Coordinator's obligation to respond to such complaints and information—they qualify the nature of the response to ensure the response is effective.

Nor do the other requirements of § 106.44(f)(1) distract from a Title IX Coordinator's response to sex discrimination. To the contrary, § 106.44(f)(1) directly advances the Title IX Coordinator's responsibility to

[36] Even when a recipient's response to sex discrimination is assessed under the deliberate indifference standard in a private action for damages, some courts have recognized under certain circumstances that the recipient must take additional responsive action if its initial efforts to end sex discrimination are ineffective. *See, e.g., Cianciotto ex rel. D.S.* v. *N.Y.C. Dep't of Educ.,* 600 F. Supp. 3d 434, 458 (S.D.N.Y. 2022) (denying motion to dismiss when the complaint alleged school officials failed to intensify, reassess, or adjust their response to reports of ongoing and escalating sex-based harassment); *Doe* v. *Sch. Dist. No. 1, Denver,* 970 F.3d 1300, 1314 (10th Cir. 2020) (reversing dismissal of a complaint that adequately pled deliberate indifference by school officials who allegedly knew their actions to end continued sexual harassment ''had not sufficed'' yet failed ''to try something else'').

respond to sex discrimination by initiating the recipient's grievance procedures to determine whether such discrimination occurred. Similar to the 2020 amendments, § 106.44(f)(1)(v) allows a Title IX Coordinator discretion to determine whether to make a complaint. *See* 34 CFR 106.30(a) (defining a formal complaint as a written document filed by a complainant or signed by a Title IX Coordinator). In addition, paragraphs (f)(v) and (vi) include guardrails to protect complainant autonomy and safety, which will help ensure that individuals are not dissuaded from reporting sex discrimination, thus ensuring the recipient is informed of sex discrimination to which it must respond. Finally, paragraph (f)(vii) specifically requires that a Title IX Coordinator take steps to ensure that sex discrimination does not continue or recur in the recipient's education program or activity, and hence it, too, directly advances the goal of responding to sex discrimination.

Changes: As described below in the discussions of Title IX Coordinator-initiated complaints, prompt and effective steps to ensure sex discrimination does not continue or recur, and comments on proposed § 106.44(f)(1)–(4), the Department has revised § 106.44(f) to require a recipient to require its Title IX Coordinator to take specific actions set out under paragraph (f)(1) to promptly and effectively end any sex discrimination in its education program or activity, prevent its recurrence, and remedy its effects when notified of conduct that reasonably may constitute sex discrimination under Title IX or this part, unless the Title IX Coordinator reasonably determines under paragraph (f)(2) that the conduct as alleged could not constitute sex discrimination under Title IX or this part.

Conduct That Reasonably May Constitute Sex Discrimination

Comments: Some commenters asked the Department to clarify what information would provide notice of ''conduct that may constitute sex discrimination'' that would require a Title IX Coordinator to take the steps under proposed § 106.44(f)(1)–(6). Some commenters raised concerns that requiring recipients to respond fully to every allegation, including those that do not adequately allege sex discrimination, would waste resources, be unduly burdensome on recipients, and divert support from where it is needed. Other commenters asked whether the requirements would only apply after assessing that the conduct alleged constitutes sex discrimination or only if the Title IX Coordinator reasonably believes the conduct alleged constitutes sex discrimination under Title IX. Some commenters stated that the Department lacked statutory authority to require recipients to address conduct that ''may constitute sex discrimination'' and that is not sex discrimination.

Some commenters opposed the increased duties that proposed § 106.44(f) would impose on Title IX Coordinators in light of other changes in the Department's proposed regulations, including the proposed definition of ''sex-based harassment'' in § 106.2 and the notification requirements in proposed § 106.44(c). Some commenters stated that, taken together, the proposed provisions would require employees to report conduct to a recipient's Title IX Coordinator even if it could not reasonably be considered sex discrimination and would require a Title IX Coordinator to act in response to such conduct, often against a complainant's wishes.

Discussion: The Department is persuaded that a change should be made to § 106.44(f) to clarify that the Title IX Coordinator requirements will apply when the Title IX Coordinator is notified of conduct that ''reasonably'' may constitute sex discrimination under Title IX or this part. The Department agrees with commenters who stated the Title IX Coordinator requirements should not apply to conduct that on its face would not or could not constitute sex discrimination and notes that it would not have authority under Title IX to require such action. The Department does not intend to require a Title IX Coordinator to address conduct that as alleged could not constitute sex discrimination under Title IX or this part. The Department notes that a recipient would, however, have obligations under § 106.44(a) for conduct that reasonably may constitute sex discrimination. The Department declines to make the changes other commenters requested, including changing the Title IX Coordinator requirements to apply only after a Title IX Coordinator assesses the conduct as alleged and determines that it constitutes sex discrimination. A Title IX Coordinator does not determine that conduct as alleged constituted sex discrimination prior to taking the steps required under final § 106.44(f)(1); that determination can only be made by a recipient following grievance procedures undertaken consistent with the requirements of § 106.45, and if applicable § 106.46.

The revised requirements will obligate a Title IX Coordinator to act only when notified of conduct that reasonably may constitute sex discrimination. Paragraphs (f)(1) sets out the specific actions a Title IX Coordinator must take. The Department agrees with commenters that neither a Title IX Coordinator nor a recipient should be required to respond to every assertion of sex discrimination without assessing whether the conduct as alleged reasonably may constitute sex discrimination. A Title IX Coordinator should be permitted to use their judgment and expertise, consistent with these regulations, to determine whether some notifications could not reasonably constitute sex discrimination as alleged. To that end, the Department clarifies in § 106.44(f)(2) of the final regulations that none of the Title IX Coordinator requirements in § 106.44(f)(1) apply when the Title IX Coordinator reasonably determines that the conduct as alleged could not constitute sex discrimination under Title IX or this part.

The Department understands that a Title IX Coordinator will have unique expertise and specialized training that may in some cases distinguish their assessment of alleged sex discrimination from the assessment of the same conduct by a recipient's other employees, including employees a recipient trained under § 106.8(d)(1) on the scope of sex discrimination. The Title IX Coordinator will also have a broader perspective on conduct that reasonably may constitute sex discrimination because of their coordination of a recipient's Title IX compliance, including offering and coordinating supportive measures, and initiating grievance procedures and the recipient's informal resolution process, if any. In coordinating these actions for all reports of alleged sex discrimination, a Title IX Coordinator may be aware of prior conduct, incidents, or concerns that may shed light on the allegations. The Department understands that a Title IX Coordinator's assessment of whether conduct as alleged reasonably may constitute sex discrimination would draw on this institutional expertise and perspective. So, while a recipient must train and require its non-confidential employees to report information about conduct that they believe reasonably may constitute sex discrimination to the Title IX Coordinator under § 106.44(c), a Title IX Coordinator's assessment of the same report might reasonably conclude that the conduct as alleged could not constitute sex discrimination.

These changes address commenters' concerns that the proposed regulations

would have required Title IX Coordinators to satisfy proposed § 106.44(f) even after being notified of conduct that on its face would not constitute sex discrimination. These changes also address commenters' concerns that requiring a Title IX Coordinator to satisfy the obligations set out in proposed § 106.44(f) for every allegation of sex discrimination without considering whether the conduct as alleged reasonably may constitute sex discrimination could negatively impact a Title IX Coordinator's ability to coordinate a recipient's Title IX compliance. The Department appreciates the opportunity to clarify that nothing in these regulations addresses conduct that does not reasonably constitute sex discrimination or precludes a recipient from addressing this conduct through other means.

Changes: The Department has revised § 106.44(f) such that a Title IX Coordinator, when notified of conduct that reasonably may constitute sex discrimination under Title IX or this part, will be required to take the actions set out under paragraph (f)(1), unless the Title IX Coordinator determines, pursuant to paragraph (f)(2), that the conduct as alleged could not constitute sex discrimination under Title IX or this part.

Title IX Coordinator-Initiated Complaints

Comments: Commenters expressed varied views on the proposed requirements for Title IX Coordinator-initiated complaints under proposed § 106.44(f)(5). Some commenters supported the proposed provision and viewed it as likely to yield better outcomes for all parties and as helpful for assisting a Title IX Coordinator in determining whether to initiate a complaint. One commenter suggested the Department clarify in the Title IX Coordinator requirements that a recipient owes a duty under Title IX to its educational community, not only a complainant.

Some commenters expressed concern that the proposed provision would incentivize Title IX Coordinators to pursue complaints regarding all reports of possible sex discrimination to avoid liability. Others expressed concern that proposed § 106.44(f)(5) would set too low a bar for Title IX Coordinator complaint initiation.

In addition, some commenters raised concerns that proposed § 106.44(f)(5) would deny complainants autonomy to choose whether to pursue a complaint. One commenter asserted that the notification requirements under proposed § 106.44(c) and the complaint initiation provisions of proposed § 106.44(f)(5) together would erode trust in Title IX Coordinators and decrease reports of possible sex discrimination. Other commenters preferred § 106.44(a) of the 2020 amendments, which requires a Title IX Coordinator, upon learning of possible sex discrimination, to provide a complainant information about supportive measures and the recipient's grievance procedures and requires ''actual knowledge'' for a Title IX Coordinator to initiate a complaint.

Commenters offered a range of views on the discussion in the July 2022 NPRM of the factors that a Title IX Coordinator should consider in determining whether to initiate a complaint under proposed § 106.44(f)(5). Some commenters supported the Department's view that the factors would appropriately require a Title IX Coordinator to balance complainant autonomy and a recipient's obligation to address sex discrimination in its education program or activity.

Other commenters characterized the factors discussed in the preamble as ambiguous and asked the Department to include clear language in the final regulations or issue subsequent guidance on when a Title IX Coordinator may initiate a sex discrimination complaint. Different commenters asked the Department to grant recipients greater flexibility to determine which factors warrant initiating a complaint. One commenter stated that the factors discussed in the preamble would require an investigation by the Title IX Coordinator to determine whether to initiate a complaint.

Some commenters asserted that complaints initiated against a complainant's wishes may be dismissed and are unlikely to result in a determination of responsibility due to a lack of evidence.

Some commenters proposed modifications to balance complainant autonomy against a recipient's duty to address and prevent sex discrimination in its education program or activity. One commenter recommended a modification to proposed § 106.44(c) that any nonconfidential employee of the recipient who is not an employee with ''authority to institute corrective measures'' be required to provide the complainant with information on how to report sex discrimination so that the decision whether to report sex discrimination to a recipient's Title IX Coordinator rests with the complainant.

Some commenters questioned how proposed § 106.44(f)(5) would affect the rights of respondents. For example, some commenters stated the proposed provision would deny respondent's constitutional rights, including a right to confront their accuser, freedom of speech and religion, and due process protections.

Other commenters raised concerns about how proposed § 106.44(f)(5) would impact parents' rights, including that it would authorize a Title IX Coordinator to initiate a complaint on behalf of a minor without the authorization or consent of a parent, including complaints about discrimination contrary to a parent's beliefs. One commenter stated that the Department's proposed regulations create some confusion about the extent of parent involvement and explained that it would be impractical, and in some cases not feasible, to involve a parent in a Title IX Coordinator's inquiry under proposed § 106.44(f)(5) to determine whether to initiate a complaint.

Some commenters raised hypothetical scenarios and asked for clarification on when a Title IX Coordinator would be required to initiate a complaint. For example, commenters asked the Department to clarify how a Title IX Coordinator should respond to alleged, egregious sex discrimination that a complainant declines to pursue through the recipient's grievance procedures for safety reasons; alleged discrimination involving a party who no longer participates in the recipient's education program or activity; and third-party complaints that are not based on firsthand knowledge. Another commenter asked whether a Title IX Coordinator would have discretion to initiate or resume a grievance procedure if the respondent failed to satisfy the terms of an informal resolution agreement or the Title IX Coordinator determined that the informal resolution agreement did not end the sex discrimination and prevent its recurrence.

Discussion: The Department has carefully considered commenters' support, opposition, and concerns about the circumstances in which a Title IX Coordinator may initiate a complaint when one is not pending or has been withdrawn by a complainant and acknowledges the range of comments related to proposed § 106.44(f)(5). Final § 106.44(f)(1)(v) and (f)(2) are part of a comprehensive set of Title IX Coordinator requirements that will yield prompt and equitable outcomes for all parties and provide clarity to Title IX Coordinators on how to respond when notified of conduct that reasonably may constitute sex discrimination in the absence of a complaint, in the withdrawal of any allegations in a complaint, or in the absence or

termination of an informal resolution process under § 106.44(k).

Under the 2020 amendments, when a Title IX Coordinator determined that a non-deliberately indifferent response to alleged sex discrimination required an investigation, the Title IX Coordinator had the discretion to initiate a recipient's grievance process. 85 FR 30131. Although the Department, as in 2020, recognizes that a Title IX Coordinator is in a specially trained position to evaluate whether initiating the grievance procedures is necessary given the circumstances, *see* 85 FR 30122, additional clarity is needed to provide a recipient's Title IX Coordinator with guidance on how to assess whether a complaint that would initiate a recipient's grievance procedures is necessary to address alleged sex discrimination. This additional instruction is necessary because the preamble to the 2020 amendments provided only one example of when a Title IX Coordinator might initiate a complaint—when presented with allegations ''against a potential serial sexual perpetrator''—but gave little guidance other than this example on what factors a Title IX Coordinator should (or should not) consider when determining whether to initiate the recipient's grievance procedures. *See* 87 FR 41445 (quoting 85 FR 30131). Proposed § 106.44(f)(5) sought to address these shortcomings and provided that, upon being notified of conduct that may constitute sex discrimination under Title IX and this part and in the absence of a complaint, a Title IX Coordinator had to determine whether to initiate a complaint. The July 2022 NPRM included six factors a Title IX coordinator might weigh in accounting for both a recipient's duty to ensure equal access to its education program or activity and a nondiscriminatory educational environment, and the wishes of a complainant not to proceed with a complaint investigation. *Id.* The Department agrees with commenters that the discussion of the factors that would assist a Title IX Coordinator in deciding whether to initiate a complaint under proposed § 106.44(f)(5) in the July 2022 NPRM, 87 FR 41445–46, provided helpful clarity on how a Title IX Coordinator must balance complainant autonomy against a recipient's obligation to address alleged sex discrimination in its education program or activity. The Department further recognizes that proposed § 106.44(f) itself did not specify factors a Title IX Coordinator must consider and weigh against a standard that prioritized complainant autonomy except in certain limited circumstances. The Department acknowledges that other commenters disagreed and requested greater flexibility to determine when to initiate a complaint.

After careful consideration, the Department agrees with the commenters who asserted the lack of criteria and factors in the regulatory text created a potentially ambiguous situation in which Title IX Coordinators might not know how to assess whether to initiate a complaint. To address these concerns and provide additional clarity on the narrow instances in which the Title IX Coordinator might initiate a complaint, the Department has revised the regulations to incorporate the factors described in the preamble to the July 2022 NPRM with some modifications. The changes reflect commenters' suggestions that a Title IX Coordinator assess potential harm to a complainant, harm to the educational environment, whether conduct as alleged presents an imminent and serious threat to the health or safety of a complainant or other person, and whether a recipient would be prevented from ensuring equal access on the basis of sex to its education program or activity if a complaint is not initiated. The final regulations enumerate eight factors that a Title IX Coordinator must consider, at a minimum, in making the fact-specific determination whether to initiate a complaint of sex discrimination in the absence of a complaint, following the withdrawal of any or all of the allegations in a complaint, and in the absence or termination of an informal resolution process. These factors are:

(*1*) The complainant's request not to proceed with initiation of a complaint. Although the preamble to the July 2022 NPRM did not enumerate the complainant's request as a separate suggested factor a Title IX Coordinator might consider, the Department explained in its discussion of proposed § 106.44(f)(5) that ''a recipient should honor a complainant's request not to proceed with a complaint investigation when doing so is consistent with a recipient's obligation to ensure it operates its education program or activity free from sex discrimination.'' Final § 106.44(f)(1)(v)(A)(*1*) incorporates that consideration into the factors a Title IX Coordinator must consider.

(*2*) The complainant's reasonable safety concerns regarding initiation of a complaint. Numerous commenters urged the Department to require a recipient's Title IX Coordinator to take a complainant's safety concerns into account in weighing whether to initiate a complaint. The Department agrees with commenters that a complainant's reasonable safety concerns are paramount to whether a Title IX Coordinator should initiate a complaint. Therefore, the Department added final § 106.44(f)(1)(v)(A)(*2*) and (vi), which is discussed further below, to ensure that a complainant's reasonable safety concerns are properly weighed and addressed.

(*3*) The risk that additional acts of sex discrimination would occur if a complaint is not initiated. The Department continues to believe that a Title IX Coordinator must consider circumstances that suggest a risk of additional acts of sex discrimination, which might include whether there have been other reports or complaints of sex discrimination by the respondent or a pattern of behavior that suggests a risk of future discrimination by the respondent. *See* 87 FR 41445.

(*4*) The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence. This tracks the discussion of two factors in the July 2022 NPRM—the seriousness of alleged sex discrimination, such as whether the alleged incident involved violent acts, threats of violence or retaliation, and use of a weapon; and whether the alleged conduct, if established, might require a respondent's removal or imposition of another disciplinary restriction to end the discrimination and prevent its recurrence. *Id.*

(*5*) The age and relationship of the parties, including whether the respondent is an employee of the recipient. This factor aligns with the factor listed in the July 2022 NPRM suggesting a Title IX Coordinator consider the age and relationship of the parties, and further requires a Title IX Coordinator to specifically consider whether the respondent is an employee of the recipient, which, as explained in the July 2022 NPRM, might indicate a power imbalance between the parties and could also make it more likely that a Title IX Coordinator would initiate a complaint to address the affected workplace or learning environment. *Id.*

(*6*) The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals. The sixth factor also aligns with a factor listed in the July 2022 NPRM regarding the scope of the alleged sex discrimination. *Id.*

(*7*) The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred. The seventh factor stems from a factor included in the July 2022 NPRM, with revisions to clarify that the Title IX Coordinator, in deciding whether to initiate a complaint at this stage, is not making a determination whether sex discrimination occurred. *Id.* As explained in the July 2022 NPRM, the lack or unavailability of such evidence could weigh against the Title IX Coordinator initiating a complaint when a complainant has not elected to do so, but the Department reiterates that a Title IX Coordinator would still be required to comply with final § 106.44(f)(1)(vii), by taking other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity. *Id.*

(*8*) Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures under § 106.45, and if applicable § 106.46. The Department added the eighth factor to clarify for recipients that a Title IX Coordinator may have means, other than through the initiation of a recipient's grievance procedures, to end alleged sex discrimination and prevent its recurrence. In particular, this may be a factor when there is not a respondent and the alleged discrimination relates to a recipient's policies or practices. For example, if an employee decides to pursue remedies under an applicable collective bargaining agreement instead of Title IX grievance procedures, the Title IX Coordinator might determine that the collective bargaining agreement affords a process outside of a recipient's Title IX grievance procedures that can end sex discrimination and prevent its recurrence, which might counsel against the Title IX Coordinator initiating a complaint of sex discrimination that complies with the grievance procedures under § 106.45, and if applicable § 106.46.

Consideration of the factors in paragraph (f)(1)(v)(A) aims to ensure that recipients only initiate grievance procedures without the complainant or when the complainant has withdrawn some or all allegations, in very limited, specific circumstances. A recipient should not proceed without the complainant if the alleged conduct neither presents an imminent and serious threat to the health or safety of the complainant or other person, nor prevents the recipient from ensuring equal access based on sex to its education program or activity, *see* 87 FR 41445, and § 106.44(f)(1)(v)(B) restricts a Title IX Coordinator from initiating a complaint absent these circumstances. The Department disagrees that a Title IX Coordinator would be permitted to initiate a complaint based on mere suspicion or a misunderstanding or would be encouraged to do so to avoid possible legal liability, and in the Department's enforcement experience, it is not likely that a Title IX Coordinator would do so.

The Department appreciates the opportunity to clarify how § 106.44(f)(1)(v) will operate in practice. Under § 106.44(f)(1)(v)(A), at a minimum, a Title IX Coordinator must consider whether the alleged conduct implicates any of the considerations listed in factors (*1*)–(*8*), described above. A Title IX Coordinator would consider each of the eight factors in light of the alleged conduct and the information available at that time. The Department notes that a Title IX Coordinator's required consideration of these enumerated factors does not preclude the Title IX Coordinator from considering other information that may be known to them and that could also be relevant to the Title IX Coordinator's ultimate decision whether to initiate a complaint.

After considering each of the eight enumerated factors, along with any other factors and information the Title IX Coordinator deems relevant, the Title IX Coordinator must determine whether the conduct as alleged presents an imminent and serious threat to the health or safety of the complainant or other person, or whether the conduct as alleged prevents the recipient from ensuring equal access based on sex to its education program or activity as required under final § 106.44(f)(1)(v)(B). If neither of the two considerations set out under § 106.44(f)(1)(v)(B) is present, then a recipient's Title IX Coordinator must not initiate a complaint. A Title IX Coordinator may have reason to believe that conduct as alleged implicates serious health or safety concerns or threatens equal access to a recipient's education program or activity, yet still determine that a complaint is not necessary to address those concerns because events postdating the conduct as alleged have ameliorated those concerns. For example, the respondent might have resigned from their employment at the recipient or withdrawn or transferred from the institution. In such cases there may not be a present health or safety or equal access concern, in which case a Title IX Coordinator's consideration of the factors in § 106.44(f)(1)(v)(B) would not support initiating a complaint.

The Department notes that the standard a recipient will use to assess whether conduct as alleged presents an imminent and serious risk to health and safety will not differ from the assessment a recipient will make of these same considerations prior to removing a respondent under the emergency removal provision. The discussion of final § 106.44(h) below provides additional explanation of such risks. The addition of these requirements, which a Title IX Coordinator must consider before initiating a complaint, addresses commenters' concerns that the proposed regulations set too low a bar for Title IX Coordinator-initiated complaints.

Consideration of the § 106.44(f)(1)(v)(A) factors will not require an investigation by a Title IX Coordinator to determine whether to initiate a complaint. Most of the required factors relate to information that the Title IX Coordinator will receive with the report or in conversations with a complainant if they agree to speak with the Title IX Coordinator, including the complainant's request not to proceed with a complaint and any reasonable safety concerns shared, as well as the severity of the alleged discrimination, the age and relationship of the parties, and whether the respondent is the recipient's employee. Other factors relate to information a Title IX Coordinator may reasonably know from experience initiating complaints and overseeing a recipient's compliance with its grievance procedure requirements or from investigating similar or related complaints. This information will help the Title IX Coordinator assess the scope of the alleged conduct and whether the available information suggests a pattern, ongoing sex discrimination, or conduct that is alleged to have an impact on multiple individuals.

The Department appreciates the opportunity to clarify that a Title IX Coordinator's initial assessment under § 106.44(f)(1)(v) is a threshold determination required to satisfy a recipient's obligation under Title IX to ensure equal educational access on the basis of sex, but it is not a credibility determination or an assessment of whether sex discrimination occurred. For that reason, the Department uses the term ''as alleged'' to refer to the information provided to a Title IX Coordinator by a student or other person reporting conduct that reasonably may constitute sex discrimination, consistent with the definitions of complaint and complainant in final § 106.2, or by an employee fulfilling the requirements of

final § 106.44(c) by notifying the Title IX Coordinator about conduct that the employee believes reasonably may constitute sex discrimination under Title IX. To meet the requirements of paragraph (f)(2), a Title IX Coordinator would consider the information as alleged along with any other relevant information to decide if the information reported to them requires the Title IX Coordinator to complete the steps in paragraph (f)(1)(v)(A).

Incorporating paragraph (f)(1)(v)(A) into the final regulations appropriately accounts for commenters' support for a balancing approach that weighs not only complainant autonomy, but also concerns for complainant safety and a risk of harm from initiating a complaint that the complainant may not support. The Department disagrees that these final regulations will erode trust in a recipient's Title IX Coordinator and has included provisions, including final § 106.44(f)(1)(vi), to ensure a Title IX Coordinator maintains clear lines of communication with complainants about actions the recipient may take to fulfill the recipient's obligations under Title IX that may be contrary to a complainant's wishes. In addition, under paragraph (f)(1)(v)(A)(*7*), a Title IX Coordinator would need to consider the availability of necessary evidence to assist a decisionmaker in determining whether sex discrimination occurred, including evidence that could be supplied only by the complainant, before deciding to initiate a complaint without the complainant.

A Title IX Coordinator must consider factors such as the age and relationship of the parties, the severity of the alleged conduct, and whether the sex discrimination as alleged suggests a pattern, ongoing sex discrimination, or widespread sex discrimination such as a sex-based hostile environment that would implicate the rights of numerous individuals to an educational environment free from sex discrimination. These considerations are incorporated into paragraphs (f)(1)(v)(A)(*4*)–(*6*) of the final regulations. As the Department explained in the July 2022 NPRM, these factors take into account a recipient's duty to ensure equal access to its education program or activity and provide an educational environment free from sex discrimination, and the regulations require a Title IX Coordinator to also take into consideration the complainant's individual interests. 87 FR 41445.

Additionally, as noted above, the Department added paragraph (f)(1)(vi) to address possible safety concerns when a Title IX Coordinator initiates a complaint without the complainant, and potentially, over the complainant's objection. This provision of the final regulations will require a Title IX Coordinator, after making the determination to initiate a complaint, to notify the complainant before doing so and appropriately address reasonable concerns related to the complainant's safety or the safety of others. For example, the complainant may have indicated to the Title IX Coordinator a preference not to initiate the recipient's grievance procedures in a case involving serious allegations of sexual misconduct because the complainant encounters the respondent on the walk to and from classes. The complainant may have a reasonable concern that the respondent will engage in physically threatening behavior based on prior experiences. The Title IX Coordinator could offer to address the complainant's reasonable safety concerns by offering to provide an escort to accompany the complainant to and from class. Regardless of the specific measures a Title IX Coordinator might take to address the complainant's reasonable safety concerns, paragraph (f)(1)(vi) requires the Title IX Coordinator to inform the complainant that a complaint is being initiated before doing so to ensure that the complainant is aware of the complaint and able to raise any reasonable safety concerns. These changes address how a Title IX Coordinator may respond to an allegation of egregious sex discrimination that the complainant does not wish to pursue because of safety concerns.

The Department also recognizes that commenters raised concerns about the rights of respondents and parents in connection with a Title IX Coordinator-initiated complaint. The Department shares commenters' concerns about the costs and harms experienced by a respondent when a complaint of sex discrimination is made against them, whether initiated by a complainant or a Title IX Coordinator, and maintains that § 106.44(f)(1)(v) appropriately balances those considerations against a recipient's obligation to ensure it operates its education program or activity free from sex discrimination. 87 FR 41445. As noted above, these final regulations provide for Title IX Coordinators to initiate complaints only in the circumstances of an imminent and serious threat to the health or safety of the complainant or other person or conduct that would prevent a recipient from ensuring equal access to its education program or activity on the basis of sex. The Department does not agree with commenters that respondents would be deprived of due process or any other procedural rights protected by the U.S. Constitution or Federal law. A Title IX Coordinator-initiated complaint is investigated and resolved under a recipient's grievance procedures; therefore, the rights to a fair process and the protections in § 106.45, and if applicable § 106.46, afforded to the complainant and respondent, apply to such complaints. Additional discussion of how the grievance procedures requirements under §§ 106.45 and 106.46 afford all parties a fair process and necessary protections can be found in the preamble discussion of those provisions.

With respect to parents, the Department has carefully considered commenters' concerns and appreciates the opportunity to clarify that § 106.44(f)(1)(v) of the final regulations does not derogate any legal right of a parent, guardian, or other authorized legal representative to act on behalf of a complainant, respondent, or other person. As explained in § 106.6(g), a parent, legal guardian, or other authorized legal representative must be permitted to exercise whatever rights the parents, guardian, or other authorized legal representative might have to act on behalf of a complainant or other person as a result of State, local, or other sources of law; such rights might include making a complaint of sex discrimination, accompanying a minor student to meetings, interviews, and hearings, and otherwise participating in the recipient's grievance procedures. A Title IX Coordinator is not prohibited from consulting a parent in conducting the inquiry to determine whether to initiate a complaint under § 106.44(f)(1)(v). The factors listed in paragraph (f)(1)(v)(A) are, as the final regulations make clear, the minimum that the Title IX Coordinator must consider and are not a restriction on what may be considered. Further, when a parent and a minor student disagree about a decision to make a complaint of sex discrimination, deference to a parent, guardian, or other authorized representative with a legal right to act on behalf of that student in such matters is appropriate. As a general matter, it is appropriate for the Title IX Coordinator to respect the wishes of the parent with respect to that parent's child except in cases of serious threat to the health or safety of the child. For example, if a recipient is concerned about potential physical harm to a student, or a student's suicidality, the recipient can act to protect the student. Where it is appropriate for the Title IX Coordinator to defer to the parent with respect to a

complaint, the Title IX Coordinator may still be required to, as necessary, take other steps generally to ensure equal access on the basis of sex. The recipient could, for instance, provide training to prevent sex-based bullying and harassment in the school.

Likewise, the Department disagrees that the Title IX Coordinator complaint initiation requirements limit or restrict the rights of respondents or parents to freedom of speech, expression, or religion, which are covered by § 106.6(d). We reaffirm that the Department intends these Title IX regulations not to be interpreted to impinge upon rights protected under the First Amendment, and the protections of the First Amendment must be considered if issues of speech, expression, or religion are involved. The Department also underscores that none of the amendments to the regulations changes or is intended to change the commitment of the Department, through these regulations and OCR's administrative enforcement, to fulfill its obligations in a manner that is fully consistent with the First Amendment and other guarantees of the Constitution of the United States. For additional consideration of the First Amendment, see the discussion of Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2) (Section I.C)) and the discussion of § 106.44(a) above.

Despite some commenters urging the Department to do so, it is unnecessary to modify § 106.44(f)(1)(v) to restrict Title IX Coordinator-initiated complaints in response to third-party reports to circumstances in which there is compelling evidence that the discrimination occurred, was severe, endangers other students, and can be addressed neutrally. The requirements of § 106.44(f)(1)(v)(A), which apply to all situations in which a complaint is not made or was withdrawn in whole or in part, including situations in which conduct was reported by an individual other than the complainant, are sufficient to guide a Title IX Coordinator's determination whether to initiate complaints based on third-party reports without this modification.

The Department also acknowledges the hypothetical examples commenters provided seeking clarification on Title IX Coordinator-initiated complaints. Whether a complaint would need to be initiated in specific circumstances is a fact-specific analysis that would need to be made on a case-by-case basis. The Department recognizes that a Title IX Coordinator must assess such scenarios under the requirements of § 106.44(f)(1)(v) and initiate a complaint only in the limited circumstances permitted under the final regulations.

The Department understands commenters' views that recipients may wish to explain to the members of their educational community the need to balance individual complainant needs and wishes against the overarching duty to address sex discrimination in a recipient's education program or activity when deciding whether to initiate a complaint. These regulations require such balancing and do not prohibit such communication.

Changes: The Department has revised § 106.44(f)(1)(v) in the final regulations to clarify that in the absence of a complaint or the withdrawal of any or all of the allegations in a complaint, and in the absence or termination of an informal resolution process, a recipient must require its Title IX Coordinator not to proceed with a complaint investigation unless, after considering at a minimum the factors described in paragraph (f)(1)(v)(A), the Title IX Coordinator determines that the conduct as alleged presents an imminent and serious threat to the health or safety of a complainant or other person, or that the conduct as alleged prevents the recipient from ensuring equal access on the basis of sex to its education program or activity as required under paragraph (f)(1)(v)(B). The final regulations require a Title IX Coordinator to consider at a minimum the following factors: the complainant's request not to proceed with initiation of a complaint (paragraph (f)(1)(v)(A)(*1*)); the complainant's reasonable safety concerns regarding initiation of a complaint (paragraph (f)(1)(v)(A)(*2*)); the risk that additional acts of sex discrimination would occur if a complaint is not initiated (paragraph (f)(1)(v)(A)(*3*)); the severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence (paragraph (f)(1)(v)(A)(*4*)); the age and relationship of the parties, including whether the respondent is an employee of the recipient (paragraph (f)(1)(v)(A)(*5*)); the scope of the alleged conduct, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals (paragraph (f)(1)(v)(A)(*6*)); the availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred (paragraph (f)(1)(v)(A)(*7*)); and whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating grievance procedures (paragraph (f)(1)(v)(A)(*8*)). In addition, paragraph (f)(1)(vi) of the final regulations requires, if a Title IX Coordinator initiates a complaint under paragraph (f)(1)(v), that the Title IX Coordinator notify the complainant prior to doing so and appropriately address reasonable concerns about the complainant's safety or the safety of others.

Prompt and Effective Steps To Ensure Sex Discrimination Does Not Continue or Recur (Proposed § 106.44(f)(6))

Comments: Commenters shared a range of views on proposed § 106.44(f)(6). Some supported the proposed provision because it would require a Title IX Coordinator, upon being notified of possible sex discrimination, to take ''other appropriate prompt and effective steps'' to end sex discrimination, in addition to the steps listed in proposed § 106.44(f)(1)–(5).

Other commenters stated the requirements of proposed § 106.44(f)(6) were not well defined and a recipient would not know whether its Title IX Coordinator had complied with them.

Some commenters objected to proposed § 106.44(f)(6) because they believed it would require a Title IX Coordinator to act on any notice of possible sex discrimination, including when the conduct reported does not adequately or plausibly allege sex discrimination. One commenter asserted this requirement would be burdensome and divert a recipient's resources away from where they are most needed, such as responding to complaints of sex discrimination. Another commenter said that requiring a Title IX Coordinator to take action prior to an assessment about whether alleged conduct is persistent or severe would be contrary to other statements in the July 2022 NPRM indicating that a recipient is not required to address alleged sex-based harassment that does not meet the proposed definition of ''sex-based harassment.''

Commenters also objected to proposed § 106.44(f)(6) because they believed it would authorize a Title IX Coordinator to conduct an independent investigation and punish a respondent (whether by imposing disciplinary sanctions or providing supportive measures) without affording due process or following a recipient's established grievance procedures, which some characterized as contrary to basic fairness and in conflict with other provisions of the Department's proposed regulations. One commenter noted that the July 2022 NPRM stated that the

steps a Title IX Coordinator might take under proposed § 106.44(f)(6) could cause the Title IX Coordinator to reconsider whether to initiate a complaint if they believe disciplinary sanctions may be needed to effectively end sex discrimination, and asked how a Title IX Coordinator would know that disciplinary sanctions are needed if a respondent is presumed not responsible until the conclusion of a recipient's grievance procedures.

Some commenters asked the Department to clarify that proposed § 106.44(f)(6) applies only after a Title IX Coordinator assesses the information they received and determines a response is warranted because the allegation describes conduct that would constitute sex discrimination. One commenter, a postsecondary institution, asked the Department to provide recipients flexibility to determine how to proceed in cases when a complainant does not initiate grievance procedures and the Title IX Coordinator determines the reported conduct does not require the initiation of a complaint, including the flexibility to decide no further action is necessary. Another commenter asserted that the requirements of proposed § 106.44(f) effectively set a ''doing nothing is always wrong'' standard by requiring prompt and effective action even if grievance procedures are not initiated by a complainant or the Title IX Coordinator.

Other commenters opposed the requirement in proposed § 106.44(f)(6) that a Title IX Coordinator take prompt and effective action to remedy sex discrimination even if a complaint is not filed. The commenters asserted that this requirement, together with several of the July 2022 NPRM's other proposed provisions such as the removal of the ''actual knowledge'' standard and the requirement that non-confidential employees report conduct that may constitute sex discrimination to the Title IX Coordinator, would mean that a recipient would not comply with the Department's Title IX regulations if its employees failed to take any of the steps the commenters asserted would be required under the proposed regulations, including the required action by its Title IX Coordinator.

Discussion: The Department recognizes commenters' concerns that proposed § 106.44(f)(6) might have obligated a Title IX Coordinator to take prompt and effective steps to end sex discrimination when on notice of any conduct that alleged sex discrimination, regardless of whether the allegations were plausible or credible. As explained in the discussion of ''conduct that reasonably may constitute sex discrimination'' above, to address this and similar concerns raised by commenters, § 106.44(f)(1) of these final regulations will require a Title IX Coordinator to take the actions set out under paragraphs (f)(1) when notified of conduct that reasonably may constitute sex discrimination, and those actions will not be required if the Title IX Coordinator reasonably determines, pursuant to paragraph (f)(2), that the conduct as alleged could not constitute sex discrimination under Title IX or this part. These changes resolve commenters' concerns, including that proposed § 106.44(f)(6) would have required a Title IX Coordinator to prevent the recurrence of conduct that did not plausibly allege sex discrimination or to address under its Title IX authority alleged sex-based harassment that does not meet the definition of such conduct under § 106.2. These changes also afford recipients the flexibility requested by commenters because the changes recognize a Title IX Coordinator's unique position and expertise and authorize them to rely on the Title IX Coordinator's specialized knowledge to assess alleged sex discrimination. These commenters expressed a preference for greater flexibility over how to respond to information about conduct that may constitute sex discrimination outside of their grievance procedures, and the parameters set out under § 106.44(f)(1) afford sufficient flexibility and discretion while ensuring satisfaction of Title IX's nondiscrimination mandate. The Department expects that trained Title IX Coordinators will receive information about a range of conduct that individuals believe may reasonably constitute sex discrimination. The Department anticipates recipients will adequately train their Title IX Coordinators to distinguish allegations that reasonably may constitute sex discrimination from allegations that, even if true, could not constitute sex discrimination, because, for example, they do not involve different treatment on the basis of sex or sex-based harassment.

The Department disagrees with commenters' characterization that proposed § 106.44(f)(6) included unclear requirements and that a recipient could not know if its Title IX Coordinator's actions complied with the requirements. Section 106.44(f)(1)(vii) of these final regulations requires a Title IX Coordinator to take ''other appropriate prompt and effective steps,'' outside of any remedies provided to an individual complainant, to ensure an end to sex discrimination in a recipient's education program or activity that was not addressed through a recipient's grievance procedures and to prevent its recurrence. The Department added the phrase ''Regardless of whether a complaint is initiated'' to final § 106.44(f)(1)(vii) to clarify that a Title IX Coordinator is required to take action under this provision even in those circumstances when the Title IX Coordinator is notified of conduct that reasonably may constitute sex discrimination under Title IX or these final regulations and determines not to initiate a complaint under § 106.44(f)(1)(v). When the Title IX Coordinator is notified of conduct that reasonably may constitute sex discrimination and does not initiate a complaint, the Title IX Coordinator must take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.

A prompt and effective response to sex discrimination, as explained in the discussion of ''action that is 'prompt and effective' and necessary to 'remedy the effects' of sex discrimination'' above, is a standard that is well known to recipients from the 1975 regulations and the Department's longstanding enforcement of Title IX before the 2020 amendments. The requirement to afford a prompt and effective response to sex discrimination is also consistent with how some courts have assessed a recipient's obligation to respond to sexual harassment under the deliberate indifference standard for private suits seeking monetary damages. *See, e.g., Cianciotto,* 600 F. Supp. 3d at 458 (explaining that the deliberate indifference standard of liability can be shown through a delayed and inadequate response to harassment) (citing *Zeno* v. *Pine Plains Cent. Sch. Dist.,* 702 F.3d 655, 667 n.12, 669–71 (2d Cir. 2012) (applying *Davis* to Title VI racial harassment claim and concluding deliberate indifference can be shown by a recipient's ''lengthy and unjustifiable delay'' or ''inadequate or ineffective'' response to the harassment)). Finally, a prompt and effective response to sex discrimination is consistent with other Federal civil rights statutes such as Section 504 that are enforced by the Department and require a similar prompt and effective response to discrimination. *See, e.g.,* 34 CFR 104.7(b).

The Department acknowledges that some commenters opposed proposed § 106.44(f)(6), which they characterized as requiring a Title IX Coordinator to undertake an investigation that they asserted would be contrary to principles

of basic fairness, would deny respondents due process, and could result in the provision of supportive measures or imposition of disciplinary sanctions contrary to § 106.44(g)(2) (explaining that supportive measures must not unreasonably burden either party) and § 106.45(h)(4) (limiting imposition of disciplinary sanctions until the conclusion of a recipient's grievance procedures under § 106.45, and if applicable § 106.46). The Department disagrees with these assertions, which misstate the function and structure of the Title IX Coordinator requirements under § 106.44(f) and the requirements of these final regulations. Contrary to commenters' views, final § 106.44(f)(1)(vii) does not conflict with other provisions of these final regulations, and a Title IX Coordinator's response to information about conduct that reasonably may constitute sex discrimination will not authorize a Title IX Coordinator to circumvent the grievance procedures requirements set out under § 106.45 or § 106.46. Nothing in § 106.44(f) will permit a Title IX Coordinator to provide supportive measures that unreasonably burden any party. Nor does anything in § 106.44(f) interfere with any party's right to challenge supportive measures applicable to them under final § 106.44(g)(4). In addition, imposition of disciplinary sanctions will be permitted only after a recipient complies with the requirements of § 106.45, and if applicable § 106.46, and nothing in § 106.44(f) indicates otherwise. Moreover, the action a Title IX Coordinator will be required to take under § 106.44(f)(1)(vii) would not involve discipline of a respondent; instead, it would involve other measures, such as educational programming or employee training, as long as such measures are not imposed for punitive or disciplinary reasons and are not unreasonably burdensome to a party. As the Department explained in the discussion of § 106.44(a), above, these actions are necessary to close the gap in a recipient's required response to sexual harassment under the 2020 amendments. Under those amendments, a recipient could have information about possible sex discrimination in its education program or activity yet have no obligation to address it beyond providing supportive measures and information about grievance procedures if (1) the complainant did not initiate a complaint, and if (2) the Title IX Coordinator did not exercise the Title IX Coordinator's very limited discretion to do so. *See* 85 FR 30131. These final regulations, in contrast, require a Title IX Coordinator under § 106.44(f)(1)(vii) to take certain actions to more fully address sex discrimination in such circumstances. The more limited obligation to respond to sexual harassment outside of a recipient's grievance procedures under the 2020 amendments failed to recognize the many other steps available to a recipient, such as educational programming or employee training, to address sex discrimination. Depending on the factual circumstances, these steps may be necessary to fulfill a recipient's Title IX obligation to provide participants an education program or activity free from sex discrimination.

The Department strongly disagrees that a Title IX Coordinator's compliance with § 106.44(f)(1)(vii) will lead to outcomes that do not comport with the Department's commitment to procedures that are fair to all. In situations in which a recipient has not initiated its grievance procedures, the prompt and effective steps that a Title IX Coordinator may take under § 106.44(f)(1)(vii) are limited to non-disciplinary action, including for example providing additional training for employees, educational programming aimed at the prevention of sex discrimination, or remedies such as permitting a complainant to retake a class. *See* 87 FR 41446–47. The Department emphasizes that, if a Title IX Coordinator determines that the recipient would be required to impose disciplinary sanctions on a respondent, then the grievance procedures under § 106.45, and if applicable § 106.46, must be initiated and sanctions may only be imposed if there is a determination that the respondent violated the recipient's policy prohibiting sex discrimination. *See* 87 FR 41447.

The Department also disagrees with commenters' suggestion that a Title IX Coordinator's compliance with § 106.44(f) could subject respondents to sex discrimination, which commenters did not support with additional details, and notes that § 106.31(a)(1) prohibits a recipient from discriminating against any party based on sex. Anyone who believes that a recipient's treatment of a complainant or respondent constitutes sex discrimination may file a complaint with OCR, which OCR would evaluate and, if appropriate, investigate and resolve consistent with these regulations' requirement that a recipient not discriminate against parties based on sex.

The Department agrees with the commenter who stated that in some cases no response would be required under proposed § 106.44(f)(6). The same will be true under final § 106.44(f)(1)(vii). The Department reaffirms the position stated in the July 2022 NPRM that it will not always be necessary for a Title IX Coordinator to take additional steps to ensure that sex discrimination does not continue or recur in its education program or activity. 87 FR 41446. For example, no additional steps would be necessary when the sex discrimination involved only the parties and did not impact others participating or attempting to participate in the recipient's education program or activity, and the sex discrimination was addressed fully through a recipient's grievance procedures or informal resolution process. *Id.* Similarly, a Title IX Coordinator might determine that no additional steps are necessary to ensure that sex discrimination does not continue or recur within the recipient's education program or activity if the complainant has pursued remedies under a collective bargaining agreement. The Department therefore disagrees with the commenter who described § 106.44(f) as imposing a ''doing nothing is always wrong'' standard. Although a recipient would not be in compliance if its Title IX Coordinator failed to take any of the required steps under § 106.44(f)(1) of these final regulations, if a Title IX Coordinator assessed the information it received about possible sex discrimination in the ways required by these final regulations and reasonably determined no further action was warranted, a recipient would be in compliance.

While some commenters correctly asserted that a recipient would not comply with the Department's Title IX regulations if its Title IX Coordinator or other employees fail to take actions required under § 106.44(f)(1), including the requirement to take prompt and effective action under final § 106.44(f)(1)(vii) and other provisions of these regulations, the Department disagrees with commenters' characterization of this as a problem. Expanded reporting requirements and a greater role for the Title IX Coordinator, as compared to the 2020 amendments, are necessary in the Department's view to more effectively ensure that recipients' education programs and activities are in fact free from discrimination on the basis of sex. The Department therefore fully expects recipients to comply with these Title IX regulations, which give recipients sufficient flexibility to ensure that their Title IX Coordinators and employees are equipped to do so, including by permitting their Title IX Coordinators to

delegate duties and by imposing additional training requirements.

Finally, the Department notes that the wording of final § 106.44(f)(1)(vii), which requires a Title IX Coordinator to ''take other appropriate prompt and effective steps, in addition to steps necessary to effectuate the remedies provided to an individual complainant, if any, to ensure that sex discrimination does not continue or recur within the recipient's education program or activity,'' differs slightly from proposed § 106.44(f)(6), which would have required a Title IX Coordinator to ''take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within a recipient's education program or activity, in addition to remedies provided to an individual complainant.'' This non-substantive change in the structure of this provision clarifies that whatever actions a recipient's Title IX Coordinator might take under this provision would be distinct from any relief that a recipient may have provided to a complainant in connection with a resolved complaint of sex discrimination.

Changes: The Department has redesignated proposed § 106.44(f)(6) as final § 106.44(f)(1)(vii), and modified the provision to state that ''[r]egardless of whether a complaint is initiated,'' a recipient must require its Title IX Coordinator to take other appropriate prompt and effective steps, ''in addition to steps necessary to effectuate the remedies provided to an individual complainant,'' to ensure that sex discrimination does not continue or recur within the recipient's education program or activity. As discussed above, the Department has also revised § 106.44(f)(1) of the final regulations to require a recipient to require its Title IX Coordinator, when notified of conduct that reasonably may constitute sex discrimination under Title IX or this part, to take the specific actions described in paragraph (f)(1) to promptly and effectively end any sex discrimination in its education program or activity, prevent its recurrence, and remedy its effects.

Proposed § 106.44(f)(1)–(4)

Comments: One commenter suggested that proposed § 106.44(f)(1), regarding equitable treatment of the complainant and respondent, would promote grievance procedures that are more transparent, fair, and likely to address any harm the parties may experience during the pendency of the grievance procedures because it would require a Title IX Coordinator to communicate with the parties equitably. Other commenters asked whether proposed § 106.44(f)(1) would require a Title IX Coordinator to treat employee and student respondents similarly. One commenter asserted that although proposed § 106.44(f)(1) would require a Title IX Coordinator to treat a complainant and respondent equitably, other provisions in the Department's proposed regulations appear to favor complainants in grievance procedures. Some commenters recommended the Department eliminate proposed § 106.44(f)(1) because it is redundant of proposed § 106.45(b)(1).

Commenters also offered their views, suggested changes, and requested clarifications regarding proposed § 106.44(f)(2), which addresses a Title IX Coordinator's communications with a complainant or respondent upon learning of conduct that may constitute sex discrimination under Title IX. For example, some commenters asserted it would be inequitable for a Title IX Coordinator to notify a complainant when they receive information about conduct that may constitute sex discrimination but delay notifying a respondent until a complaint is made. Other commenters asked whether a Title IX Coordinator may delay notifying a respondent of a Title IX complaint if there is a concurrent criminal investigation that could be negatively impacted. Some commenters asked the Department to clarify whether proposed § 106.44(f)(2) would require a Title IX Coordinator to notify the parent, legal guardian, or other authorized legal representative of a minor. One commenter asked the Department to modify proposed § 106.44(f)(2)(i) to require a Title IX Coordinator to provide written notice of the recipient's grievance procedures as well as notice of any option for informal resolution before a complaint investigation is begun. According to the commenter, including this information on a recipient's website is inadequate because links often break or change.

Commenters expressed support for the Title IX Coordinator's duty to offer and coordinate supportive measures under proposed § 106.44(f)(3) because it would promote early intervention, encourage more support for individuals harmed by sex discrimination, and provide resources to change the behavior of individuals accused of sex discrimination; ensure that students who report sex discrimination are informed of available supportive measures; ensure equitable support for complainants and respondents; and address what some commenters characterized as the inadequacy of the 2020 amendments' response to information about conduct that may constitute sex discrimination.

Other commenters expressed a preference for the approach in § 106.44(a) of the 2020 amendments, which requires a Title IX Coordinator to provide information about supportive measures to a complainant upon learning of possible sex discrimination. One commenter objected to requiring the Title IX Coordinator to offer supportive measures to a respondent because doing so presumes that a respondent is entitled to such measures. One commenter suggested the Department retain the current regulations' requirement that a recipient investigate each complaint it receives because, in the commenter's view, the approach adopted in the 2020 amendments is a more protective framework than proposed § 106.44(f)(4). Some commenters expressed concern that proposed § 106.44(f)(3) would allow a Title IX Coordinator to offer a complainant supportive measures that would be burdensome to a respondent prior to a finding of responsibility and objected to treating a complainant and respondent differently with respect to the timing of offering supportive measures. Commenters also asked the Department to modify proposed § 106.44(f)(3) to state a recipient is required to offer supportive measures to the complainant and/or the respondent.

One commenter asserted that proposed § 106.44(f)(4), which would require a Title IX Coordinator to initiate a recipient's grievance procedures or informal resolution process in response to a complaint, is unnecessary because proposed §§ 106.45 and 106.46 contain applicable requirements.

Discussion: The Department acknowledges commenters' support for proposed § 106.44(f)(1), which is included as § 106.44(f)(1)(i) of the final regulations, and affirms that equitable treatment of a complainant and a respondent will encompass communications with both parties, as warranted, to provide important information about a recipient's Title IX policies and obligations as well as available resources and supports. The Department disagrees that § 106.44(f)(1)(i) is redundant of the similar requirement in § 106.45(b)(1), which is limited to the basic requirements for a recipient's grievance procedures; § 106.44(f)(1)(i), in contrast, applies to a Title IX Coordinator's obligations in response to information about conduct that reasonably may constitute sex discrimination, including in situations that arise outside of or precede a recipient's grievance procedures.

Section 106.44(f)(1)(i) of the final regulations will not require a recipient to treat employee and student respondents similarly or favor complainants in a recipient's grievance procedures, as some commenters suggested. The requirement of equitable treatment in § 106.44(f)(1)(i) applies to the complainant and respondent and does not address more generally the relationship of parties to the recipient—for example as an employee, student-employee, or student. And the Department strongly disagrees with commenters' assertion that the requirements under §§ 106.45 and 106.46 favor complainants. For more explanation of the fair procedures afforded to all parties under each of the applicable provisions, see the discussion of the Framework for Grievance Procedures for Complaints of Sex Discrimination (Section II.C).

Further, delaying when a Title IX Coordinator notifies a respondent of a recipient's grievance procedures until a complaint is initiated would not be inequitable to a respondent as some commenters asserted. A recipient must provide broad notice of its grievance procedures under § 106.8(b)(2), and the Department continues to believe that providing information about a recipient's grievance procedures to a respondent at the time a Title IX Coordinator oversees initiation of the grievance procedures under § 106.44(f)(1)(iii)(B) is adequate to apprise a respondent of the grievance procedures and the rights they afford. *See* 87 FR 41444. Additional discussion of equitable treatment of the parties to a recipient's grievance procedures, including student and employee respondents, is provided in the preamble discussion of § 106.45(b)(1) of the final regulations.

In response to commenters who asked whether a recipient may delay notifying a respondent of a Title IX complaint in circumstances when a concurrent criminal investigation is underway, the Department clarifies that such delays are not required under §§ 106.45(b)(4) and 106.46(e)(5), which allow a reasonable extension of timeframes on a case-by-case basis for good cause, but that the possibility of a concurrent law enforcement investigation in certain circumstances could justify such a delay, depending on the circumstances. Further, nothing in final § 106.44(f)(1)(iii) or (iv), which require a Title IX Coordinator to notify the parties of a recipient's grievance procedures and informal resolution process if available and appropriate, and to initiate those procedures or informal resolution process if requested by all parties, will preclude a recipient from requiring its Title IX Coordinator to provide a respondent with that information in writing, if the complainant pursues an informal resolution process or the Title IX Coordinator initiates a complaint, as requested by one commenter. However, the Department declines to require all recipients to require such written communication. The Department appreciates the opportunity to clarify that if a recipient only provides the required information through links to web pages that do not work, it does not satisfy its obligation under final § 106.44(f)(1)(iii)(B) to notify a respondent, if a complaint is made, of the recipient's grievance procedures or an informal resolution process if available and appropriate.

In response to commenters' questions about a Title IX Coordinator's duty to notify the parents of minors of a recipient's grievance procedures under § 106.45, and if applicable § 106.46, upon receiving information about possible sex discrimination, the Department appreciates the opportunity to reiterate that nothing in final § 106.44(f)(1)(iii), which addresses notification of a recipient's grievance procedures, or any other provision of these final regulations, derogates any legal right of a parent, guardian, or other authorized legal representative (*e.g.,* a court-appointed educational representative or a court-appointed decisionmaker) to act on behalf of a complainant, respondent, or other person. *See* § 106.6(g). To the extent commenters are asking the Department to clarify in the final regulations that a recipient's Title IX Coordinator must notify the parents of a minor when the Title IX Coordinator receives information about possible sex discrimination, the Department notes that such a duty would arise under State or local law or school policy and is not required under these final regulations.

In addition, the Department has further clarified the notification requirements in final § 106.44(f)(1)(iii)(A), which will require the Title IX Coordinator to notify the complainant or, if the complainant is unknown, the individual who reported the conduct, about the recipient's grievance procedures and the availability of an informal resolution process if available and appropriate. The Department indicated in the July 2022 NPRM that, under the proposed regulations, when a Title IX Coordinator does not know the identity of the complainant, the Title IX Coordinator would be permitted to provide information about the recipient's grievance procedures to the individual, if any, who reported the conduct. 87 FR 41444. In its enforcement experience, the Department frequently observed that a complainant is unknown or unidentified at the time information is reported to a Title IX Coordinator, such as when a witness to sexual assault reported the incident but does not know the name of the person who was assaulted. To ensure information is conveyed to an individual who may be in a better position to identify the complainant and provide them the required information, the Department determined that it is necessary to include this information in these final regulations.

With respect to offers and coordination of supportive measures, the Department agrees with commenters who supported proposed § 106.44(f)(3) because it would strengthen a recipient's response to notice of possible sex discrimination, as compared to § 106.44(a) in the 2020 amendments, by requiring a Title IX Coordinator to do more than offer supportive measures to a complainant. The Department maintains that basic commitment in these final regulations and has modified proposed § 106.44(f)(3) to clarify recipient and Title IX Coordinator obligations. Thus, final § 106.44(f)(1)(ii) clarifies that a recipient must require its Title IX Coordinator to offer and coordinate supportive measures, as appropriate, for the complainant upon notice of information that reasonably may constitute sex discrimination; and do so for a respondent upon the recipient's initiation of grievance procedures or offer to a respondent of an informal resolution process. The Department shares commenters' assessment that such a requirement will promote an early response to possible sex discrimination, afford necessary support to the individuals impacted by possible sex discrimination, and afford resources that seek to prevent future incidents of possible sex discrimination for complainants and respondents.

The Department strongly disagrees with some commenters' suggestion that proposed § 106.44(f)(3) would presume that a respondent requires supportive measures that they may not be entitled to receive. With respect to supportive measures, the preamble discussion of § 106.44(g) provides the Department's rationale for requiring a recipient, through its Title IX Coordinator, to offer and coordinate supportive measures to a respondent under final § 106.44(f)(1)(ii). However, to provide greater clarity on what the Department meant by ''as appropriate'' with respect to offering and coordinating supportive

measures for a respondent, the Department changed that requirement in final § 106.44(f)(1)(ii) to align the offer and coordination of supportive measures to a respondent with the time when the Title IX Coordinator initiates the recipient's grievance procedures or offers an informal resolution process to the respondent. The final regulations delay the offer of supportive measures to a respondent until a recipient has initiated grievance procedures or notified the respondent of the availability of an informal resolution process to avoid prematurely notifying the respondent before the complainant has decided whether to make a complaint. The Department also clarified final § 106.44(f)(1)(iv), referencing final § 106.44(k), to state that informal resolution would only be initiated if available, appropriate, and requested by all parties. In addition, the Department streamlined the language regarding supportive measures in final § 106.44(f)(1)(ii) because the definition of supportive measures itself indicates that they are for the purpose of restoring a party's access to the recipient's education program or activity. Further, the discussion of § 106.44(g)(2) below addresses commenters' concerns about a Title IX Coordinator's offer and coordination of supportive measures to a party and ensures that no supportive measures are provided that would unreasonably burden either party.

With respect to initiation of grievance procedures or informal resolution processes, the Department has incorporated proposed § 106.44(f)(4) into final § 106.44(f)(1)(iv), with the modification regarding informal resolution noted above. The Department disagrees with one commenter's assertion that proposed § 106.44(f)(4) would have afforded a less protective framework than § 106.44(a) in the 2020 amendments, which the commenter stated would better prevent a recipient from avoiding its Title IX obligations. For the reasons explained in the discussion of § 106.44(a) and throughout this discussion of § 106.44(f), the Department agrees with other commenters who viewed the provisions of proposed § 106.44(f) as affording a stronger, more comprehensive response to possible sex discrimination than what is afforded under § 106.44(a) in the 2020 amendments and its adapted deliberate indifference standard. The Department also declines to remove proposed § 106.44(f)(4) from these final regulations because it disagrees that this provision is duplicative of the applicable complaint initiation requirements under the grievance procedures requirements set out under §§ 106.45 and 106.46. The grievance procedures requirements apply only after a complaint is initiated. To determine when to initiate a complaint, however, the Title IX Coordinator must first take the actions set out under § 106.44(f)(1)(i)–(iii) of these final regulations. If, after taking those actions, the Title IX Coordinator learns that a complainant wishes to initiate a complaint, then § 106.44(f)(1)(iv) directs the Title IX Coordinator to initiate grievance procedures in accordance with § 106.45, and if applicable § 106.46. Further, in the event of a Title IX Coordinator-initiated complaint under § 106.44(f)(1)(v), a Title IX Coordinator would also be required to provide a respondent information about the recipient's grievance procedures and informal resolution process, if available and appropriate, under § 106.44(f)(1)(iii)(B).

In response to requests for supplemental guidance and technical assistance on the scope of the Title IX Coordinator role and any of the role's specific requirements, the Department agrees that supporting recipients and Title IX Coordinators in implementing these regulations is important. The Department will offer technical assistance, as appropriate, to promote compliance with these final regulations.

Changes: The Department has reorganized several of the provisions in proposed § 106.44(f)(1)–(6) into paragraphs (f)(1)(i)–(vii) of the final regulations. Paragraph (f)(1)(ii) will require a Title IX Coordinator to offer and coordinate supportive measures under § 106.44(g), if appropriate, for a complainant upon being notified of conduct that reasonably may constitute sex discrimination and to offer and coordinate supportive measures for a respondent if the recipient has initiated grievance procedures under § 106.45, and if applicable § 106.46, or has offered the respondent an informal resolution process under § 106.44(k). Under paragraph (f)(1)(iii)(A), when a complainant is unknown, the Title IX Coordinator will be required to notify the individual who reported conduct that reasonably may constitute sex discrimination of the grievance procedures under § 106.45, and if applicable § 106.46, and the informal resolution process under § 106.44(k), if available and appropriate. And a Title IX Coordinator will be required under paragraph (f)(1)(iii)(B) to notify a respondent of grievance procedures under § 106.45, and if applicable § 106.46, and the informal resolution process under § 106.44(k), if available and appropriate, if a complaint is made. Paragraph (f)(1)(iv) will require a Title IX Coordinator to initiate a recipient's informal resolution process under § 106.44(k) if available and appropriate and requested by all parties.

7. Sections 106.44(g) and 106.2 Supportive Measures and Definition of ''Supportive Measures''

Definition of Supportive Measures (§ 106.2)

Comments: One commenter supported the proposed definition of ''supportive measures'' because it would allow a recipient to provide non-disciplinary, non-punitive measures to potential complainants who may not want to initiate Title IX grievance procedures and would allow these complainants continued access to education without unreasonably burdening the respondent.

One commenter opposed the proposed definition of ''supportive measures'' and urged the Department to keep the definition in the 2020 amendments, on the ground that it correctly balances the need to support a complainant with the need to ensure that a respondent is not punished until found responsible. Some commenters opposed the language in the definition of ''supportive measures'' because they argued that the standard is different from the standard articulated for burdensome supportive measures in proposed § 106.44(g)(2). One commenter requested the Department use the term ''equitable interim measures'' rather than ''supportive measures.'' One commenter requested the Department revise the definition to state that supportive measures are offered, as appropriate, ''before or after the filing of a formal complaint or where no formal complaint has been filed.'' One commenter asked the Department to clarify who a ''party'' is in the definition of supportive measures in § 106.2.

Discussion: The Department acknowledges commenters' support for the definition of ''supportive measures.'' The Department declines to retain the definition of ''supportive measures'' in the 2020 amendments for the reasons discussed in the July 2022 NPRM and herein. The final definition maintains the intent of the definition in the 2020 amendments with revisions to increase clarity and to better align with § 106.44(g) and the other final regulations. *See* 87 FR 41421. The definition of ''supportive measures'' in the final regulations balances the need to support a complainant with the need to ensure that a respondent is not disciplined unless and until found responsible. While the definition of

''supportive measures'' permits supportive measures that do not unreasonably burden a complainant or respondent, a recipient is not required to provide such measures and many supportive measures will not burden a party at all. All supportive measures are subject to the limits set forth in § 106.44(g)(2), may be challenged under § 106.44(g)(4), and may not be imposed for punitive or disciplinary reasons. Additionally, after careful consideration of the comments, the Department has deleted the language ''deter the respondent from engaging in sex-based harassment'' from the definition of ''supportive measures'' to avoid any suggestion that a recipient should make a preliminary determination as to whether a respondent has engaged in sex-based harassment when considering what supportive measures to offer to a complainant.

As discussed in more detail below, the Department has revised the definition of supportive measures to remove ''temporary measures that burden a respondent that are designed to protect the safety of the complainant'' and made conforming edits to § 106.44(g)(2). The Department has replaced this language with a reference to ''measures that are designed to protect the safety of the parties.'' These changes were made to avoid any implication of bias against respondents in the provision of supportive measures. The Department notes that, consistent with the definition of ''supportive measures'' in the 2020 amendments, this change does not mean that a supportive measure provided to one party cannot impose any burden on the other party; rather, the definition of ''supportive measures'' specifies that supportive measures cannot impose an unreasonable burden on the other party. 85 FR 30181. The definition of ''supportive measures'' and § 106.44(g)(2) continue to permit a recipient to provide a wide range of supportive measures intended to meet any of the purposes stated in the definition, including to restore or preserve equal access to education, protect safety, or provide support during a recipient's grievance procedures or informal resolution process, as long as such measures are not unreasonably burdensome and are not imposed for punitive or disciplinary reasons.

By removing the word ''temporary'' from the definition, the Department acknowledges that some supportive measures may not be temporary, such as a voluntary housing relocation. A recipient is in the best position to determine the appropriate length of time for any given supportive measure. Sections 106.44(g)(3) and (4) permit a recipient to modify or terminate supportive measures as appropriate and provide parties with the ability to seek modification or termination of supportive measures when a party believes a supportive measure does not meet the definition of ''supportive measures'' in § 106.2 or when circumstances have changed materially, such as where there has been a finding of non-responsibility following a grievance procedure under § 106.45, or if applicable § 106.46.

The Department also acknowledges commenters' confusion about perceived differences in the requirements articulated in the definition of ''supportive measures'' in proposed § 106.2 and the standard set forth in proposed § 106.44(g)(2). Although the Department intended the definition of ''supportive measures'' and proposed § 106.44(g)(2) to establish the same requirements for supportive measures, the Department understands how the different terminology could cause confusion. The Department has revised the definition of ''supportive measures'' in final § 106.2 to align with the language in § 106.44(g)(2), stating that such measures must not be imposed ''for punitive or disciplinary reasons.'' This change is intended to clarify that, for example, while a recipient may utilize actions such as no-contact orders as supportive measures even if they may also be imposed as or accompany a disciplinary sanction under the recipient's disciplinary code at the conclusion of the grievance procedures, such supportive measures cannot be imposed for punitive or disciplinary reasons.

In addition, the Department has modified proposed § 106.44(g)(2) to include language in the final provision that states that supportive measures must not unreasonably burden a complainant or a respondent and must be designed to protect the safety of the parties or the recipient's educational environment.

The Department declines to replace the term ''supportive measures'' with ''equitable interim measures.'' The term ''supportive measures'' accurately reflects the types of measures available to both respondents and complainants, which may be provided even if a complainant chooses not to move forward with a complaint or after a complaint is dismissed and which are not limited to the pendency of a grievance procedure. *See* § 106.44(f)(1)(ii), (g)(3). The Department also declines to add information to the definition of ''supportive measures'' about when supportive measures are available as this procedural information is already contained in § 106.44(f)(1)(ii) and (g)(2)–(3).

In consideration of commenter concerns about who is a ''party'' under the definition of ''supportive measures,'' the Department notes that it has added a definition to § 106.2 to clarify that ''party'' means a complainant or respondent. Additionally, for clarity in this specific context, the Department has modified the definition of ''supportive measures'' to state that supportive measures mean individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a ''complainant or respondent.''

Changes: The Department has replaced the phrase ''a party'' in the introductory paragraph of the definition of ''supportive measures'' with ''a complainant or respondent.'' Consistent with the changes made to § 106.44(g)(2), as discussed below, the Department has deleted ''non-disciplinary, non-punitive'' from the introductory paragraph of the definition of ''supportive measures,'' replaced it with ''not for punitive or disciplinary reasons,'' and moved the reference after the phrase ''without unreasonably burdening a complainant or respondent.'' The Department has also removed the reference to non-punitive and non-disciplinary reasons from paragraph (1) of the definition, deleted ''temporary measures that burden a respondent that are designed to protect the safety of the complainant'' and replaced it with ''measures that are designed to protect the safety of the parties,'' and deleted the language ''or deter the respondent from engaging in sex-based harassment'' from the definition of ''supportive measures'' in § 106.2.

Responsibility To Offer and Coordinate Supportive Measures (§ 106.44(g) and 106.44(g)(6))

Comments: Many commenters expressed support for proposed § 106.44(g) because it would allow complainants to continue accessing their education during the pendency of the grievance procedures, protect complainants by not forcing them to sacrifice their educational experience, help protect against peer retaliation, and address the history of complainants not receiving the support they need. Some commenters supported proposed § 106.44(g) because it would expand the requirement to offer supportive measures to individuals who experience any form of sex discrimination, while other commenters valued offering supportive measures to individuals who

report sex-based harassment even if they do not pursue resolution through the recipient's Title IX grievance procedures or informal resolution, or if their complaint is dismissed. Other commenters appreciated the flexibility in proposed § 106.44(g) with respect to offering supportive measures. Several commenters supported proposed § 106.44(g) because it would create a more streamlined process with uniform standards that would help to ensure the timely resolution of complaints.

Other commenters interpreted proposed § 106.44(g) and (g)(6) as limiting the ability to offer and coordinate supportive measures to a Title IX Coordinator, which commenters asserted would be burdensome for a Title IX Coordinator and would restrict a recipient's flexibility to involve other employees and administrators in the offering and coordination of supportive measures. One commenter stated that K–12 school districts typically rely on many employees to provide supportive measures, including counselors, assistant principals, and support staff with mental health training, and requested that a recipient have the flexibility to designate multiple staff to offer and coordinate such measures. Another commenter recommended that proposed § 106.44(g)(6) be modified to require a Title IX Coordinator to oversee and coordinate, but not necessarily offer, supportive measures.

Other commenters stated that confidential employees, not Title IX Coordinators, should be responsible for offering and coordinating supportive measures. One commenter expressed concern about a potential chilling effect by locating confidential resources within the Title IX office or otherwise requiring students to seek supportive measures from the Title IX office. Another commenter raised concerns that records that would be kept by the Title IX Coordinator under the proposed regulations could, by risking disclosure, endanger students who seek supportive services. Commenters asserted that confidential employees or campus advocates are better equipped to provide supportive measures because, for example, students do not trust campus administrators and Title IX Coordinators are not trained to provide emotional support. One commenter noted that some State laws now direct that confidential employees have the authority to offer and coordinate supportive measures.

Several commenters raised concerns about the timing and scope of supportive measures offered under proposed § 106.44(g). For example, one commenter stated that supportive measures should be provided to all complainants and respondents regardless of whether grievance procedures are initiated and should be continued after grievance procedures are complete if necessary to restore or preserve a party's access to the recipient's education program or activity. Another commenter asked the Department to allow supportive measures for any community member engaged in grievance procedures, but did not explain further what they meant, and suggested that a recipient be allowed to consider not only the safety of the complainant but the safety of the broader community. One commenter recommended that a recipient be required to offer supportive measures only for sex-based harassment and not sex discrimination more broadly. One commenter asked the Department to clarify how coordination and implementation of supportive measures should be handled when a student discloses sex-based harassment to a confidential employee and not a Title IX Coordinator.

Several commenters requested that the Department require a recipient to publish additional information about supportive measures, to make information available in different formats and languages, and to require a recipient to work with its Principal Designated School Officials [37] to make sure that international students have access to supportive measures and understand how supportive measures may impact their immigration status.

Discussion: The Department agrees that § 106.44(g) will provide a recipient flexibility in offering supportive measures while also restoring and preserving access to a recipient's education program or activity.

The Department understands that some commenters interpreted proposed § 106.44(g) and (g)(6) to permit only a Title IX Coordinator to offer and coordinate supportive measures. The Department appreciates this opportunity to clarify that while a recipient must continue to require its Title IX Coordinator to offer and coordinate supportive measures under §§ 106.44(f)(1)(ii) and 106.8(a) of these final regulations permits a recipient to designate more than one employee to serve as a Title IX Coordinator and also provides a recipient or Title IX Coordinator with the flexibility and discretion to delegate specific duties of the Title IX Coordinator to one or more designees. Permission to delegate responsibilities to designees enables a recipient to assign duties to personnel who are best positioned to perform them, such as campus personnel with a close relationship with students; to avoid actual or perceived conflicts of interest; and to align with the recipient's administrative structure. Thus, although the final regulations require one Title IX Coordinator to retain ultimate oversight over a recipient's Title IX responsibilities, including oversight over the offering and coordination of supportive measures, nothing in the final regulations otherwise restricts how the duties of offering and coordinating supportive measures may be assigned to other personnel and the Department recognizes that some recipients may find it helpful to delegate certain duties related to the provision of supportive measures.

The Department acknowledges that some commenters would prefer for confidential employees to be responsible for supportive measures and recognizes the support that confidential employees often offer to complainants and respondents. While the Department agrees that confidential employees may play a role in the implementation of supportive measures, for example by providing counseling services, the Department declines to require confidential employees to be responsible for offering and coordinating supportive measures. The provision of supportive measures is part of a recipient's responsibilities under Title IX. As confidential employees must keep the information they receive confidential, they are not well situated to be responsible for offering and coordinating the provision of supportive measures through other offices or individuals on behalf of the recipient. Therefore, the final regulations require a recipient to ensure that its Title IX Coordinator is responsible for coordinating the recipient's compliance with its obligations under Title IX, including the obligation to offer and coordinate supportive measures under § 106.44(g). *See* §§ 106.8(a), 106.44(f)(1)(ii). With respect to State laws that may permit confidential employees to offer and coordinate supportive measures, the obligation to comply with Title IX and the final regulations is not obviated or alleviated by any State or local law or other requirement that conflicts and a recipient must comply with Title IX and the final regulations even if that means the recipient will not receive the full benefit of such State laws. *See* §§ 106.6(b), 106.44(d)(2).

The Department also reiterates that the recipient itself is responsible for compliance with obligations under Title IX, including any responsibilities

[37] *See* 8 CFR 214.3(l)(1).

specifically assigned to the recipient's Title IX Coordinator under these final regulations, and the Department will hold the recipient responsible for meeting all obligations under these final regulations. To further clarify the recipient's ultimate responsibility for Title IX compliance and address commenters misunderstandings, the Department has revised § 106.44(g) to state that a recipient must offer and coordinate supportive measures, as appropriate. Additionally, the Department is persuaded that changes should be made to clarify and simplify the language in § 106.44, particularly in proposed § 106.44(f) and (g). To do so, the Department has deleted proposed § 106.44(g)(6) as redundant of final § 106.44(f)(1)(ii) and instead included a reference directly to final § 106.44(f) in § 106.44(g).

The Department also appreciates the opportunity to clarify that supportive measures must be offered to complainants, as appropriate, regardless of whether grievance procedures are initiated. For example, supportive measures must be offered to a complainant, as appropriate, when a complainant elects to pursue an informal resolution process or not to initiate grievance procedures. *See* § 106.44(f)(1)(ii). As indicated in the July 2022 NPRM, supportive measures may also be offered to a respondent. *See, e.g.,* 87 FR 41421. But because a respondent will not always receive notice of a complaint if a complainant elects not to move forward with grievance procedures, the Title IX Coordinator must offer supportive measures to a respondent, as appropriate, only if grievance procedures have been initiated or an informal resolution process has been offered. *See* § 106.44(f)(1)(ii); 87 FR 41448. Additionally, as discussed below in relation to § 106.45(d)(4)(i), even if a recipient elects to dismiss a complaint of sex discrimination because, for example, the recipient is unable to identify the respondent after taking reasonable steps to do so, the recipient must, as appropriate, still offer supportive measures to the complainant, such as counseling.

The Department declines to limit supportive measures to sex-based harassment. As discussed in the July 2022 NPRM, a recipient has an obligation under Title IX to address all forms of sex discrimination, including ensuring that access to the recipient's education program or activity is not limited by such sex discrimination. *See, e.g.,* 87 FR 41405. Supportive measures are designed to restore or preserve a party's access to the recipient's education program or activity and the need for such support is not limited to sex-based harassment. 87 FR 41421. As such, supportive measures are available for all forms of sex discrimination, which is consistent with the proposed definition of ''supportive measures'' in § 106.2 and with § 106.44(a). 87 FR 41448. The Department also declines to require a recipient to offer supportive measures to every community member engaged in grievance procedures as this would be burdensome on a recipient. The Department notes that nothing in these final regulations prevents a recipient from offering supportive measures in circumstances not required by these regulations. In addition, to the extent a person other than the complainant who is participating or attempting to participate in a recipient's education program or activity when sex discrimination occurred also had their access to the education program or activity limited or denied as a result of that sex discrimination, that person may be able to receive remedies as appropriate under § 106.45(h)(3) if there is a determination that sex discrimination occurred.

In response to commenters' requests that a recipient be allowed to consider not only the safety of the parties but the safety of the broader community, the Department notes that the definition of ''supportive measures'' and § 106.44(g)(2) permits a recipient to consider supportive measures designed to protect the safety of the recipient's educational environment and § 106.44(h) allows a recipient to take into account the safety of the campus community when conducting a safety and risk analysis.

In response to commenter concerns about how to coordinate supportive measures when a student discloses sex-based harassment to a confidential employee, the Department clarifies that when a person informs a confidential employee of conduct that reasonably may constitute sex discrimination under Title IX, § 106.44(d)(2)(ii) and (iii) require that the confidential employee explain how to contact the recipient's Title IX Coordinator and that the Title IX Coordinator may be able to offer and coordinate supportive measures, as well as initiate an informal resolution process or an investigation under the grievance procedures.

Further, the Department declines to require recipients to publish additional information about supportive measures, provide information about supportive measures in a particular format, or require a recipient to work with Principal Designated School Officials in offering supportive measures. The Department has determined that § 106.44(g) strikes the appropriate balance between requiring a recipient to offer and coordinate supportive measures while providing a recipient with flexibility to choose how to meet this requirement in a way that best serves the needs of its community. Nothing within these final regulations prevents a recipient from choosing to publish additional information about supportive measures or from coordinating with other administrators or offices to ensure all members of a recipient's educational community have access to information concerning supportive measures, assuming such efforts otherwise comply with the requirements of these regulations. *See* § 106.8(c)(1).

In response to a commenter's concern about privacy around records related to supportive measures, see the discussion of § 106.44(g)(5) and (j).

Changes: To clarify and simplify the language in § 106.44 and further clarify the recipient's ultimate responsibility for Title IX complaints, § 106.44(g) has been revised to change ''would'' to ''does,'' add ''any'' before ''other person,'' and specify that, under paragraph (f) of § 106.44, a recipient must offer and coordinate supportive measures, as appropriate, as described by the remainder of the provision. The Department has also deleted proposed § 106.44(g)(6).

Types of Supportive Measures (§ 106.44(g)(1))

Comments: Some commenters supported the examples of supportive measures provided in proposed § 106.44(g)(1) but requested that the Department expand the list of examples. Commenters suggested additional examples, including: allowing resubmission of an assignment or to retake an exam, adjusting a complainant's grades or transcript, independently re-grading the complainant's work, preserving a complainant's eligibility for a scholarship, honor, extracurricular, or leadership position, and reimbursing tuition or providing a tuition credit; medical and psychological services including free mental health support; complainant advocacy; changes related to transportation; removal of a respondent from participation on a school athletic team; trauma-informed care; access to a specialized social worker; accessible emergency housing (including housing that is safe for transgender and gender nonconforming students); assistance with breaking off-campus leases to access school-provided emergency housing; waiver of lease

breakage fees for school-owned housing; and assistance with reasonable moving expenses for moving to emergency housing. One commenter requested that the Department clarify in proposed § 106.44(g)(1) that supportive measures do not include involuntary changes to a complainant's schedule.

Some commenters requested that the Department add examples of additional supportive measures for respondents. These commenters stated that support for respondents would not only help to restore and preserve a complainant's access to a recipient's education program or activity but also prevent future sex-based harassment.

Several commenters asked the Department to clarify that supportive measures may include retroactive measures necessary to address harms that complainants have already experienced. One commenter noted that many complainants do not report sex-based harassment immediately after it occurs and may experience the negative academic impacts of such harassment prior to reporting, such as missed exams or failed classes. The commenter stated that supportive measures should include measures to undo these academic impacts.

Some commenters expressed a variety of opinions on the inclusion of restrictions on contact in proposed § 106.44(g)(1). Some commenters opposed the use of any type of no-contact order as a supportive measure, stating that no-contact orders are a prior restraint on speech. Other commenters asked the Department to expressly prohibit mutual no-contact orders, which one commenter suggested are easily abused and are only appropriate when both parties have been accused of misconduct towards each other. Several commenters asked the Department to explicitly state in the final regulations that a recipient is permitted to impose a non-mutual no-contact order against a respondent. Other commenters opposed the inclusion of non-mutual no-contact orders as supportive measures stating that they are highly susceptible to abuse. Some commenters asked the Department to clarify that proposed § 106.44(g)(1) would allow a recipient to impose a non-mutual no-contact order or a mutual no-contact order, depending on what is reasonable under the circumstances.

Some commenters requested that the Department clarify that a recipient is required to provide a supportive measure if the supportive measure is reasonably available. These commenters expressed concern about a recipient refusing to provide supportive measures to complainants even when requests for supportive measures were reasonable.

One commenter asked the Department to clarify whether ''involuntary changes in work'' refers to changes in work parameters or removal of work.

Discussion: The Department acknowledges commenters' views on the examples of supportive measures in proposed § 106.44(g)(1) as well as suggestions for the additional examples noted above. After careful consideration, the Department has determined that final § 106.44(g)(1) strikes the appropriate balance between providing illustrative examples of supportive measures to assist a recipient in determining appropriate supportive measures, while leaving a recipient with as much flexibility and discretion as possible to determine reasonably available supportive measures for their educational community. As discussed in the July 2022 NPRM, while a recipient has substantial discretion over the supportive measures it offers, such discretion is limited by the requirement to offer supportive measures only as appropriate to restore or preserve the party's access to the recipient's education program or activity or provide support during the grievance procedures and not for disciplinary or punitive reasons. 87 FR 41448. The Department agrees that there may be circumstances in which supportive measures for respondents, such as counseling, support groups, or specialized training, if reasonably available, can be appropriate to restore or preserve a party's access to the recipient's education program or activity. The Department also agrees that there may be supportive measures that apply retroactively, such as retroactive withdrawals, extensions of deadlines, adjustments to transcripts, or tuition reimbursements, that, if reasonably available, can be appropriate to restore or preserve a party's access to the recipient's education program or activity.

The Department also acknowledges commenters' views on no-contact orders, including non-mutual no-contact orders and mutual no-contact orders. As discussed in the July 2022 NPRM, the Department proposed eliminating the term ''mutual'' from the non-exhaustive list of supportive measures under § 106.44(g)(1) to ensure that a recipient understands that it is not limited to imposing mutual restrictions on contact between the parties as supportive measures. 87 FR 41450. After careful consideration of the comments, the Department has made further modifications to the language in § 106.44(g)(1) to address continued commenter confusion about whether mutual and non-mutual no-contact orders are permitted as supportive measures. The Department has changed ''restrictions on contact between the parties'' to ''restrictions on contact applied to one or more parties.'' This will further clarify that a recipient may apply mutual or non-mutual no-contact orders to complainants and/or respondents as supportive measures.

The Department also disagrees that no-contact orders are highly susceptible to abuse and notes that commenters provided no evidence for such an assertion. The Department reiterates that, as with other supportive measures, a recipient may consider the appropriateness of restrictions on contact in light of factors such as those described in the July 2022 NPRM, including the need expressed by the complainant or respondent; the ages of the parties involved; the nature of the allegations and their continued effects on the complainant or respondent; whether the parties continue to interact directly in the recipient's education program or activity, including through student employment, shared residence or dining facilities, class, or campus transportation; and whether steps have already been taken to mitigate the harm from the parties' interactions, such as implementation of a civil protective order. 87 FR 41448. In considering whether to provide a no-contact order, a recipient must also ensure that a no-contact order is not imposed for punitive or disciplinary reasons and does not unreasonably burden a complainant or a respondent.

The Department disagrees that a no-contact order constitutes an impermissible ''prior restraint'' on speech. The Supreme Court has cautioned that a content-neutral injunction that incidentally affects expression is not a ''prior restraint'' when the enjoined party has access to alternative avenues of expression. *Madsen* v. *Women's Health Ctr.,* 512 U.S. 753, 763 n.2 (1994). Moreover, even when such an order restricts access to a public forum, it is constitutionally permissible if it ''burden[s] no more speech than necessary to serve a significant government interest.'' *Id.* at 765. Under these final regulations, a no-contact order available as a supportive measure may not unreasonably burden a complainant or respondent, § 106.44(g)(2). For additional discussion of the relationship between 20 U.S.C. 1681 and freedom of speech, see the discussion of Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2).

The Department also appreciates the opportunity to clarify that supportive measures include measures that a recipient deems to be ''reasonably available,'' consistent with the definition of ''supportive measures.'' The Department understands that use of the phrase ''available and reasonable'' in proposed § 106.44(g)(1) was confusing to commenters and has modified the language of final § 106.44(g)(1) to ''reasonably available.''

In response to commenters' confusion about the reference to ''voluntary or involuntary'' changes in class, work, housing, or extracurricular or any other activity, the Department has eliminated the words ''voluntary or involuntary'' in the final regulations. Supportive measures may include changes in work schedules or work assignments that are not imposed for punitive reasons, so that the complainant and respondent are not working on the same projects or at the same time. The Department declines to categorically prohibit involuntary changes to a complainant's or respondent's class schedule through supportive measures as it is possible that such changes may not constitute an unreasonable burden on a complainant or respondent. Whether such an involuntary change would constitute an unreasonable burden which is not permitted under the definition of supportive measures and § 106.44(g), is a fact-specific analysis that would depend on the particular circumstances of the complainant or respondent.

Changes: The Department has modified ''available and reasonable'' in the proposed regulations to ''reasonably available'' in final § 106.44(g)(1). The Department has also modified ''restrictions on contact between the parties'' to ''restrictions on contact applied to one or more parties.'' The Department has also removed the phrase ''voluntary or involuntary.''

Temporary Supportive Measures That Impose Burdens (§ 106.44(g)(2) and (g)(3))

Comments: Some commenters expressed support for proposed § 106.44(g)(2) because it would allow for supportive measures that may burden a respondent when necessary to protect a complainant's safety or their access to their educational environment, as long as the measures are not punitive or disciplinary. Some commenters stated that temporary burdensome supportive measures would protect the safety and well-being of all students, including the respondent, in a manner fair to all parties. Some commenters supported proposed § 106.44(g)(2) but requested that the Department allow burdensome supportive measures to be imposed outside the pendency of the grievance procedures, including after grievance procedures are completed. One commenter suggested that burdensome supportive measures may be sufficient to end discrimination and prevent its recurrence, in which case there would be no need to initiate grievance procedures. Another commenter stated that burdensome supportive measures should be permitted for informal resolution and noted that informal resolution is the preferred approach for K–12 school districts.

Some commenters opposed proposed § 106.44(g)(2), including because they believed it would allow a recipient to impose burdensome supportive measures as an ''interim punishment'' without providing necessary due process, such as the opportunity to present evidence. Some commenters stated that proposed § 106.44(g)(2) would allow a respondent to be denied equitable access to education and would demonstrate a bias against respondents in violation of § 106.45(b)(2). Other commenters stated that a recipient should instead seek to equalize the application of burdensome supportive measures or minimize the combined burden of supportive measures on all parties by taking on the burden itself when possible. One commenter argued that burdensome supportive measures would be arbitrary and capricious and inconsistent with a respondent's constitutional rights, including free speech.

Some commenters opposed proposed § 106.44(g)(2) because they perceived it to provide no limit on the burden a supportive measure could impose, which could lead a recipient to prioritize the complainant's access to the recipient's education program or activity whenever the recipient chooses and without any required justification. One commenter further asserted that the Department's explanation of burdensome supportive measures offered in the July 2022 NPRM is inadequate to limit the burden placed on respondents because it suggests only that a recipient consider the impact to a respondent's access to the recipient's education program or activity but does not require, for example, that a recipient weigh the negative impact against the needs of a complainant. Other commenters stated that the 2020 amendments correctly balanced providing supportive measures with requiring the measures to be non-disciplinary and non-punitive, and another commenter asked the Department to keep the same safety and risk analysis required under the 2020 amendments. One commenter suggested that proposed § 106.44(h), regarding emergency removal, would be sufficient to address any safety concerns about a respondent. One commenter suggested that the Department should clearly limit the situations in which burdensome supportive measures can be imposed, add a statement that burdensome supportive measures do not indicate a respondent is presumed responsible, and state that a decisionmaker is not permitted to consider burdensome supportive measures when making a determination of responsibility. One commenter suggested that the Department clarify that no-contact orders qualify as supportive measures that burden a respondent and offer an immediate opportunity to appeal.

Several commenters expressed confusion over whether a supportive measure can be burdensome while also being non-punitive and non-disciplinary. One commenter stated that such supportive measures would still have a disciplinary effect that would require due process protections. One commenter asked the Department to clarify why burdensome supportive measures cannot be imposed for ''disciplinary reasons'' if actions that have been identified as possible disciplinary sanctions can also be used as burdensome supportive measures. The commenter asked the Department to further clarify that supportive measures may continue to be listed in codes of conduct or other policies without constituting ''disciplinary sanctions'' under proposed § 106.2 or proposed § 106.45(h)(4). One commenter stated that any measure that burdens an individual is a punitive measure regardless of the subjective reason for imposing it.

Several commenters sought clarification on burdensome supportive measures, including what constitutes a ''reasonable burden'' for a supportive measure, how to determine that a burdensome supportive measure is no more restrictive than necessary, and what the difference is between a restrictive and disciplinary measure. Several commenters asked the Department to clarify the difference between burdensome supportive measures and emergency removal under proposed § 106.44(h), including whether burdensome supportive measures are subject to the same safety and risk assessment as required under proposed § 106.44(h) and, if not, to provide examples of when burdensome supportive measures can be used without meeting the threshold of § 106.44(h). Another commenter asked the Department to clarify whether

restrictions on participation in extracurricular activities can be used as a burdensome supportive measure or if such restrictions would have to be justified under the emergency removal provision.

Discussion: After careful consideration of the concerns raised by commenters, including concerns that temporary burdensome supportive measures categorically suggest a presumption of responsibility against a respondent, bias against a respondent, inequitable treatment of the parties, or a violation of a respondent's constitutional rights, the Department has determined that it is necessary to modify proposed § 106.44(g)(2) to remove reference to temporary supportive measures that burden a respondent. The Department has deleted this language to avoid any suggestion that respondents and complainants are subject to different treatment in the implementation of supportive measures. Under these regulations, both complainants and respondents may be burdened by supportive measures, but neither may be unreasonably burdened by such measures.

The language in final § 106.44(g)(2) clarifies that a recipient is permitted to provide supportive measures to a complainant or a respondent as long as such supportive measures are not unreasonably burdensome to any party, are not imposed for punitive or disciplinary reasons, and are designed to protect the safety of the parties or the recipient's educational environment or to provide support during the recipient's grievance procedures under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(k). This language aligns § 106.44(g)(2) with the definition of ''supportive measures,'' and addresses commenters' concerns about perceived inconsistencies between the definition of ''supportive measures'' and proposed § 106.44(g)(2).

Consistent with the definition of ''supportive measures'' in the 2020 amendments, *see* 85 FR 30181, this change does not mean that a supportive measure provided to one party cannot impose any burden on the other party; rather, the definition of ''supportive measures'' specifies that supportive measures cannot impose an unreasonable burden on the other party. As discussed in the July 2022 NPRM, the Department heard from stakeholders that perceived the 2020 amendments to limit supportive measures that burden a respondent to mutual restrictions on contact. 87 FR 41448–49. These stakeholders expressed concern that this limitation hampered their ability to restore or preserve a complainant's access to the recipient's education program or activity. 87 FR 41449. Section 106.44(g)(2) clarifies that, as the Department explained in the preamble to the 2020 amendments, nothing within the regulations states that a supportive measure cannot impose any burden on a party, but such supportive measures cannot be unreasonably burdensome. 85 FR 30180–81; *see also* 87 FR 41448.

The Department appreciates the opportunity to clarify that § 106.44(g) would not permit a recipient to impose supportive measures without any limitation on how burdensome they may be. First, a recipient must not impose a supportive measure for reasons that are punitive or disciplinary. A punitive or disciplinary measure is one that is intended to punish a respondent for conduct that violates Title IX, whereas a supportive measure is one that is intended to fulfill the purposes of supportive measures set forth in § 106.2. The fact that a measure is burdensome does not determine whether it is a supportive measure or a punitive or disciplinary measure. For example, a stay-away order may be burdensome because it requires a respondent to change routes when navigating campus or avoid a certain hallway in order to preserve a complainant's access to the recipient's education program or activity, but it would be a permissible supportive measure to the extent that the order was imposed to preserve access and was not imposed for any punitive or disciplinary reason. Similarly, a respondent might be asked to register for classes after a complainant in order to make sure that the two parties are not in the same class. While such a request may be burdensome, it would not be punitive or disciplinary because the reason for providing the supportive measure was not to punish or discipline, but rather to ensure that both parties have access to the recipient's education program or activity during the course of the grievance procedures. If a party believes a measure is unreasonably burdensome, it may challenge the supportive measure through the procedures set forth in § 106.44(g)(4).

In response to a commenter, the Department notes that the reason for a supportive measure is important to its validity. While § 106.44(g)(2) gives a recipient the discretion to make case-specific judgments about whether such actions can be used in a manner that complies with this section and the final regulations, the Department has replaced ''may'' with ''must'' in § 106.44(g)(2) to emphasize that a recipient must not impose supportive measures for punitive or disciplinary reasons. If a party could show that a supportive measure that burdened them was intended to punish them because, for example, the supportive measure did not remedy barriers to access for the other party, the recipient would need to terminate the supportive measure. The Department recognizes that some actions used as supportive measures may also be available and employed as disciplinary sanctions after a determination of responsibility. As the Department stated in the July 2022 NPRM, such actions are not inherently disciplinary simply because the same or similar action could be imposed for disciplinary reasons. 87 FR 41449.

Second, as the Department discussed in the 2020 amendments, the Department expects recipients to engage in a fact-specific inquiry to determine whether supportive measures constitute a reasonable burden on a party. 85 FR 30182. The Department reiterates that the unreasonableness of a burden on a party must take into account the nature of the educational programs, activities, opportunities, and benefits in which the party is participating, not solely those components that are ''academic'' in nature. *Id.* Supportive measures such as schedule or housing adjustments may or may not constitute an ''unreasonable'' burden on a party. Likewise, in the elementary school and secondary school context, the Department has previously stated that many actions taken by school personnel to quickly intervene and correct behavior, such as educational conversations with students or changing student seating, would be considered reasonable supportive measures. *Id.* The Department notes, however, that actions such as suspension or expulsion are inherently burdensome and would be an unreasonable burden upon a party as a supportive measure. *Id.*

Section 106.44(g)(2) and the definition of ''supportive measures'' require a recipient to consider each set of unique circumstances to determine what actions will meet the purposes, and limitations, of supportive measures and when a party's access to the array of educational opportunities and benefits offered by a recipient is unreasonably burdened. *See* 85 FR 30182. The Department continues to decline to provide a specific list of what supportive measures might constitute a ''reasonable'' or ''unreasonable'' burden because that would detract from a recipient's flexibility to take into account the specific facts and circumstances and unique needs of the parties in individual situations. For this reason, the Department acknowledges

hypothetical scenarios provided by commenters but declines to provide an exhaustive list of circumstances in which actions or restrictions would constitute reasonable supportive measures. The Department understands that a recipient needs case-by-case flexibility to provide supportive measures that restore or preserve access to a recipient's educational community while preserving the rights of all parties.

The Department declines commenters' suggestion to require a recipient to equalize the application of supportive measures or minimize the combined burden of supportive measures on all parties by taking on the burden itself when possible. This is an area in which a recipient must have discretion to consider whether possible supportive measures are necessary to restore or preserve a party's access to the recipient's education program or activity; protect the safety of the parties or the recipient's educational environment; or provide support during the recipient's grievance procedures. The Department appreciates the opportunity to clarify that a recipient should not rely on its flexibility to provide supportive measures that burden a party at the expense of considering other supportive measures, including those that can be provided by the recipient without burden on either party.

As the Department has removed the reference to temporary measures that burden a respondent from the definition of ''supportive measures,'' the Department has also removed the language from § 106.44(g)(2) limiting temporary measures that burden a respondent to the pendency of a recipient's grievance procedures under § 106.45, and if applicable § 106.46, and requiring that such measures be terminated at the conclusion of the grievance procedures. Instead, § 106.44(g)(3) directs a recipient to, as appropriate, modify or terminate supportive measures at the conclusion of the grievance procedures under § 106.45, and if applicable § 106.46, or at the conclusion of the informal resolution process under § 106.44(k). Alternatively, when appropriate, a recipient may continue supportive measures beyond the conclusion of such procedures. The Department cautions, however, that the determination whether a supportive measure constitutes a reasonable burden on a party may change following the conclusion of the grievance procedures, particularly following a determination of non-responsibility, and a recipient should consider whether such measures continue to meet the definition of ''supportive measures,'' when evaluating whether to continue, modify or terminate supportive measures under § 106.44(g)(3). The Department also notes that the completion of grievance procedures or the informal resolution process may constitute materially changed circumstances permitting a party to seek additional modification or termination of a supportive measure under § 106.44(g)(4) and a finding of non-responsibility will often constitute materially changed circumstances that require modification or termination of a supportive measure.

The Department appreciates the opportunity to clarify that supportive measures are not ''relevant evidence'' that can be considered in reaching a determination under § 106.45(b)(6) and (h)(1).

The Department also appreciates the opportunity to clarify that providing supportive measures under § 106.44(g)(2) is distinct from emergency removal under § 106.44(h). As explained below in the discussion of § 106.44(h), emergency removal permits a recipient to remove a respondent from the recipient's education program or activity on a limited emergency basis when the recipient undertakes an individualized safety and risk analysis and determines that a respondent poses an imminent and serious threat to the health and safety of the members of the campus community. Unlike emergency removal, supportive measures can be provided to restore or preserve a party's access to the recipient's education program or activity and protect the safety of the parties or the recipient's educational environment. Providing such supportive measures does not require an imminent and serious threat to the health and safety of the campus community or the risk assessment required under § 106.44(h) and the Department therefore declines the commenter's suggestion to utilize the same safety and risk analysis required under the 2020 amendments. Together, § 106.44(g) and (h) provide a recipient with the appropriate flexibility to respond to reports of sex discrimination, including to preserve educational access, protect the safety of all parties, and respond to emergency situations.

The Department disagrees that § 106.44(g)(2) would result in inequitable restrictions on speech and reiterates that it has long made clear that it enforces Title IX consistent with the requirements of the First Amendment. Nothing in these final regulations requires a recipient to restrict any rights that would otherwise be protected from government action by the First Amendment. *See* discussion of Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2); 34 CFR 106.6(d).

Changes: To align the definition of supportive measures and § 106.44(g)(2), the Department has modified § 106.44(g)(2) to state that supportive measures must not unreasonably burden either party and must be designed to protect the safety of the parties or the recipient's educational environment or to provide support during the recipient's grievance procedures under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(k). The Department has also changed ''may'' to ''must'' to emphasize that supportive measures must not be imposed for punitive or disciplinary reasons. The Department has also deleted ''For supportive measures other than those that burden a respondent'' in § 106.44(g)(3).

Challenges to Supportive Measures (§ 106.44(g)(4))

Comments: Several commenters supported proposed § 106.44(g)(4) but requested that the Department issue supplemental guidance on how to implement a process for reviewing challenges to supportive measures, including how to conduct the fact-specific inquiry to determine whether a challenge should be allowed, how many challenges should be allowed, the degree of burden that would give a respondent a right to challenge a supportive measure, and the due process required as part of determining whether to modify or reverse a supportive measure. One commenter appreciated that the respondent must be offered the opportunity to seek modification or termination of burdensome supportive measures by appeal to an official other than the one who originally imposed them.

Some commenters opposed proposed § 106.44(g)(4) and requested the Department remove the requirement that parties be allowed to challenge supportive measures. Commenters asserted it would be overly burdensome, including because of the number of requests for supportive measures by parties at postsecondary institutions. A number of commenters raised concerns that proposed § 106.44(g)(4) would place no limit on the number of challenges or require a certain standard of review, which some commenters asserted would, for example, divert resources away from other parts of a recipient's grievance procedures or create a ''cycle of disputes,'' under which each party continually raised challenges claiming that circumstances had changed materially. Several

commenters expressed concern about the burden of identifying an additional administrator to oversee challenges to supportive measures, including on smaller institutions with fewer resources. One group of commenters stated that a recipient would be required to develop an entire administrative structure to comply with proposed § 106.44(g)(4).

Other commenters opposed proposed § 106.44(g)(4) because they believed it would not provide sufficient protection for respondents. For example, one commenter stated that proposed § 106.44(g)(4) would allow for substantial employee discretion and would not require access to evidence, a presumption of non-responsibility, or a deadline for completion. Another commenter stated that proposed § 106.44(g)(4) would not allow respondents to challenge supportive measures as long as they would be necessary to restore or preserve a complainant's access to a recipient's education program or activity.

Several commenters suggested modifications to proposed § 106.44(g)(4) that they perceived to be less burdensome, such as replacing § 106.44(g)(4) with a general requirement for equitable implementation of supportive measures. Other commenters suggested limiting the number of or bases for challenges permitted under proposed § 106.44(g)(4). One commenter suggested that the Department should instead allow the same administrator to handle initial requests for supportive measures and challenges under § 106.44(g)(4). Another commenter requested the Department require the fact-specific determination whether a challenge has been timely to be in writing and require that the determination whether to grant or deny a challenge be resolved based on whether there has been a material change in party circumstances.

Some commenters requested the Department clarify that if a recipient is aware that a supportive measure is ineffective, the recipient must modify the supportive measure or offer alternative supportive measures.

Discussion: The Department acknowledges commenters' support for § 106.44(g)(4), including the opportunity to seek modification or termination of supportive measures.

Although the Department recognizes that some commenters requested the Department remove the right to challenge supportive measures, the Department declines to do so, because § 106.44(g)(4) provides the parties with the necessary procedural protections to address the provision of supportive measures. Section 106.44(g)(4) will provide both parties with the opportunity to contest a recipient's decision regarding supportive measures as long as the supportive measure is applicable to them.

The Department disagrees that § 106.44(g)(4) will not provide sufficient protection for respondents and declines to add additional procedural or evidentiary requirements to § 106.44(g)(4). Section 106.44(g)(4) strikes the appropriate balance of ensuring procedural protections for all parties in the form of independent review while also providing a recipient with the flexibility to handle such challenges in a manner that works best for their educational communities and their available resources.

The Department acknowledges commenters' concerns about the volume of potential challenges under § 106.44(g)(4) and the perception that § 106.44(g)(4) will be burdensome to implement and acknowledges commenters' suggestions of ways to modify § 106.44(g)(4) to reduce burden. While the Department declines to replace § 106.44(g)(4) with an alternative process for the same reasons it declines to remove § 106.44(g)(4), the Department has modified proposed § 106.44(g)(4) to address these concerns and clarify that a complainant or respondent may only challenge a recipient's decision to provide, deny, modify, or terminate supportive measures when such measures are applicable to them. For example, when a complainant seeks, as a supportive measure, to transfer out of a particular section of a course so as not to be in the same class as the respondent, the recipient would not be required to provide the respondent with an opportunity to challenge the recipient's decision to provide or decline such a supportive measure, because the requested supportive measure is not applicable to the respondent. When a complainant requests a supportive measure that applies to a respondent, such a measure would be applicable to both parties and a respondent could challenge the decision to provide the supportive measure or a complainant could challenge the decision to deny it. When a recipient provides a supportive measure to a respondent that a complainant did not request and that is not applicable to the complainant, such as additional training, a recipient would not be required to provide the complainant with the opportunity to challenge the recipient's decision to provide the supportive measure. The Department also clarifies that the same restriction applies to a party seeking additional modification or termination of a supportive measure based on materially changed circumstances. Materially changed circumstances will vary depending on the particular context of the complainant and respondent. For example, if a respondent is required, as a supportive measure, to transfer to a different section of a certain class so that the respondent and complainant are not in the same class, the respondent may seek to terminate that supportive measure if the complainant withdraws from the class or if the respondent is found not responsible after the conclusion of the applicable grievance procedures. Although there is some risk of repeated challenges based on materially changed circumstances, this provision is necessary to ensure that the supportive measures continue to achieve the goal of preserving or restoring access to the education program or activity.

The Department has also modified § 106.44(g)(4) to provide additional direction on the bases for challenging a supportive measure. The Department has added language to clarify that an impartial employee may modify or reverse a recipient's decision to provide, deny, modify, or terminate supportive measures applicable to them when the impartial employee determines the decision was inconsistent with the definition of ''supportive measures'' in § 106.2. Thus, challenges to supportive measures under § 106.44(g)(4) could include, but are not limited to, challenges concerning whether a supportive measure is reasonably burdensome, whether a supportive measure is reasonably available, whether the supportive measure is being imposed for punitive or disciplinary reasons, whether the supportive measure is being imposed without fee or charge, and whether the supportive measure is effective in meeting the purposes for which it is intended, including to restore or preserve access to the education program or activity, provide safety, or provide support during the grievance procedures.

In light of the removal of temporary burdensome supportive measures from § 106.44(g)(2) and the definition of ''supportive measures,'' the Department has also deleted the language in proposed § 106.44(g)(4) providing that, if a supportive measure burdens a party, the initial opportunity to seek modification or reversal of the recipient's decision must be provided before the measure is imposed or, if necessary, under the circumstances, as soon as possible after the measure has taken effect. As discussed in the July

2022 NPRM, the Department provides a recipient flexibility concerning timing in order to account for the wide range of supportive measures available under proposed § 106.44(g)(1) and to allow a recipient to take into account a party's interests as well as other concerns, such as circumstances in which offering such a review is impractical until after supportive measures have been provided. 87 FR 41450; *see also Mathews,* 424 U.S. at 335, 349 (holding that due process permitted an agency to provide an evidentiary hearing after terminating disability benefits and determining that the adequacy of due process procedures involves a balancing test that considers the private interest of the affected individual, the risk of erroneous deprivation and benefit of additional procedures, and the government's interest, including the burden and cost of providing additional procedures); *Fed. Deposit Ins. Corp.* v. *Mallen,* 486 U.S. 230, 240 (1988) (holding that an FDIC bank official was not entitled to a hearing prior to his suspension from office because the government's interest in protecting depositors and maintaining public confidence justified postponing the opportunity to be heard until after the initial deprivation).

The Department also acknowledges that some commenters expressed confusion about the requirement in proposed § 106.44(g)(4) to conduct a ''fact specific inquiry'' to determine what constitutes a timely opportunity for seeking modification or reversal, including whether this requires a formal determination and how to conduct such an inquiry. The Department is persuaded that this language may have inadvertently suggested a formal determination process and has deleted this language from final § 106.44(g)(4). The Department notes that a recipient has the flexibility to determine when a request for modification or reversal of a supportive measure is timely, and nothing within these regulations prohibits a recipient from conducting an informal fact-specific inquiry concerning timeliness, consistent with the final regulations, should the recipient choose to do so.

While the Department understands that § 106.44(g)(4) requires a recipient to identify an additional impartial employee with authority to modify or reverse decisions on supportive measures to review challenges under § 106.44(g)(4), the importance of this independent review outweighs any burdens it may impose. Section 106.44(g)(4) does not require an entire administrative structure, as suggested by a group of commenters; it only requires, at minimum, assigning one person to handle challenged decisions. The Department intends § 106.44(g) to provide a recipient with flexibility to structure the imposition and review of supportive measures while ensuring the procedural protection of a timely independent review. For example, the Title IX Coordinator may choose to delegate the responsibility to provide or deny supportive measures to another employee and provide appropriate and impartial review of requests to terminate or modify such measures themselves, or the Title IX Coordinator may be the one to provide or deny supportive measures and the recipient or the Title IX Coordinator may designate an alternative appropriate and impartial administrator to review challenges to supportive measures. To ensure that the parties receive an independent review, however, neither the Title IX Coordinator nor any other employee will be permitted to both provide and review the same supportive measures. 87 FR 41449.

The Department declines to require a recipient to affirmatively modify supportive measures or initiate new supportive measures because it would be extremely burdensome for a recipient to have to proactively monitor all outstanding cases involving supportive measures for possible changes necessitating a modification or initiation of new supportive measures. When a party believes that a supportive measure is ineffective upon implementation, or when circumstances have materially changed to render it ineffective, § 106.44(g)(4) will allow the party to seek modification of such supportive measures.

In response to the suggestion to replace § 106.44(g)(4) with a general requirement for equitable implementation of supportive measures, it is not clear what the ''equitable implementation of supportive measures'' would entail, but the Department notes that the challenge procedure in § 106.44(g)(4), as well as the other provisions of § 106.44(g) and the definition of ''supportive measures'' in § 106.2, ensure that supportive measures are only implemented as appropriate. To the extent the commenters are suggesting that every supportive measure be applied equitably to both the complainant and respondent, the Department declines to impose such a requirement because it is inconsistent with the intent that supportive measures be individualized measures, and would unnecessarily burden a recipient, complainant, and respondent. For example, if either the complainant or respondent required an escort service on campus, but the other party did not, then it would be unnecessary to provide both parties an escort service.

As to requests for supplemental guidance on how to implement a process for reviewing challenges to supportive measures, the Department agrees that supporting recipients and Title IX Coordinators in implementing these regulations is important. The Department will offer technical assistance, as appropriate, to promote compliance with these final regulations.

Changes: The Department has modified § 106.44(g)(4) to clarify that a recipient must only provide a complainant or respondent with a timely opportunity to seek, from an appropriate and impartial employee, modification or reversal of the recipient's decision to provide, deny, modify, or terminate supportive measures when such measures are ''applicable to them.'' The provision also provides that a party must have the opportunity to seek additional modification or termination of a supportive measure ''applicable to them'' if circumstances change materially. The Department has also modified § 106.44(g)(4) to clarify that an impartial employee considering modification or reversal of a recipient's decision to provide, deny, modify, or terminate supportive measures may do so when the impartial employee determines that the decision was inconsistent with the definition of ''supportive measures'' in § 106.2. For clarity, the Department changed ''the decision being challenged'' to ''the challenged decision.'' To avoid implying that a recipient must engage in a formal determination process, the Department has also deleted the requirement that a recipient must make a fact-specific inquiry to determine what constitutes a timely opportunity for seeking modification or reversal of a supportive measure. Finally, the Department has deleted the requirement that if a supportive measure burdens a party, the initial opportunity to seek modification or reversal of the recipient's decision must be provided before the measure is imposed or, if necessary under the circumstances, as soon as possible after the measure has taken effect.

Disclosure of Supportive Measures (§ 106.44(g)(5))

Comments: Several commenters supported proposed § 106.44(g)(5) because it would limit the recipient's disclosure of supportive measures, including limiting disclosures to parties unless necessary to restore or preserve

that party's access to the education program or activity. Other commenters raised concerns about the restrictions on the recipient's disclosure of supportive measures in proposed § 106.44(g)(5). Several commenters requested the Department permit recipients to make additional disclosures of supportive measures under proposed § 106.44(g)(5) for ''applicable federal and state statutes, regulations and agency policies where disclosure of misconduct, investigations, outcomes and administrative actions is mandated by a government entity.'' These commenters asserted that proposed § 106.44(g)(5) would conflict with the Creating Helpful Incentives to Produce Semiconductors (CHIPS) and Science Act, which, the commenters stated, requires recipients to report any administrative action taken in response to allegations of sexual harassment by individual personnel participating on the federal research grant,[38] and the grant award terms of agencies such as the National Institutes of Health, National Science Foundation, and National Aeronautics and Space Administration, which require recipients to report administrative actions against grant award personnel for sex-based harassment.

Other commenters opposed proposed § 106.44(g)(5) because, they stated, it would not provide for disclosure of supportive measures to parents and would allow supportive measures to be provided without parental knowledge or consent.

Other commenters suggested the language in proposed § 106.44(g)(5) would be too broad and may violate FERPA. One commenter requested that the Department delete ''other than the complainant or respondent'' from proposed § 106.44(g)(5) to ensure that information about supportive measures is only disclosed to complainants and respondents as needed. Another commenter requested the Department clarify that a respondent should never be informed of supportive measures provided to complainants that do not affect the respondent.

Discussion: The Department acknowledges commenters' views on the disclosure of supportive measures under § 106.44(g)(5). As addressed in the discussion regarding § 106.44(j), the Department received numerous comments requesting clarification of a recipient's obligations regarding nondisclosure protections for information that a recipient obtains in the course of complying with this part. In response to these comments, the Department revised § 106.44(j) to apply to any personally identifiable information obtained in the course of complying with this part, which includes personally identifiable information obtained in offering and coordinating supportive measures under this paragraph. In addition to § 104.44(j), the Department maintains this nondisclosure provision in § 106.44(g)(5) because of specific considerations that arise in the context of supportive measures.

While § 106.44(j) applies to personally identifiable information obtained in the course of complying with this part, § 106.44(g)(5) applies to any information about supportive measures. If the supportive measure is being provided in connection with grievance procedures or informal resolution, the respondent will already know the identity of the complainant and vice versa, so it is not the identity of the person but the information about the supportive measure itself that warrants protection. For example, if a student has initiated grievance procedures against another student for sex-based harassment and receives counseling services as a supportive measure, the respondent knows who the complainant is but is not entitled to know that the complainant is receiving counseling services. Additionally, this is consistent with the approach in the July 2022 NPRM, 87 FR 41451, and § 106.30(a) of the 2020 amendments (''The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.'').

To avoid confusion or conflict between this provision and § 106.44(j), § 106.44(g)(5) permits disclosure if any of the exceptions in § 106.44(j)(1) through (5) applies. Thus, for instance, if the recipient obtains prior written consent from the person receiving the supportive measure allowing disclosure of that information, the recipient may make the disclosure pursuant to § 106.44(j)(1). In response to commenters' questions about parental knowledge, § 106.44(j)(2) permits disclosures regarding supportive measures to parents of minors in elementary school or secondary school who are receiving the supportive measure. Also, as explained further in the discussion of § 106.44(j), § 106.44(j)(4) reflects the Department's agreement with commenters who asked the Department to permit disclosures of supportive measures when the disclosure is required by Federal laws or regulations or the terms and conditions of a Federal award in connection with addressing sex discrimination.

Further, this provision clarifies that the limitations on disclosures apply in the context of informing one party of supportive measures provided to another party. In the July 2022 NPRM, this was a separate sentence, but given the addition of the § 106.44(j) exceptions in final § 106.44(g)(5), for clarity and to reduce repetitiveness, the Department combined the two sentences of the July 2022 NPRM into one sentence. The Department emphasizes the importance of not disclosing information to one party regarding a supportive measure provided to another party because, without reassurance that this information will not be disclosed except in the limited circumstances in which such disclosure is necessary to provide the measure or an exception applies, the party may be discouraged from seeking supportive measures. For example, if one party is receiving counseling as a supportive measure, the Department does not anticipate that any of the exceptions of this provision would apply to allow the recipient to disclose that information to another party. However, there are occasions where disclosure to the other party may be necessary to restore or preserve a party's access to the education program or activity, such as where it may be necessary to tell one party that another party has moved to a new dorm in order to maintain the protections of an existing stay-away order. This provision would allow such a disclosure.

The Department disagrees that a disclosure under § 106.44(g)(5) is too broad or would violate FERPA. FERPA permits a recipient to disclose personally identifiable information from a student's education records without consent if it is to other school officials whom the recipient has determined have a legitimate educational interest, under the criteria set forth in the recipient's annual notification of FERPA rights, in the information. 34 CFR 99.7(a)(3)(iii), 99.31(a)(1)(i)(A). Thus, FERPA need not preclude a recipient from being able to disclose a supportive measure to school officials as necessary to provide the supportive measure. However, as noted above, even if permitted by FERPA, a recipient may inform one party of supportive measures provided to another party only if necessary to restore or preserve the access of the party receiving the supportive measure. For further information about FERPA, see the discussion of § 106.6(e).

The Department has replaced the phrase ''complainant or respondent'' in

[38] Public Law 117–167, Subtitle D (2022).

§ 106.44(g)(5) with ''the person to whom they apply'' to ensure that supportive measures provided to a person who does not make a complaint are encompassed within this provision. Finally, as explained in greater detail in the discussion of § 106.6(g), nothing in this provision may be read in derogation of any legal right of a parent, guardian, or other authorized legal representative to act on behalf of a complainant, respondent, or other person. This includes in connection with supportive measures.

Changes: The Department modified § 106.44(g)(5) to prohibit disclosures about supportive measures to persons other than to whom the supportive measures apply. The Department incorporated the exceptions to the disclosure prohibition in § 106.44(j)(1)–(5). For clarity, the Department has combined the two sentences of proposed § 106.44(g)(5) into one sentence. For streamlining purposes, the Department has also deleted the phase ''ensure that it does'' from the first sentence of § 106.44(g)(5).

Students With Disabilities (§ 106.44(g)(6))

Comments: The Department notes that proposed § 106.44(g)(7) has been redesignated as § 106.44(g)(6) in the final regulations, and the following comment summaries and discussion refer to the provision as § 106.44(g)(6).

Some commenters expressed support for proposed § 106.44(g)(6) because it would help ensure that a Title IX Coordinator offers and coordinates supportive measures for students with disabilities, including by requiring consultation with the IEP team, Section 504 team, or other disability personnel working with the student given the potential intersection of supportive measures with decisions regarding placement, reasonable accommodations, or special education and related services for students with disabilities.

Several commenters requested modifications to the consultation requirements in proposed § 106.44(g)(6)(i) because of concerns about delays that the consultation requirements would cause. Some commenters suggested that Title IX Coordinators should instead consult only with specific officials or administrators, such as the lead member of the Section 504 team. One commenter suggested that consultation with the IEP or Section 504 team only be required when a supportive measure would impact a student's placement, services, or access to a FAPE. Another commenter suggested the Department should instead require a Title IX Coordinator to refer to a student's IEP or Section 504 plan rather than require consultation. One commenter asked the Department to clarify whether the required consultation with an IEP and Section 504 team in proposed § 106.44(g)(6)(i) would be an informal consultation.

Other commenters requested the Department include a requirement in proposed § 106.44(g)(6)(ii) that a postsecondary institution's disability services office publish a notice that states the availability of the Title IX Coordinator to consult with a postsecondary student with a disability if that student files a Title IX complaint, because individuals with disabilities are at higher risk of sex-based harassment but may not know a Title IX Coordinator is available to provide supportive measures.

One commenter requested the Department clarify the extent to which a Title IX Coordinator may access a student's education records under proposed § 106.44(g)(6). The commenter stated that it is not clear a Title IX Coordinator would have a legitimate educational interest in such records under FERPA. Additionally, some commenters requested the Department clarify that burdensome supportive measures cannot be so burdensome that they interfere with a respondent's access to special education services or accommodations. Another commenter requested that if a burdensome supportive measure will result in a unilateral placement change under the IDEA and Section 504, the Department clarify that any required manifestation determination review as provided for in the IDEA would not violate proposed § 106.45(b)(3).

Discussion: The Department acknowledges commenters' suggestions concerning the requirement to consult with the IEP and/or Section 504 team in § 106.44(g)(6)(i). The Department recognizes that, for an elementary school or secondary school student with a disability who is a complainant or respondent, supportive measures provided under Title IX may intersect with the decisions made by an IEP team or Section 504 team, including with regard to the provision of FAPE. The Department disagrees that consultation with the IEP or Section 504 team should only be required when a supportive measure would impact a student's placement, services, or access to a FAPE, because there may be other ways in which the supportive measures intersect with the decisions made by the IEP team or Section 504 team. For the same reason, the Department also does not agree that referring to the IEP or Section 504 plan alone is sufficient.

After careful consideration, the Department clarifies in the final regulations that a Title IX Coordinator is not required to consult with a student's entire IEP or Section 504 team. Accordingly, the Department has added language to § 106.44(g)(6)(i) to make clear that a Title IX Coordinator must consult with one or more members, as appropriate, of a student's IEP or Section 504 team. This modification strikes the appropriate balance between ensuring that consultation between the Title IX Coordinator and a student's IEP or Section 504 team occurs at the elementary school and secondary school level, while also providing a recipient flexibility to consult in an appropriate manner given the variety of ways in which the supportive measures can intersect with the decisions made by the IEP team or Section 504 team. The regulations do not require IEP or Section 504 meetings, do not mandate consultation with full IEP teams or Section 504 teams, do not identify particular individuals within the IEP team or Section 504 team that must be part of the consultation, and do not specify the decisionmaking process. At the same time, § 106.44(g)(6)(i) does not preclude a recipient from taking actions such as convening additional IEP or Section 504 meetings or consulting with full IEP or Section 504 teams if appropriate under the particular circumstances. The Department also recognizes that the responsibility of ensuring that this consultation takes place lies with the recipient. Therefore, the Department has altered the final regulations to clarify that the recipient must require that the Title IX Coordinator consult with at least one member of a student's IEP team or Section 504 team.

In response to commenters' requests that the Department provide more information about the purpose of the consultation, the Department notes that the consultation is for purposes of complying with Title IX and emphasizes that mere consultation with members of an IEP team or Section 504 team may not ensure compliance with the IDEA and Section 504, as a recipient's obligations under those statutes operate independent of these regulations. The Department anticipates that, in many cases, consultation will identify additional measures that are necessary to ensure compliance with the IDEA and Section 504. Accordingly, the Department has revised this provision to emphasize that the purpose of the consultation is to determine how the recipient can comply with relevant laws

protecting students with disabilities while carrying out the recipient's obligation under Title IX and this part.

The Department acknowledges commenters' requests that a recipient be required to publish additional notices concerning the availability of a Title IX Coordinator to provide supportive measures to students with disabilities, but declines to mandate such a notice because the requirements for the contents of the notice of nondiscrimination within § 106.8(c)(1) of these final regulations are sufficient to notify a recipient's community members about the scope of a recipient's obligations to them under Title IX. Nothing in these final regulations prohibits a recipient from providing such notice as appropriate under the circumstances and consistent with the requirements of the final regulations.

The Department reiterates that nothing within § 106.44(g)(6) abrogates a recipient's obligation to comply with other Federal laws to protect the rights of students with disabilities, including when implementing supportive measures. Section 106.44(g)(6) does not modify any rights under the ADA, IDEA, or Section 504. The Department further emphasizes that, as discussed in the FERPA overview, to the extent a Title IX Coordinator's consultation under this section results in access to disability-related education records, such as an IEP or Section 504 plan, such access is solely in connection with the implementation of supportive measures, which may be defined by an educational agency or institution as constituting a legitimate educational interest. 34 CFR 99.31(a)(1)(i)(A). FERPA requires a recipient to include criteria on what the recipient considers to be a ''legitimate educational interest'' in the recipient's annual notification of rights under FERPA. 34 CFR 99.7(a)(3)(iii).

Changes: Proposed § 106.44(g)(7) has been redesignated as § 106.44(g)(6) in the final regulations because of the elimination of proposed § 106.44(g)(6), as discussed above. The Department has revised § 106.44(g)(6)(i) to state that ''the recipient must require the Title IX Coordinator to consult'' with one or more members of the IEP or Section 504 team, as appropriate, to align this section with § 106.8(e), as appropriate, and to clarify that it is the recipient's duty to ensure that the Title IX Coordinator consults with at least one member of a student's IEP team or Section 504 team when implementing supportive measures concerning an elementary or secondary student with a disability.

The Department has also removed the term ''Section 504 team'' from § 106.44(g)(6)(i) because the term does not appear in the Section 504 regulations. The Department has also changed ''supports'' to ''support'' in § 106.44(g)(ii) for consistency with § 106.8(e). Finally, the Department has revised § 106.44(g)(6)(i) and (ii) to provide that the Title IX Coordinator should consult ''to determine how to comply'' with relevant Federal laws protecting students with disabilities.

8. Section 106.44(h) Emergency Removal

Non-Physical, Serious, and Imminent Threats

Comments: Some commenters supported proposed § 106.44(h) because it would provide recipients greater flexibility to remove a respondent on an emergency basis when the respondent poses a serious threat to a complainant's physical or non-physical health and safety and recognizes the full range of serious threats that a respondent may pose to a complainant.

Some commenters objected to removal of the word ''physical'' because the Department considered and rejected similar requests to permit emergency removal for non-physical threats in the 2020 amendments. Other commenters opposed removal of the term ''physical'' from current § 106.44(c) including because, the commenters argued, doing so would make the standard for when emergency removal is permitted less clear and subjective and because emergency removal seriously burdens a respondent and therefore should be limited to physical threats. One commenter noted that whether a threat is serious is subjective. Commenters asked the Department to clarify the standard a recipient should apply to determine whether emergency removal is appropriate to address an individual's allegation that a respondent's presence in the recipient's education program or activity causes them emotional distress and what consideration a recipient would be expected to give to a complainant's assertion that they would feel unsafe to participate in an activity if a respondent is not removed.

Some commenters cautioned against permitting indefinite emergency removal of a respondent without providing an opportunity to challenge the decision. Commenters asserted that recipients should be required to follow the grievance procedures in proposed § 106.45, and if applicable § 106.46, before a respondent is removed on an emergency basis. Commenters asked the Department to clarify what constitutes an emergency, the level of due process a recipient must afford a respondent before removal, and the process a recipient would be required to use if a respondent were to challenge their removal.

Commenters recommended various changes to the immediate and serious threat standard in proposed § 106.44(h). Some commenters opposed proposed § 106.44(h) because they believed it set the bar for emergency removal of a respondent too high and would limit a recipient's ability to protect members of its community from sex discrimination. Commenters asked the Department to replace ''immediate and serious threat to health or safety'' with ''ongoing threat to health or safety.'' Other commenters recommended the Department replace ''immediate'' with ''imminent'' and asserted that tying a recipient's own emergency response to an immediate threat is not aligned with current best practices for threat assessment. One commenter stated that law enforcement should address immediate threats because there is not time for a recipient to assess the risk of such threats. In contrast, the commenter explained that an imminent threat is one that is likely to occur soon but not immediately. Another commenter suggested the Department require a recipient to determine that a realistic or credible threat to health or safety is imminent, ongoing, or reasonably likely to occur. One commenter suggested that the Department replace the term ''individualized safety and risk analysis'' with the term ''threat assessment,'' which the commenter stated describes campus threat assessment efforts.

Discussion: The Department has carefully considered the comments and agrees that § 106.44(h) gives recipients the flexibility they need to remove a respondent on an emergency basis when the recipient determines that a respondent poses an imminent and serious threat to the health or safety of members of its community. The Department has considered comments related to the proposed provision's elimination of the requirement in the 2020 amendments that the threat to safety must be ''physical.'' As noted in the July 2022 NPRM, 87 FR 41452, the Department received feedback through the June 2021 Title IX Public Hearing and listening sessions in which postsecondary institutions and safety compliance officers stated that limiting emergency removals to circumstances in which a respondent poses a threat to the physical health or safety of any student or other individuals fails to account for the significant non-physical harms some respondents pose to complainants and other individuals. A serious non-

physical threat to student safety may warrant the emergency removal of a respondent following an individualized assessment. For example, a complainant who is stalked by a respondent may not experience a physical threat, yet the stalking could present an imminent and serious threat to the student's health and safety. The Department concludes that serious, non-physical threats can be assessed as objectively as physical threats. As the stalking example shows, a complainant's assertion that a respondent's participation in a recipient's education program or activity is making them unsafe and causing them significant distress can be a basis for emergency removal if it rises to the level of an ''imminent and serious threat to the health or safety of a complainant.'' The Department further concludes that it is appropriate to address such serious, non-physical threats on the same basis as physical threats.

The Department understands that emergency removal is a significant hardship for a respondent. The final regulations consider both a recipient's mandate to ensure a safe campus community and the rights of a respondent. As the Department explained in the 2020 amendments, when a genuine emergency exists, a recipient must have the authority to remove a respondent while providing notice and an opportunity for the respondent to challenge that decision. 85 FR 30224. The Department further notes that final § 106.44(h) retains the protection in § 106.44(c) of the 2020 amendments requiring a recipient to provide a respondent with notice and an opportunity to challenge the decision immediately following a removal. The Department appreciates the opportunity to clarify that final § 106.44(h) does not permit a recipient to permanently remove someone from its education program or activity. As noted in the 2020 amendments in response to requests that the Department set a time limitation for emergency removals, ''the issue of whether a respondent needs to be removed on an emergency basis should not arise in most cases,'' 85 FR 30230, and as these final regulations clarify, emergency removal is appropriate only when justified by an imminent and serious threat to health and safety. Moreover, emergency removal is not intended to serve as a substitute for grievance procedures that would resolve underlying allegations of sex discrimination. *See id.* at 30229. Section 106.44(h) continues ''to ensure that recipients have the authority and discretion to appropriately handle emergency situations that may arise from allegations'' of sex discrimination, *id.;* however, the Department continues to believe that it is not necessary to specify a maximum amount of time for emergency removal arising from allegations of sex discrimination. *Id.* at 30230. If a recipient seeks permanent expulsion or removal of an individual, the recipient must implement the grievance procedures established in § 106.45, and if applicable § 106.46, prior to taking such action. *See* § 106.45(h)(4). Those grievance procedures require a recipient to establish reasonably prompt timeframes for the major stages of the grievance procedures including a process for extending timeframes for good cause shown, and notice to the parties. *See* § 106.45(b)(4). For all of these reasons, the Department has determined that § 106.44(h) gives recipients the necessary flexibility to ensure a safe campus community while protecting the rights of all students.

The Department disagrees with a commenter's concern that the determination whether a threat is ''serious'' is subjective. It is a familiar term that is adequately flexible to inform an individualized assessment of the unique facts and circumstances of the health and safety risks posed by a respondent. Also, as was true under the 2020 amendments, the Department continues to believe it unnecessary to define what constitutes an emergency or to specify the level of process a recipient must provide through its procedures to challenge an emergency removal, beyond providing the respondent with notice and an opportunity to challenge the decision immediately following the removal. Instead, the Department continues to leave the decision about which specific procedures to employ to a recipient's discretion. *See* 85 FR 30226. As the Department explained in the 2020 amendments, ''[w]e do not believe that prescribing procedures for the post-removal challenge is necessary or desirable, because this provision ensures that respondents receive the essential due process requirements of notice and an opportunity to be heard while leaving recipients flexibility to use procedures that a recipient deems most appropriate.'' *Id.* at 30229 (citing *Goss,* 419 U.S. at 582–83). The Department continues to believe that recipients must have flexibility to address emergency situations and notes that § 106.44(h) appropriately balances the seriousness of a respondent's removal and rights to receive the ''essential'' protections of due process against the risks raised in situations in which emergency removal is justified. In particular, the Department notes that the emergency removal provision contains a number of guardrails to protect against misuse of the provision, including requirements that a recipient must: (1) undertake an individualized safety and risk analysis; (2) determine that an imminent and serious threat to the health or safety of a complainant, or any students, employees, or other persons arising from the allegations of sex discrimination justifies removal; and (3) provide the respondent with notice and an opportunity to challenge the decision immediately following the removal. The Department further declines to specify additional protections that must be provided because, since the 2020 amendments went into effect, many recipients have established procedures that comply with these requirements and through which a respondent may challenge their emergency removal. In addition, because § 106.44(h) appropriately balances a recipient's need for flexibility to address emergency situations and a respondent's due process rights, the Department declines to require recipients to follow the grievance procedures in § 106.45, and if applicable § 106.46, before a respondent is removed on an emergency basis.

The Department has carefully considered comments that the emergency removal standard in the 2020 amendments did not give recipients sufficient flexibility to remove a respondent who poses a serious threat to the health and safety of the campus community. The Department also acknowledges comments that suggested a change to align proposed § 106.44(h) with threat assessment best practices by focusing the emergency removal provision on ''imminent'' rather than ''immediate'' threats. The Department agrees that there is a need to distinguish emergency situations involving ''immediate'' threats from those in which a threat is ''imminent.'' The Department agrees with commenters that ''immediate'' threats involve emergency situations in which there is not time for recipients to assess risks and in which an immediate law enforcement response is necessary. In contrast, ''imminent'' threats are those that while not active, are likely to occur soon but not immediately, and thus are appropriate for an individualized risk assessment. Therefore, the Department has replaced ''immediate threat'' in the proposed regulations with ''imminent threat'' in final § 106.44(h). The Department disagrees with the

commenters who recommended requiring a threat to be ''ongoing'' to justify emergency removal because a threat may present an imminent and serious risk to safety that justifies emergency removal, even if it is not shown to be an ongoing threat.

Regarding the regulation's requirement that recipients undertake an individualized risk assessment, the Department recognizes that different recipients use different terms to describe their individualized assessments. Regardless of the precise terms or phrases used, recipients will satisfy the requirement in § 106.44(h) if they have a process to conduct an analysis of safety and risk that is particular to the respondent and circumstances at issue, regardless of the words recipients use to describe their assessment.

Finally, commenters who asserted that proposed § 106.44(h) set too high a bar to protect members of the recipient's community from sex discrimination misapprehend the purpose of emergency removal, which is not, as these commenters suggested, to protect against sex discrimination, rather, it is to protect against an imminent and serious threat to health or safety that arises from allegations of sex discrimination. The remaining provisions in final § 106.44 and the grievance procedures requirements in §§ 106.45 and 106.46 afford recipients sufficient tools to adequately protect against sex discrimination allegations that do not raise a concern of imminent or serious threats to health or safety.

Changes: The Department has revised § 106.44(h) to replace ''immediate'' with ''imminent'' and added the words ''a complainant or any'' before ''students, employees, or other persons'' to clarify that the word ''students'' does not exclude complainants.

Sex Discrimination and Protected Speech

Comments: Some commenters objected to allowing a recipient to permit emergency removal for all forms of alleged sex discrimination. One commenter objected to the Department's proposal to expand the basis for emergency removal beyond sexual harassment to other forms of alleged sex discrimination because, the commenter asserted, it would be difficult to identify sex discrimination other than sex-based harassment that would justify emergency removal.

Some commenters expressed concern that respondents could be subjected to emergency removal for expressing their viewpoint, such as engaging in speech questioning or criticizing the inclusion of transgender students in single-sex spaces and activities. One commenter alleged that proposed § 106.44(h) would result in the emergency removal of Christian, conservative, and pro-life students from campus when other students who do not share their views assert that the disagreement causes them distress. Another commenter stated that speech alone cannot pose imminent danger to individuals.

Discussion: The Department has carefully considered the comments regarding the appropriateness of emergency removal for all forms of sex discrimination. The Department declines to limit § 106.44(h) to sex-based harassment, because the nondiscrimination mandate in Title IX—and therefore the basis for a recipient's response—applies to all forms of sex discrimination, including circumstances involving sex discrimination other than sex-based harassment. While the Department recognizes that conduct that rises to the level of an ''imminent and serious threat to the health or safety'' of members of a recipient's communities may often take the form of sex-based harassment, the Department declines to limit the scope of § 106.44(h) to sex-based harassment in order to give recipients flexibility to address circumstances in which conduct falls short of the definition of sex-based harassment but still poses an imminent and serious threat to the health or safety of members of a recipient's communities. The Department has consistently recognized that when a genuine emergency exists, a recipient must have the authority to remove a respondent. *See, e.g.,* 85 FR 30224.

The Department reiterates that emergency removal is intended to apply only to those situations that pose an imminent and serious threat to health and safety of a complainant or any students, employees, or other persons arising from the allegations of sex discrimination, an intentionally high standard. The Department does not anticipate that speech that simply and even strongly articulates a point of view on ethical, social, political, or religious topics would meet this standard even though others may find that speech offensive or objectionable. Indeed, the Department is unaware of circumstances in which such speech has been the basis for removal under the lower standard set forth in § 106.44(c) of the 2020 amendments, which permits removal for even non-serious immediate threats to physical health or safety. *See also* 87 FR 41452 (explaining that the Department added the term ''serious'' in the proposed regulations to confirm that non-serious threats do not warrant emergency removal). In any event, the Department has long made clear that Title IX is enforced consistent with the requirements of the First Amendment, and nothing in these final regulations requires a recipient to restrict any rights that would otherwise be protected from government action by the First Amendment. *See* 34 CFR 106.6(d) (''Nothing in this part requires a recipient to . . . [r]estrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution''); *see also* discussion of Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2) (Section I.C). For the same reasons, the Department declines to amend § 106.44(h) because of some commenters' concern that individuals could be subjected to emergency removal for expressing their viewpoints.

The Department disagrees with one commenter's claim that the 2020 amendments permitted emergency removal only for an individual's nonspeech actions and did not permit emergency removal for sex-based harassment accomplished through speech. The 2020 amendments specifically recognized emergency removal as an option for threats of violence and did not limit the provision to physical conduct. The 2020 amendments also provided that the underlying sexual harassment from which a threat emanates need not be limited to sexual assault or rape but may be verbal sexual harassment. 85 FR 30225. The Department has therefore consistently recognized that threats beyond acts of physical violence may justify emergency removal.

Changes: None.

Partial Emergency Removals and Supportive Measures

Comments: Some commenters asked about the distinction between emergency removal and supportive measures that may be provided under § 106.44(g) that would burden a respondent, including those that would remove a respondent from a part of a recipient's education program or activity during the pendency of a recipient's grievance procedures. Commenters asked whether the requirements for emergency removal, including the opportunity to challenge the removal, would need to be met when a recipient institutes a supportive measure that removes a respondent from a specific program or activity but not from a recipient's entire education program or activity. Some commenters favored allowing these kind of ''partial''

emergency removals while other commenters opposed it. One commenter stated that recipients currently do not know whether partial emergency removal is permitted under the 2020 amendments and requested clarification.

Some commenters stated that proposed § 106.44(h) should permit greater flexibility for a recipient to remove a respondent for the safety of the complainant and the recipient's educational community, while allowing the respondent to continue to participate in a modified way. One commenter asked the Department to modify proposed § 106.44(h) to include language requiring a recipient to provide respondents with alternative access to their academic classes, work, and responsibilities, which the commenter stated would be consistent with respondents' due process rights.

Multiple commenters asked the Department to clarify when removal from part of a recipient's education program or activity would be permitted and provided several hypothetical scenarios.

Discussion: The Department has determined that, together with the requirements of §§ 106.44, 106.45, and if applicable 106.46, allowing emergency removal consistent with the requirements of § 106.44(h) provides appropriate flexibility to recipients to respond to emergency situations. *See, e.g.,* 87 FR 41452. The 2020 amendments allow a recipient to remove a respondent on an emergency basis from a part of a recipient's education program or activity, rather than the entire program or activity, in appropriate circumstances. *See* 85 FR 30232 (''where the standards for emergency removal are met . . . the recipient has discretion whether to remove the respondent from all the recipient's education programs and activities, or to narrow the removal to certain classes, teams, clubs, organizations, or activities''). The Department agrees with commenters who suggested that this option, when sufficient to address an imminent and serious safety risk, may reduce the burden that an emergency removal from the entire program places on a respondent. For that reason, under § 106.44(h) of the final regulations, a recipient retains discretion to remove a respondent on an emergency basis from one or more parts of its education program or activity, as long as the recipient meets the other requirements of final § 106.44(h).

The Department acknowledges that some commenters expressed confusion over when a recipient would remove a respondent from a part of its education program or activity as an emergency removal that meets the requirements of § 106.44(h) and when a recipient would do so as a supportive measure consistent with the requirements of proposed § 106.44(g)(2). In some cases, a partial removal may be appropriate as a supportive measure, as long as it is consistent with the requirements of § 106.44(g) and the definition of supportive measures in § 106.2. In emergency situations, a recipient could remove a respondent using the emergency removal procedures under § 106.44(h). With emergency removal, a recipient would be permitted to remove a respondent from all or part of its education program or activity, as long as it affords the respondent notice and an opportunity to challenge the decision immediately following the removal.

Finally, as clarified in the preamble to the 2020 amendments, in many cases a recipient will ''accommodate students who have been removed on an emergency basis with alternative means to continue academic coursework during a removal period,'' 85 FR 30226, and the post-removal notice and opportunity to challenge a removal required under final § 106.44(h) provides respondents adequate opportunity to raise concerns about continued access to coursework.

Changes: None.

Emergency Removal and Other Legal Requirements

Comments: One commenter asked the Department to clarify that disclosure of information related to an emergency removal is permitted to comply with applicable Federal and State statutes, regulations, and agency policies related to misconduct investigations, outcomes, and administrative actions. Other commenters asked the Department to clarify how proposed § 106.44(h) relates to the Clery Act emergency removal provision and whether proposed § 106.44(h) would impact a postsecondary institution's obligations under the Clery Act to restore and preserve campus safety. Some commenters asked the Department to confirm that if recipients can take immediate action consistent with their policies to address discrimination prohibited under other laws, proposed § 106.44(h) would not preclude them from taking comparable action to address sex discrimination. Commenters also asked the Department to clarify that a decisionmaker cannot take into consideration the emergency removal of a student when determining responsibility in any related sex discrimination grievance procedures under § 106.45, and if applicable § 106.46, which would ensure that a respondent enjoys the presumption of non-responsibility.

Some commenters supported proposed § 106.44(h) because it would provide recipients greater flexibility to remove a respondent on an emergency basis following an individualized assessment while continuing to recognize that emergency removal does not modify rights under the IDEA, Section 504, or the ADA. Other commenters asked the Department to further clarify the relationship between proposed § 106.44(h) and the IDEA and Section 504 requirements for changes to the placement of a student with a disability, including whether a recipient must conduct any required manifestation determination review before removing a respondent who is a student with a disability under § 106.44(h). One commenter suggested the Department modify proposed § 106.44(h) to provide that a recipient may make an initial determination that a respondent student violated the code of conduct solely for purposes of conducting an MDR.

Discussion: As noted in the 2020 amendments and as explained in the discussion of the Framework for Grievance Procedures for Complaints of Sex Discrimination (Section II.C), these final regulations may impose different requirements than Title VI or Title VII, but they do not present an inherent conflict with those statutes. *See* 85 FR 30439. Therefore, while a recipient may be able to take immediate action to address other discrimination under other laws following procedures that would not satisfy the requirements of § 106.44(h), the Department continues to believe that the emergency removal requirements in these final regulations are appropriate for addressing sex discrimination, even if that means that a recipient is required to handle different types of discrimination under different procedures. *See* 85 FR 30226. The Department has determined that for Title IX purposes, a lower threshold would not appropriately balance a recipient's need to remove a respondent posing an immediate threat with the need to ensure that such action is not inappropriately used to bypass the general prohibition on imposing discipline without first following a recipient's grievance procedures' requirements. And as explained in the discussion of § 106.8(b), these final regulations do not alter requirements under FERPA or its implementing regulations, or the Clery Act or its implementing regulations, and disclosures pursuant to such

requirements generally will be permitted under § 106.44(j). For additional information on the circumstances under which a recipient may disclose personally identifiable information obtained in the course of complying with this part, see the discussion of § 106.44(j).

The Department acknowledges commenters' views on § 106.44(h), including its continued recognition of a respondent's right to an assessment and other disability-related rights under the IDEA, Section 504, and the ADA. Emergency removal under § 106.44(h) provides flexibility to address imminent and serious threats to individual safety in a recipient's education program or activity, including threats to non-physical health, while safeguarding the rights of a respondent under applicable law. The Department made a technical change to final § 106.44(h) to replace the reference and citation to Title II of the ADA with a reference to the ADA and a citation to 42 U.S.C. 12101 *et seq.* The Department made this change to clarify that § 106.44(h) does not modify any rights under any part of the ADA.

As explained in greater detail in the discussion of § 106.8(e), the IDEA and Section 504 protect the rights of students with disabilities in elementary school and secondary school. The implementing regulations for the IDEA and Section 504 require that a group of persons, known as the IEP team or Section 504 team, is responsible for making individualized determinations about what constitutes a FAPE for each student with a disability. Section 106.44(h) does not modify any rights under the ADA, IDEA, or Section 504, including the right to a manifestation determination review as provided for in IDEA in some cases, and a recipient might have to treat a respondent student with a disability subject to emergency removal differently than a respondent student without a disability to comply with applicable Federal disability laws. 85 FR 30228. Nothing in § 106.44(h) prevents a recipient from involving a respondent student's IEP team before making an emergency removal decision, and § 106.44(h) does not require a recipient to remove a respondent when the recipient has determined that the threat posed by the respondent is a manifestation of a disability and IDEA requirements would thus constrain the recipient's discretion to remove the respondent. 85 FR 30229. Moreover, to ensure that the regulations preserve the rights of students with a disability at the elementary school and secondary school levels, the final regulations include § 106.8(e), which requires a recipient's Title IX Coordinator or designee to consult with one or more members, as appropriate, of the student's IEP or Section 504 team about the student in the course of complying with § 106.45.

Finally, the Department appreciates the opportunity to clarify that emergency removal is not ''relevant evidence'' that can be considered in reaching a determination under § 106.45(b)(6) and (h)(1).

Changes: The Department changed the citation of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131–12134, to the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*

9. Section 106.44(i) Administrative Leave

Comments: Some commenters expressed general support for proposed § 106.44(i), including the recognition that placing a student employee respondent on administrative leave may be appropriate in some cases as a supportive measure. One commenter asked the Department to clarify that a recipient may place volunteers, agents, and other persons authorized by the recipient to provide an aid, benefit, or service on administrative leave.

Some commenters raised due process concerns with proposed § 106.44(i). For example, one commenter likened administrative leave to emergency removal, both of which the commenter asserted would prioritize a recipient's reputation over a respondent's due process rights. Another commenter stated that proposed § 106.44(i) would permit an action that is punitive in nature and presumes an employee respondent's responsibility before or during an investigation. This commenter asked the Department to require a recipient to afford an employee the protections provided under proposed § 106.45, and if applicable § 106.46, before placing the employee on administrative leave.

One commenter observed that administrative leave can be disruptive to an employee respondent's work, damage the employee respondent's reputation, and make an employee respondent vulnerable to targeting by individuals on a recipient's campus. Another commenter asked the Department to clarify that a recipient can resolve workplace issues with employee respondents through its existing faculty and staff processes.

Discussion: Section 106.44(i) grants a recipient discretion to place respondents who are employees on administrative leave during the pendency of a recipient's grievance procedures. The Department disagrees with commenters who asserted that allowing administrative leave presumes a respondent's responsibility. The Department reiterates that a respondent may only be found responsible for sex discrimination under Title IX upon the conclusion of a recipient's grievance procedures under § 106.45, and if applicable § 106.46. The Department appreciates the opportunity to clarify that nothing in § 106.44(i) interferes with a recipient's discretion to place respondents who are employees, including student employees, on administrative leave from their employment responsibilities. This discretion extends only to a student-employee's employment responsibilities during the pendency of the recipient's grievance procedures; a recipient must comply with § 106.45, and if applicable § 106.46, before any disciplinary sanctions are imposed on a student-employee respondent, and supportive measures may not be provided for punitive or disciplinary reasons. Section 106.44(i) of these final regulations is consistent with the Department's position in the preamble to the 2020 amendments that a recipient may place a student-employee respondent on administrative leave if it would not violate other regulatory provisions to do so. 85 FR 30237.

The Department disagrees that proposed § 106.44(i) should be modified to state that a recipient may place volunteers, agents, and other persons authorized by the recipient to provide an aid, benefit, or service on administrative leave. Although the 2020 amendments and § 106.44(i) do not define administrative leave, the Department continues to understand administrative leave as a temporary separation from one's employment, generally with pay and benefits, and thus, the term applies to a recipient's employees. *See* 85 FR 30236. As explained in the discussion of the training requirements in § 106.8(d), given the range of employment arrangements and circumstances across recipients in States with differing employment laws, individual recipients are best situated to determine whether volunteers, agents, and other persons authorized by the recipient to provide an aid, benefit or service are employee respondents to whom § 106.44(i) applies. The Department notes, however, that even if such individuals are not designated as employees, nothing in § 106.44(i) restricts a recipient from following its policies related to administrative leave with respect to other individuals (including volunteers, agents, and the like), provided that the policies comply with these final regulations and other

applicable laws. Nor does § 106.44(i) interfere with a recipient's authority to remove a volunteer, agent, or other authorized person from their position as a supportive measure for non-punitive, non-disciplinary reasons to protect the safety of a party or the recipient's educational environment, consistent with the requirements of § 106.44(g). Likewise, § 106.44(i) does not interfere with a recipient's authority to remove a volunteer, agent, or other authorized person from their position on an emergency basis when such removal is consistent with the requirements of § 106.44(h).

The Department has carefully considered the comments expressing concerns regarding due process in connection with administrative leave. The Department notes that § 106.44(i) is substantially the same as § 106.44(d) of the 2020 amendments, with only minor changes discussed in the July 2022 NPRM. *See* 87 FR 41452. Consistent with its position in the preamble to the 2020 amendments, the Department desires to give each recipient flexibility to decide when administrative leave is appropriate, considering its existing obligations under State laws and employment contracts. *See* 85 FR 30236. Section 106.44(i) does not elevate a recipient's reputation over an employee respondent's due process rights. Nor is an employee placed on administrative leave denied due process. First, if administrative leave is used as a supportive measure under § 106.44(g), the recipient must comply with the procedural protections in that provision. Because § 106.44(g)(2) requires recipients to ensure that supportive measures do not unreasonably burden a party, administrative leave as a supportive measure would generally be paid. Second, if a recipient seeks an emergency removal under § 106.44(h), then those procedural protections apply.

Nonetheless, the Department acknowledges that there could be circumstances in which a recipient determines it must place an employee on administrative leave for reasons other than supportive measures or emergency removal. As explained in the 2020 amendments, the Department acknowledges that some State laws allow or require an employee to be placed on administrative leave, or its equivalent, and § 106.44(i) does not preclude compliance with such State laws while a Title IX investigation is pending. *See* 85 FR 30236. Similarly, § 106.44(i) does not interfere with a recipient's contractual obligations, such as under a collective bargaining agreement, or obligations to comply with the recipient's own policies related to administrative leave. In such circumstances in which administrative leave is used outside of supportive measures or emergency removal, the final regulations provide recipients flexibility to use their existing procedures related to administrative leave.

In addition, as the Department previously explained, it interprets these Title IX regulations, including § 106.44(i), in a manner that complements an employer's obligations under Title VII for responding to matters involving sex-based harassment and discrimination. *See* 85 FR 30237. The Department notes that other requirements in the U.S. Constitution, Federal or State law, or collective bargaining agreements may limit a recipient's use of administrative leave, and nothing in § 106.44(i) requires a recipient to place an employee on administrative leave during the pendency of the recipient's grievance procedures. Section 106.44(i) is not intended to override or modify rights under other laws or collective bargaining agreements.

As explained in the preamble to the 2020 amendments, the Department notes that administrative leave under these regulations is temporary, and § 106.44(i) only applies ''during the pendency of the recipient's grievance procedures,'' which have been crafted to protect due process rights. Recipients are not precluded from applying applicable administrative leave laws, agreements, or policies at other times, but such application is outside the scope of § 106.44(i). *See* 85 FR 30236–37. The Department notes, however, that placing an employee on administrative leave does not deprive the employee of other rights available under Title IX. If, for example, an employee believes that they have been subject to sex discrimination or retaliation through the application of an employer's administrative leave policy, the employee would have recourse under Title IX and these final regulations. *See* §§ 106.45, 106.46, 106.71.

As stated in the 2020 amendments, the Department acknowledges that being placed on administrative leave may constitute a hardship for an employee. *See* 85 FR 30236. But such leave may be necessary to ensure that a recipient's education program or activity is operated consistent with Title IX's nondiscrimination mandate, such as when a recipient determines that a leave of absence is an appropriate supportive measure under § 106.44(g) or necessary to respond to an imminent and serious threat to health or safety under § 106.44(h). And in those circumstances, a recipient may impose administrative leave only if it meets the substantive and procedural requirements of § 106.44(g) or (h). The Department also acknowledges that placing an employee on administrative leave may impact the workplace, but for the reasons described above, the Department maintains that a recipient should have flexibility not only to use administrative leave as a supportive measure or in the context of emergency removal, but also to comply with other State law or contractual obligations, and the recipient would be in the best position to know whether administrative leave is appropriate.

Finally, the Department declines to modify the administrative leave provision to permit a recipient to address an employee respondent's employment issues solely through its existing faculty and staff employment or discipline processes. The July 2022 NPRM acknowledged stakeholders' requests that the Department exclude complaints against employee respondents from the various requirements of its Title IX regulations and declined to propose changes to its grievance procedure requirements in response to these concerns. *See, e.g.,* 87 FR 41458–59. The Department also declines to do so now because extending the requirements of these Title IX regulations to employee respondents ensures that recipients meet their obligations under Title IX. As the Department explained in the 2020 amendments, nothing in these Title IX regulations precludes a recipient from taking additional action under an employee code of conduct or other employment policies, *see* 85 FR 30440, or from honoring an employee's rights guaranteed by a collective bargaining agreement or employment contract, as long as doing so does not prevent the recipient from fulfilling its obligations under the Department's Title IX regulations, *id.* at 30442.

Changes: To align with a change made in § 106.44(h), the Department changed the citation of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131–12134, to the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*

10. Section 106.44(j) Prohibited Disclosures of Personally Identifiable Information

Comments: The Department received numerous comments seeking clarification about a recipient's duty to maintain the confidentiality of information obtained while complying with this part. Many commenters supported proposed § 106.44(j) but asked the Department to provide the nondisclosure protections of this

proposed paragraph beyond the context of informal resolution processes, grievance procedures under § 106.45, and if applicable § 106.46, or actions required under proposed § 106.44(f)(6). These commenters asserted that failing to specify protections against disclosure for provisions outside of those listed in proposed § 106.44(j) could chill students and employees from exercising their rights under Title IX or this part with regard to the provisions for which the Department did not specifically articulate nondisclosure protections.

Many commenters raised specific concerns about disclosures of information related to a student's or an employee's sexual orientation, gender identity, or pregnancy or related conditions, stating that, without more clarity as to the intended scope of protections against third-party disclosures, the chilling effect on students or employees seeking to exercise their rights under Title IX would hinder a recipient's ability to operate its education program or activity free from sex discrimination and deny the student equal access to education. For example, one commenter asserted that recipients should not be permitted to share personal details relating to students' healthcare while coordinating or implementing remedies. One commenter asked the Department to clarify how to protect the privacy and safety of LGBTQI+ students and employees in States where disclosure of records of their sexual orientation or gender identity could result in harm and in situations in which students or employees do not wish to have their sexual orientation or gender identity disclosed. One commenter asked the Department to emphasize that Title IX's protections preempt State laws and override FERPA disclosures when disclosure would create a hostile environment for LGBTQI+ students and to clarify that forced disclosure of a student's sexual orientation or gender identity without their consent violates Title IX.

Commenters also pointed out that recipients' or employees' actions to comply with the recipient's obligations under proposed §§ 106.40 and 106.57 could be thwarted by fear that disclosures of such actions, which would be outside of the scope of proposed § 106.44(j), could subject employees to civil or criminal penalties. Thus, while many commenters supported the Department's proposed relocation of the prohibition on disclosures to proposed § 106.44(j) and out of the retaliation provision, the commenters felt more clarity was needed with regard to prohibitions on disclosures beyond the enumerated circumstances of proposed § 106.44(j). Numerous commenters asked the Department to add regulatory text stating that nondisclosure protections apply to all information obtained by a recipient in complying with this part.

Some commenters raised a concern that proposed § 106.44(j) would prevent disclosures required to comply with Federal grant award terms or applications or with other Federal regulations. The commenters asked the Department to add an exception to proposed § 106.44(j) to permit disclosures to a government entity as required by Federal law, regulations, or grant award terms and conditions. Additionally, several commenters asked the Department to address the interaction between Title IX, FERPA, and HIPAA, and some commenters asked for clarification regarding the disclosure of information that is permissible under FERPA but could subject a student or employee to prosecution or create a hostile environment by placing a student's health or safety in danger.

Some commenters opposed proposed § 106.44(j) because they believed that respondents are entitled to know the identity of all complainants, witnesses, and other participants without limitation or exception. Some commenters asked whether the respondent has the right to remain anonymous. Other commenters raised concerns about the impact this proposed provision would have on informal resolution procedures, and one commenter argued that proposed § 106.44(j) would impose an impermissible ''gag order'' on parties. Finally, several commenters believed that proposed § 106.44(j) would keep parents uninformed of their child's involvement in important matters, such as being a party to a discrimination complaint.

Discussion: The Department acknowledges the numerous commenters who expressed their views on proposed § 106.44(j) and on the importance of a recipient maintaining the confidentiality of information obtained in the course of complying with this part. After careful consideration of these comments, the barriers that disclosure of personally identifiable information can create to a recipient's ability to effectuate Title IX, and the various proposed provisions in the July 2022 NPRM related to disclosure prohibitions, the Department agrees with commenters who asked the Department to provide clarity regarding a recipient's obligation under Title IX to limit the disclosure of information that a recipient obtains in the course of complying with this part. The Department notes that commenters expressed concerns related to disclosure that are discussed in several other sections of this preamble, including the discussions of §§ 106.31, 106.40, 106.44(c), and 106.44(g), underscoring the need for the Department to clarify the scope of the limitations on disclosures in a consistent manner. As a result, the Department has revised the provision so that final § 106.44(j) protects all personally identifiable information obtained by a recipient in the course of complying with the Department's Title IX regulations, with some exceptions as detailed below, in order to protect the Title IX rights of students and employees and to help ensure that a recipient's education program or activity is free from sex discrimination.

This revision addresses the concern raised by many commenters that, by limiting proposed § 106.44(j) to specific and narrow circumstances, the Department failed to provide protections from disclosures in other circumstances and that such protections are necessary to effectuate Title IX for the same reasons as those articulated for the necessity of protecting the information within the scope of proposed § 106.44(j). For instance, the scope of proposed § 106.44(j) did not include implementing reasonable modifications under § 106.40(b)(3)(ii), but if a student made a complaint of sex discrimination because a reasonable modification was not provided, proposed § 106.44(j) would have applied. However, the privacy interest in personally identifiable information regarding a reasonable modification is the same and not dependent on whether a complaint is filed. Thus, after careful consideration of commenters' views regarding the importance of disclosure protections for personal information beyond the enumerated contexts of proposed § 106.44(j), the Department is revising proposed § 106.44(j) because the concerns that motivated proposed § 106.44(j) are implicated by other personal information obtained by a recipient in the course of its compliance with Title IX.

The Department understands that a recipient cannot fulfill its duty to operate its education program or activity free from sex discrimination if members of a recipient's educational community are not aware of the circumstances under which personally identifiable information shared with a recipient as part of an exercise of their rights under Title IX can be disclosed because there may be a chilling effect on reporting or

participating in the grievance procedures that could then impair a recipient's ability to carry out those obligations. *See* 87 FR 41452 (explaining that, to effectuate a recipient's duty under Title IX to operate its education program or activity free from sex discrimination, a recipient must refrain from disclosures that would be likely to chill participation in the recipient's efforts to address sex discrimination). This is true regardless of whether the recipient obtains the information in the course of, for example, conducting an informal resolution process, implementing grievance procedures, providing supportive measures, coordinating or implementing remedies, or providing reasonable modifications for pregnancy or related conditions. By virtue of its obligations under Title IX, a recipient will obtain highly sensitive personal information about individuals participating in its education program or activity, including an allegation that a specific person experienced or engaged in sex-based harassment or information related to a specific person's pregnancy or related condition, sexual orientation, gender identity, or other sex characteristic. The Department maintains that when exercising any of their rights or engaging in any of the procedures under Title IX or this part, individuals—or, in the case of minors under the age of 18 in elementary schools or secondary schools, their parents or guardians—have a reasonable expectation that related personally identifiable information shared with a recipient generally will not be disclosed to third parties.

As explained in the July 2022 NPRM, proposed § 106.44(j) was based on § 106.71(a) of the 2020 amendments, which the Department explained was added because unnecessarily exposing the identity of complainants, respondents, and witnesses ''may lead to retaliation against them.'' 87 FR 41453 (quoting 85 FR 30537). As explained in the July 2022 NPRM, the Department sought to relocate the prohibition on disclosures in § 106.71(a) outside of the retaliation provision, because ''it relates to a recipient's broader responsibilities to address information about conduct that may constitute sex discrimination in its program or activity.'' 87 FR 41452. The Department believed that this move would reduce confusion and enhance clarity. 87 FR 41453. Moreover, proposed § 106.44(j) sought to apply § 106.71(a) of the 2020 amendments beyond parties and witnesses to include other participants in the Title IX procedures, such as advisors, parents, guardians, other authorized representatives, interpreters, and notetakers. The Department posited that some of these individuals may be reluctant to participate in Title IX processes without the nondisclosure protections of proposed § 106.44(j) and explained that their ''lack of participation could . . . impair the recipient's efforts to address information about conduct that may constitute sex discrimination.'' 87 FR 41453. Final § 106.44(j) reflects these same concerns that unnecessary disclosures can have a chilling effect on the reporting of sex discrimination that could impair a recipient's ability to carry out its Title IX obligation to maintain an educational environment free from sex discrimination. Additionally, unauthorized disclosures of personally identifiable information can lead to sex-based harm, including harassment, retaliation, and other forms of discrimination.

The Department has adopted the phrase ''personally identifiable information'' in final § 106.44(j) rather than ''identity,'' which was the term in proposed § 106.44(j). While it is not necessary to adopt a specific definition of the term ''personally identifiable information'' for final § 106.44(j) because of recipients' general familiarity with the term, as in other contexts, personally identifiable information is information that would tend to reveal the identity of an individual. After consideration of the comments, the Department realized that the term ''identity'' in proposed § 106.44(j) would not sufficiently protect an individual's interest in the confidentiality of private information, as it could be interpreted to simply protect an individual's name rather than information that would reveal an individual's identity. Thus, the Department adopted the more comprehensive term of ''personally identifiable information'' in the final regulations.

The Department emphasizes that this paragraph covers personally identifiable information obtained by a recipient in the course of complying with this part, which includes its obligation to maintain an environment free from sex discrimination. Thus, a recipient may not disclose any personally identifiable information related to, for example, a supportive measure or a request for a reasonable modification because of pregnancy or related conditions under § 106.40(b)(3), unless the recipient has obtained consent or one of the other exceptions is met, and, as with proposed § 106.44(j), this paragraph also applies to personally identifiable information obtained by a recipient with regard to complainants, respondents, or witnesses, or other participants in informal resolution processes, grievance procedures under § 106.45, and if applicable § 106.46.

Section 106.44(j) includes five exceptions to the general prohibition on disclosure of personally identifiable information. The Department reminds recipients that, even when an exception applies, a disclosure cannot be made for retaliatory purposes per § 106.71.

First, as in proposed § 106.44(j)(1), final § 106.44(j)(1) permits disclosure when the recipient has obtained prior written consent to the disclosure. The Department reworded this provision to add the phrase ''from a person with the legal right to consent to the disclosure'' to recognize that there are various Federal and State laws that may govern who has the legal authority to consent to disclosure of personally identifiable information depending on factors such as the age of the person whose personally identifiable information is at issue, whether the person whose personally identifiable information is at issue is in attendance at an institution of postsecondary education, and whether the personally identifiable information is in an education record. Final § 106.44(j)(1) clarifies that a recipient must obtain consent from a person with legal authority under applicable law, and, if that person is not the same person whose personally identifiable information is at issue, the recipient need not also obtain consent from the person whose personally identifiable information is at issue. For example, if a parent has the legal right to consent to disclosure of their minor child's personally identifiable information, the recipient need only obtain consent from the parent. This exception is to be read consistently with FERPA, and if the personally identifiable information is in an education record, the consent requirements of FERPA apply. Under FERPA, if a student is under the age of 18 and attending an elementary school or a secondary school, the right to consent to the disclosure lies with the student's parent or guardian. If the personally identifiable information is not in an education record, then there may be applicable State law requirements governing consent to the disclosure of personally identifiable information.

The Department added the second exception—final § 106.44(j)(2)—to address commenters' confusion regarding disclosures to parents. As stated elsewhere in this preamble, the

Department supports strong, communicative relationships between recipients and parents. This exception clarifies that this paragraph does not prohibit any disclosure to a parent, guardian, or other authorized legal representative who has the legal right to receive disclosures on behalf of the person whose personally identifiable information is at issue. As with final § 106.44(j)(1), this provision is intended to allow for application of legal rights conferred by other Federal laws and regulations, such as FERPA, and by applicable State laws. For example, if a student is a minor under State law but an ''eligible student'' under FERPA because they are attending a postsecondary institution, FERPA does not permit disclosures to parents unless the student provides prior written consent or one of FERPA's permissive exceptions to FERPA's written consent requirement applies. However, for students under the age of 18 years old in elementary school or secondary school, the student's parent has the legal right under FERPA to inspect and review their child's education record.

Final § 106.44(j)(3) is consistent with proposed § 106.44(j)(4)—to carry out the purposes of the Department's Title IX regulations, including action taken to address conduct that reasonably may constitute sex discrimination under Title IX in the recipient's education program or activity. The Department added the word ''reasonably'' for consistency with these final regulations. As an example of final § 106.44(j)(3), in the postsecondary context, a recipient may inform a professor of a supportive measure that a student is receiving that is related to the professor's classroom to ensure its implementation, but the recipient would not be permitted to disclose personally identifiable information about any related complaint of sex-based harassment that is not necessary to implement the supportive measure, unless the student whose personally identifiable information is at issue provided their prior written consent or one of the other exceptions is applicable. For more information about nondisclosure protections regarding supportive measures, see the discussion of § 106.44(g)(5). Additionally, § 106.44(j)(3) permits disclosures required or permitted by §§ 106.44, 106.45, or 106.46 because such disclosures carry out the purposes of 34 CFR part 106 by fully implementing Title IX's nondiscrimination mandate and ensuring fair and equitable resolution of complaints of sex discrimination. For example, this exception allows disclosures under §§ 106.45(f)(4) and 106.46(e)(6), which require recipients to provide parties with an equal opportunity to access to the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible, and under § 106.46(e)(3), which allows, but does not require, a postsecondary institution to permit parties to have persons other than the party's advisor present at any meeting or proceeding. As explained in the discussion of § 106.46(e)(3), the Department notes that, even though such a disclosure is permitted by § 106.44(j)(3), the presence of that person must not lead to a disclosure of evidence that would conflict with FERPA.

The fourth exception—final § 106.44(j)(4)—is based on proposed § 106.44(j)(3), but the Department modified this exception to cover Federal law, Federal regulations, or the terms and conditions of a Federal award, including a grant award or other funding agreement. As also explained in the discussion of § 106.44(g)(5), the Department agrees with commenters who were concerned that proposed § 106.44(j)(3) would have been interpreted as prohibiting disclosures required by the terms and conditions of a Federal grant or award, which was not the Department's intent. The Department thus added language in final § 106.44(j)(4) to clarify the permissibility of such disclosures. The Department notes that the terms and conditions of a Federal award, including a grant award or other funding agreement, must also be in accordance with FERPA in order for a recipient.to make a disclosure under such award. The Department has focused this exception on Federal law and addresses State law in the fifth exception. Additionally, the Department added language specifying Federal regulations to this exception to address commenters' questions about the interaction between Title IX, FERPA, and HIPAA, and their implementing regulations, and to clarify that this exception permits disclosure of personally identifiable information that is required under those statutes, as well as other Federal statutes, and their accompanying regulations. Permissive FERPA disclosures are generally permitted under § 106.44(j)(5), as discussed next.

Final § 106.44(j)(5), consistent with proposed § 106.44(j)(2), allows disclosures that are permitted, but not required, under FERPA, to the extent such disclosures are not otherwise in conflict with Title IX or the Department's Title IX regulations. The Department added this clarifying language in response to commenters' questions about disclosures that may be permitted under FERPA but that would nonetheless conflict with Title IX, such as by causing sex-based discrimination; by chilling reporting under Title IX; for retaliatory, harassing, or other discriminatory purposes; or by hindering the recipient's ability to operate its education program or activity free from sex discrimination. For example, FERPA permits, but does not require, a recipient to disclose personally identifiable information from a student's education record to third parties without prior written consent if the disclosure meets one or more of the exceptions outlined in 20 U.S.C. 1232g(b), (h) through (j), or 34 CFR 99.31.[39] Even if one of those exceptions is met, the recipient would nonetheless be prohibited from making that disclosure if, for example, the disclosure was for the purpose of retaliating against the student whose personally identifiable information was at issue. In response to commenters' questions, the Department notes that disclosure of personally identifiable information that creates a hostile environment as defined under § 106.2 would be prohibited under these regulations. While determinations of a hostile environment would be made following a case-by-case review of specific facts, it could be a violation of this provision if a school were to disclose personally identifiable information about a student's sexual orientation or gender identity broadly to other students or employees, which resulted in the student experiencing sex-based harassment.

Additionally, final § 106.44(j)(5) permits disclosures required by State or local law to the extent such disclosures are not otherwise in conflict with Title IX or the Department's Title IX regulations. The Department added this language to the regulatory text in response to commenters' questions about the application of State and local laws and regulations regarding disclosures of personally identifiable information obtained by a recipient in the course of complying with Title IX. As explained in the discussion of § 106.6(b) and the July 2022 NPRM, State and local laws that conflict with

[39] The Department has previously issued guidance to remind school officials of their obligations to protect student privacy under FERPA. *See, e.g.,* U.S. Dep't of Educ., Student Privacy Policy Office, Family Educational Rights and Privacy Act: Guidance for School Officials on Student Health Records (Apr. 2023), *https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FamilyEducationalRightsandPrivacyAct-GuidanceforSchoolOfficialsonStudentHealthRecords.pdf.*

Title IX and 34 CFR part 106 are preempted, *see* § 106.6(b); 87 FR 41405, and these final regulations do not alter the application of that well-established doctrine to Title IX or this part. Consistent with § 106.6(b) and with this paragraph, disclosures required under State or local law that would prevent or impede a recipient from carrying out its Title IX obligations as enumerated in this part are not exempt from the nondisclosure obligation under 106.44(j). However, to the extent disclosures required under State or local law do not prevent a recipient from carrying out its Title IX obligations, § 106.44(j)(5) clarifies that such disclosures are generally permitted. For example, this exception would permit recipients to disclose information about an employee accused of sexually assaulting a student pursuant to State mandatory reporting laws because doing so does not conflict with Title IX or 34 CFR part 106. As with the other provisions of this paragraph, a recipient must ensure compliance with FERPA or any other applicable Federal laws and regulations in making such disclosures.

With regard to other comments received on proposed § 106.44(j), the Department disagrees with the assertion that respondents are entitled to know the identity of all complainants, witnesses, and other participants without limitation, as that is not consistent with the Department's longstanding approach,[40] including the approach taken in the 2020 amendments. *See* 85 FR 30133–35, 30537; 34 CFR 106.71(a). For example, a complainant may be able to receive supportive measures before the respondent knows their identity. However, when due process necessitates revealing the identity of a complainant or witness to the respondent, § 106.44(j)(3) permits such disclosures, so the commenters' concern is unwarranted. *See* discussion of § 106.45(b)(5). Further, the Department disagrees with concerns about the application of nondisclosure protections to the informal resolution process, as those processes can be an important aspect of a recipient's efforts to address sex discrimination, and a chilling effect on participation in informal resolution processes could undermine a recipient's ability to effectuate Title IX. In response to some commenters' question regarding a respondent's right to remain anonymous, the Title IX regulations do not guarantee a right of anonymity and, as explained above, § 106.44(j)(4) permits disclosures under §§ 106.44, 106.45, and 106.46. Finally, the Department disagrees that § 106.44(j) constitutes a ''gag order'' on parties, as this provision applies to disclosures by recipients. The Department emphasizes that students, employees, and third parties retain their First Amendment rights, and § 106.44(j) does not infringe on these rights. Section 106.6(d) of the Title IX regulations explicitly states that nothing in these regulations requires a recipient to restrict rights that would otherwise be protected from government action by the First Amendment. For additional consideration of the First Amendment, see the discussion of Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2) (Section I.C).

Changes: The Department altered the heading of this paragraph to provide more specificity as to the nature of the prohibition that it addresses. Additionally, the Department modified § 106.44(j) to state that the prohibition on disclosures applies to any personally identifiable information obtained in the course of complying with this part. Section 106.44(j) includes five exceptions that may be applied to allow disclosures that do not conflict with Title IX or this part. The Department added language to clarify that § 106.44(j)(1) requires a recipient to obtain prior written consent to the disclosure from a person with the legal right to consent to the disclosure. Section 106.44(j)(2) affirms the permissibility of disclosures to a parent, guardian, or authorized legal representative with the legal right to receive disclosures on behalf of the person whose personally identifiable information is at issue. Section 106.44(j)(3) adds the word ''reasonably'' before the words ''may constitute sex discrimination.'' Section 106.44(j)(4) specifies that disclosures required by Federal law, Federal regulations, or the terms and conditions of a Federal award, including a grant award or other funding agreement, are permitted. Section 106.44(j)(5) clarifies that recipients may make disclosures that are required by State or local law or are permitted by FERPA to the extent such disclosures are not otherwise in conflict with Title IX or this part.

11. Section 106.44(k) Informal Resolution Process

General Support and Opposition

Comments: Some commenters supported proposed § 106.44(k) to the extent that informal resolution is fully voluntary, informed, and applies to student-to-student complaints. Other commenters supported the availability of an informal resolution process for sex discrimination complaints for a variety of reasons, including because, the commenters asserted, it is an effective tool to address sex-based harassment when appropriate; empowers the parties to find an effective resolution; supports complainants and facilitates their recovery; prioritizes safety for the parties and the campus; furthers the purpose of Title IX by helping a recipient address inequities; encourages reporting, accountability, and access to support services; recognizes the significant training and expertise that many student affairs practitioners have developed in these forms of resolution; is fair to both parties; and reduces litigation. Several commenters also appreciated that § 106.44(k) would provide an alternative to recipient grievance procedures that would meaningfully address sex discrimination in nuanced ways that a recipient's grievance procedures may not.

Several commenters supported informal resolution on the ground that it would provide recipients more discretion and reduce burdens, particularly on small postsecondary institutions, by allowing them to tailor their response to the specific needs of the parties. The commenters added that the proposed regulations would improve implementation of Title IX; appropriately facilitate a fair and mutually agreeable outcome that is less complicated and confusing, while complying with both State and Federal law; and allow a recipient to respond to, resolve, and reduce the number of incidents of sexual harassment in its education program or activity more efficiently.

Some commenters suggested that the Department change ''informal resolution'' to ''alternative resolution,'' which they asserted would avoid implying that these processes and outcomes are less legitimate than a recipient's grievance procedures or causing a recipient to underappreciate the training, skill, preparation, and formality needed to appropriately and successfully facilitate a process outside a recipient's grievance procedures, such as a restorative justice process that addresses sex discrimination generally, and sex-based harassment and violence specifically. Some commenters urged the Department to retain the provisions related to informal resolution in the 2020 amendments, which some argued provided a recipient more autonomy to address complaints of sex

[40] See 2001 Revised Sexual Harassment Guidance, at 16 (''In all cases, schools should make every effort to prevent disclosure of the names of all parties involved, the complainant, the witnesses, and the accused, except to the extent necessary to carry out an investigation.'').

discrimination in a substantive manner that considers the parties' concerns while allowing a recipient to focus on educating, counseling, and mentoring students. Some commenters urged the Department to retain § 106.45(b)(9) from the 2020 amendments, which requires a formal complaint and written consent from both parties before a recipient can offer informal resolution.

One commenter believed that, under § 106.44(a) of the proposed regulations, every report of sex discrimination would require a recipient to initiate its grievance procedures, regardless of the severity of the reported incident. The commenter asserted that many reports of sex discrimination, including possible different treatment, could be handled appropriately by a recipient's faculty or staff without invoking the recipient's grievance procedures. The commenter suggested that the Department provide a mechanism for informal resolution of less serious reports of sex discrimination when the complainant does not wish to resolve the complaint using the recipient's grievance procedures. Another commenter stated that informal resolution would be most appropriate for less serious allegations.

One commenter asked the Department to specify what steps and requirements would be required for an informal resolution to proceed, in the absence of a formal complaint. Another commenter asserted that the proposed regulations provide insufficient guidelines for how or when an informal resolution would be appropriate, including determining if informal resolution is in the best interest of the student, rather than the education program or activity. Commenters requested clearer guidelines on how alternative forms of addressing complaints, such as mediation, would work. Other commenters expressed concern that § 106.44(k) lacked specificity as to what informal resolution should include or exclude, which they asserted would leave complainants vulnerable to inaction on the part of the recipient. Another commenter stated that the Department should either earmark funding for a recipient to develop informal resolution processes or require a recipient to develop informal resolution processes that meet certain requirements.

Some commenters asked the Department to broaden proposed § 106.44(k) to permit a respondent who has accepted responsibility for violating a recipient's Title IX policy to pursue informal resolution, and one commenter also asked that the Department allow a respondent to agree to sanctions when they accept responsibility within an informal resolution process. One commenter, a trade group for Title IX Coordinators, interpreted the proposed regulations as foreclosing informal resolution of a complaint if there is a determination that a respondent is responsible for sex discrimination. The commenter stated that this result would be inconsistent with the practice of many recipients and its own recommended framework for informal resolution, which allows informal resolution as a means of obtaining acceptance of responsibility or a demonstration of accountability for harmful behavior.

One commenter urged the Department to provide a school district with broad discretion to undertake informal resolution processes that are consistent with Title IX, comply with relevant State law, and are age appropriate. Another commenter alternatively suggested that the Department clarify that any prohibition or limitation on informal resolution in § 106.44(k) would apply only to a postsecondary institution. The commenter asserted that such clarification is needed based on the commenter's interpretation that proposed § 106.44(g)(2) would prohibit supportive measures that burden a respondent during informal resolution, regardless of whether a recipient determines such measures to be appropriate, which the commenter stated would frustrate the ability of an elementary school or secondary school to comply with § 106.44(a).

Some commenters urged the Department to clarify that the Title IX Coordinator has discretion to initiate or resume grievance procedures if the respondent fails to satisfy the terms of the informal resolution or if the Title IX Coordinator determines that the informal resolution was unsuccessful in stopping the discriminatory conduct or preventing its recurrence.

One commenter recommended that the Department provide guidance for how a recipient may resolve a ''structural complaint'' about the recipient through informal resolution and to what extent a recipient may participate in informal resolution. The commenter stated many complaints allege sex discrimination based on the structure of a recipient's policy, practices, or environment and would not necessarily align with either informal resolution or a recipient's grievance procedures outlined in the proposed regulations. The commenter noted that proposed § 106.44(k) is silent as to whether the recipient can have a participatory role in informal resolution and asserted that many recipients play a role in informal resolution to ensure equity across complaints.

One commenter recommended that the Department replace ''ensure'' with ''designed to ensure'' in proposed § 106.44(k)(1) to acknowledge that a recipient may not be able to effectively ensure that sex discrimination does not continue or recur despite its best efforts. Another commenter recommended that the Department change ''Title IX Coordinator'' to ''recipient'' in § 106.44(k)(1) to allow a recipient to designate another official to take appropriate steps to ensure that sex discrimination does not continue or recur.

Discussion: The Department acknowledges commenters' support for the informal resolution process provided by § 106.44(k). The Department acknowledges the comments regarding the use of the term ''informal resolution,'' but declines to substitute another term instead. As indicated in the preamble to the 2020 amendments, the Department understands the term ''informal resolution processes'' to have the same meaning as ''alternative dispute resolution processes,'' with both referring to the processes that have been widely used as a substitute for the formal process. 85 FR 30400. Informal resolution accordingly may encompass a broad range of conflict resolution strategies. *Id.* at 30401. As the Department further explained in the 2020 preamble, by referring to these processes as ''informal,'' it is not the Department's intent to suggest that the personnel facilitating such processes have any less robust training and independence or that a recipient should take allegations of sex discrimination any less seriously than they would in a formal grievance proceeding. *Id.* For that reason we have retained the requirement formerly found at § 106.45(b)(1)(iii), now § 106.44(k)(4), that any person facilitating informal resolutions must be appropriately trained under § 106.8(d)(3). We also believe the term ''informal resolution'' should be broadly familiar to recipients and parties and draws a helpful contrast with grievance procedures required by § 106.45, and if applicable § 106.46.

The Department disagrees that the proposed changes to the regulations governing informal resolution would undermine a recipient's autonomy or interfere with its educational mission. The 2020 amendments prohibited a recipient from offering informal resolution in the absence of a formal complaint. These final regulations will provide a recipient with additional discretion to offer informal resolution

under more circumstances, including without requiring the complainant to make a complaint requesting that the recipient initiate its grievance procedures. A recipient is in the best position to determine whether an informal resolution process would be appropriate based on the facts and circumstances, except that a recipient must not offer informal resolution in two situations: when there are allegations that an employee engaged in sex-based harassment of an elementary school or secondary school student or when such a process would conflict with Federal, State, or local law. We address those limits below in the discussion of § 106.44(k)(1).

As discussed in the July 2022 NPRM, limiting a recipient's ability to offer informal resolution as an alternative to grievance procedures—by, for example, requiring a complainant to request initiation of grievance procedures before a recipient can offer informal resolution—would undermine the Department's goal of ensuring that, to the extent appropriate, a recipient can provide a range of effective options that meaningfully address and resolve allegations of sex discrimination consistent with Title IX. 87 FR 41455. In response to the commenter who asked what level of investigation would be required to proceed with informal resolution without a complaint, the Department clarifies that these regulations afford a recipient discretion to offer the parties an informal resolution process at any time before determining whether sex discrimination occurred, including before an investigation commences, as well as during the course of an investigation. Requiring that a complaint be made or an investigation be conducted prior to offering an informal resolution process could deter some students from seeking any resolution of alleged sex discrimination and prevent a recipient from using an effective option for resolving such allegations in those cases. If a party pursues an informal resolution process without having made a complaint, § 106.44(k)(3)(iii) specifies that they retain the right to withdraw from the informal resolution process prior to agreeing to a resolution and to initiate or resume the recipient's grievance procedures. Further, if an investigation has commenced under the grievance procedures, and if the circumstances in which informal resolution is prohibited or may be declined by the Title IX Coordinator do not apply, a party could still choose to participate in informal resolution before a determination whether sex discrimination occurred has been made.

Contrary to assertions by at least one commenter, § 106.44(a) does not require a recipient to initiate its grievance procedures for every report of sex discrimination. Rather, § 106.44(a)(1) requires a recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity to respond promptly and effectively, and § 106.44(a)(2) clarifies that a recipient must take the actions outlined in § 106.44 (b)–(k) to comply with Title IX's statutory obligation to operate its education program or activity free from sex discrimination. Under paragraph (f)(1)(iii)(A), the Title IX Coordinator must notify the complainant or, if the complainant is unknown, the individual who reported the conduct, of the grievance procedures under § 106.45, and if applicable § 106.46, and the informal resolution process under § 106.44(k), if available and appropriate. The Title IX Coordinator is not required to initiate grievance procedures for every report. Additional information regarding the Title IX Coordinator's obligations under § 106.44(f) are discussed above in this preamble.

Although the Department does not have the authority to earmark funding for recipients to develop informal resolution processes, the Department provides grants that may be used to implement programs such as restorative justice and similar programs.[41] More broadly, the Department offers technical assistance through the National Center on Safe and Supportive Learning Environments and the Title IV–A Technical Assistance Center that may also help a recipient develop informal resolution processes. Additionally, the Department declines to mandate specific requirements for an informal resolution process beyond those stated in the regulations, to provide a recipient discretion to offer an informal resolution process that can be structured to accommodate the particular needs of the parties, the recipient, and the particular circumstances of the complaint in the most effective manner.

The Department appreciates the opportunity to clarify that, under these regulations, a determination whether sex discrimination occurred can necessarily only be made at the conclusion of grievance procedures consistent with § 106.45, and if applicable § 106.46. Hence, it is the Department's view that an admission, alone, outside the context of grievance procedures consistent with § 106.45, and if applicable § 106.46, is not a determination whether sex discrimination occurred. Accordingly, nothing in § 106.44(k) prohibits a recipient from offering an informal resolution process in which a respondent may accept responsibility or accountability for sex discrimination or harm caused. The Department intends for the limitation regarding such determinations in § 106.44(k)(1)—that a recipient may offer an informal resolution process ''prior to determining whether sex discrimination occurred'' under § 106.45, and if applicable § 106.46—to clarify at what point a recipient may offer informal resolution, but not to limit the types of informal resolution a recipient may offer.

The Department also appreciates the opportunity to clarify that § 106.44(g)(2) does not prohibit terms that are similar to supportive measures from being agreed to as part of an informal resolution. Additionally, § 106.44(k)(5) states that potential terms of an informal resolution agreement may include but are not limited to, restrictions on contact and restrictions on the respondent's participation in one or more of the recipient's programs or activities or attendance at specific events, including restrictions the recipient could have imposed as remedies or disciplinary sanctions had the recipient determined that sex discrimination occurred under the recipient's grievance procedure. *See* 87 FR 41456.

Additionally, the Department appreciates the opportunity to clarify that, as stated in § 106.44(k)(3)(iii), prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the recipient's grievance procedures. If a party breaches the resolution agreement or if the recipient has other compelling reasons, such as if it learns of any fraud by a party in entering into the agreement, the recipient may void the informal resolution agreement and initiate or resume grievance procedures. *See* 87 FR 41455. However, this is only one example, and there may be other situations in which a recipient could similarly decide to initiate or resume its grievance procedures, as long as the recipient exercises its discretion in a manner that is equitable to the parties

[41] *See, e.g.,* 20 U.S.C. 7111–7122 (codifying Student Support and Academic Enrichment Grants under Title IV, Part A of the Every Student Succeeds Act); 20 U.S.C. 7281 (authorizing Project School Emergency Response to Violence (SERV) program); 20 U.S.C. 7271–7275 (authorizing grants under the Promise Neighborhoods and Full-Service Community Schools programs); 20 U.S.C. 1138 (authorizing grant program to improve postsecondary education opportunities for nontraditional students).

and otherwise complies with these final regulations.

In the July 2022 NPRM, the Department explained that informal resolution would not be available in sex discrimination complaints that do not involve a student, employee, or third-party respondent. 87 FR 41464. This is in part because § 106.45(a) states that the requirements related to a respondent apply only to sex discrimination complaints alleging that a ''person'' violated the recipient's prohibition on sex discrimination, and a complaint that a recipient's policy or practice discriminates on the basis of sex involves an allegation against the recipient itself—not a person. In many circumstances, upon notification of a potentially discriminatory policy or practice, the recipient may resolve the matter under § 106.44(f)(1), which requires a Title IX Coordinator, when notified of conduct that reasonably may constitute sex discrimination under Title IX or this part, to take the enumerated actions to promptly and effectively end any sex discrimination in its education program or activity, prevent its recurrence, and remedy its effects. These actions include, under § 106.44(f)(1)(vii), a requirement that the Title IX Coordinator take ''other appropriate prompt and effective steps,'' in addition to steps associated with remedies provided to an individual complainant, if any, to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.

The Department acknowledges the commenters' request for guidelines for how and when a recipient can decide whether informal resolution would be appropriate. With the exception of when there is an allegation that an employee engaged in sex-based harassment of an elementary school or secondary school student or when an informal resolution process would conflict with applicable Federal, State, or local law, a recipient has discretion to determine when informal resolution is not appropriate, notwithstanding the parties' consent. In making this determination, a recipient may consider the factors a Title IX Coordinator must consider when determining whether to initiate a complaint of sex discrimination, which are enumerated in § 106.44(f)(1)(v)(A).

The Department declines to replace ''ensure'' with ''designed to ensure'' in § 106.44(k)(1) because the regulations as stated fully implement Title IX's nondiscrimination mandate. The Department also declines to change ''Title IX Coordinator'' to ''recipient'' in proposed § 106.44(k)(1) because the obligations are consistent with those set forth in § 106.44(f). Further, as explained in more detail in the discussion of § 106.8(a)(2), a recipient may delegate specific duties to one or more designees.

Changes: Consistent with revisions to § 106.44, the Department has modified § 106.44(k)(1)(i) to add the word ''reasonably'' with respect to information about conduct that may constitute sex discrimination under Title IX or this part.

Section 106.44(k)(1) Discretion To Offer Informal Resolution

Comments: Some commenters supported a recipient's discretion to decline to offer informal resolution under proposed § 106.44(k)(1). Other commenters expressed support for safeguards in the proposed regulations, such as the prohibition on the use of informal resolution in cases of employee-to-student sex discrimination and when informal resolution would conflict with Federal, State, or local law, and the discretion afforded by proposed § 106.44(k)(1) to decline to offer informal resolution when, for example there is evidence of actual or potential coercion or when not appropriate in an elementary school or secondary school setting. One commenter agreed that there may be circumstances in which informal resolution would be inappropriate, such as when there is an ongoing threat of danger to others, but the commenter encouraged the Department to specify these circumstances in the final regulations to help ensure complainants are able to direct the informal resolution process within appropriate constraints of their communities' and own safety. Some commenters opposed the use of informal resolution for all sex discrimination cases, including in cases of sexual harassment or assault, because of the seriousness of the conduct necessarily involved in sex discrimination cases, potential negative impacts on the complainant, and potential risk to the community from a repeat offender.

Several commenters noted that courts have recognized the importance of informal resolution, argued that a recipient should not have discretion to decline to offer informal resolution over the preference of the parties, and urged the Department to modify proposed § 106.44(k)(1)(i) to restrict a recipient's discretion to deny a party's request for informal resolution.

One commenter asserted that denying informal resolution would impede a recipient's ability to address sex discrimination, arguing that informal resolution is more likely to reduce future harm than sanctions available through grievance procedures and that some people may forgo filing a complaint if informal resolution is not an option.

Prohibition on Informal Resolution for Student Complaints Against Employee Respondents

Some commenters urged the Department to retain current § 106.45(b)(9)(iii), which prohibits informal resolution for complaints in which an employee is alleged to have sexually harassed a student. One commenter noted that the regulatory text in proposed § 106.44(k)(1) would prohibit informal resolution in all cases in which an employee allegedly engaged in sex discrimination against a student, whereas the statement in the July 2022 NPRM explaining this proposed provision stated that the provision would prohibit informal resolution in cases in which an employee allegedly engaged in sex-based harassment (not all forms of sex discrimination) against a student. The commenter suggested there might be a conflict between the proposed regulatory text and the July 2022 NPRM preamble language.

Other commenters urged the Department to remove or revise the clause in proposed § 106.44(k)(1) that would prohibit informal resolution of complaints alleging that an employee engaged in sex discrimination toward a student. Some commenters argued that the prohibition would be overly broad and would bar informal resolution in contexts in which it could be effective and appropriate, particularly for less severe allegations. Other commenters supported such a restriction for allegations that an employee sexually harassed an elementary school or secondary school student but objected to barring voluntary participation in informal resolution at a postsecondary institution because such a prohibition would deprive an adult complainant of autonomy. One commenter also asserted that presenting a student complainant with fewer options would further decrease already low reporting rates of employee-to-student sex discrimination allegations.

Some commenters believed that the prohibition on informal resolution for employee-to-student sex discrimination complaints in proposed § 106.44(k)(1) is based on the Department's incorrect assumption that informal resolution processes are less effective, rigorous, and legitimate, and are more prone to power imbalances than a recipient's grievance procedures. The commenter also asserted that students have reached informal resolutions that effectively

addressed behavior and held respondents accountable when a recipient invested in skilled facilitators and created procedures based on developed practices, such as shuttle negotiation or restorative justice.

Another commenter stated that power imbalances between students and employees can be particularly heightened for a student with multiple and overlapping identities, in a graduate program, or in a small or specialized department or program and such a student may view informal resolution as preferable to a more formal and adversarial process.

Several commenters noted that other safeguards exist to prevent unfair informal resolution of employee-to-student complaints. One commenter, a postsecondary institution, noted that its own policy includes a prohibition on requiring face-to-face mediation in any case that involves physical or sexual violence or an employee respondent in a position of authority over the complainant. Another commenter noted that proposed § 106.44(k)(2) and (3)(iii) would create safeguards to address concerns related to power imbalances or unfair outcomes. The commenter also noted that proposed § 106.44(k)(1)(i) would otherwise allow a recipient to decline to offer informal resolution, including if it determined that the power differential was too great. One commenter noted that an appropriately trained Title IX Coordinator or informal resolution facilitator could rely on the same factors outlined in proposed § 106.44(k)(1) and (2) to assess whether a student-to-employee complaint would be suitable for informal resolution.

A number of commenters asked for clarification about whether informal resolution would be available for student complaints against student-employee respondents in light of the lesser power differential between a student and student-employee.

Requests for Modifications or Clarification

Some commenters recommended that the Department modify proposed § 106.44(k)(1) to provide a recipient more discretion in determining when informal resolution would be appropriate, as long as the recipient documents the parties' voluntary and informed consent to participate in such procedures.

Some commenters asked for clarification as to how to assess the future risk of harm to others for purposes of proposed § 106.44(k)(1)(ii). Another commenter recommended that the Department strike proposed § 106.44(k)(1)(ii) because it contains an example that the commenter believed could be read as exhaustive rather than illustrative. One commenter urged the Department to modify § 106.44(k)(1) to allow a recipient to deny a request for informal resolution only when the recipient reasonably determines that the respondent presents an immediate risk of harm to others. Another commenter urged the Department to revise § 106.44(k)(1) to require a recipient to consider the wishes of the parties before declining to offer informal resolution and amend the preamble to urge a recipient to consider the likelihood that an allegation would be meaningfully investigated without the complainant's participation. Another commenter suggested that the Department add ''or where an informal resolution process may contribute to increased trauma for any party'' to the end of proposed § 106.44(k)(1)(ii) as an example of when informal resolution of a complaint would be inappropriate.

One commenter recommended that the Department offer examples in which informal resolution may be inappropriate, such as with contractors, outside vendors, or when the allegations are based on events sponsored by the recipient that take place off campus.

Discussion: The Department acknowledges the support for, and comments related to, the circumstances under which a recipient has discretion to offer informal resolution under § 106.44(k)(1).

The Department is persuaded by commenters who argued that the proposed prohibition regarding allegations that an employee engaged in sex discrimination toward a student in proposed § 106.44(k)(1) would be overly broad. The Department agrees that this limit on recipient discretion to offer informal resolution options would create an unacceptably high risk of dissuading complainants who do not want to undergo grievance procedures from making a complaint and of frustrating a recipient's ability to address sex discrimination in its education program or activity. The Department also agrees that in some cases the parties and recipient may view informal resolution as a better avenue to mitigate power imbalances between a student and an employee. The Department agrees that other safeguards in § 106.44(k), such as the recipient's discretion, the requirement that participation be voluntary, and the right to withdraw, will ensure that adult participants are protected from an unfair process. The Department is persuaded that the prohibition would be more appropriate as applied in the elementary school and secondary school context, given the unique power dynamics between a minor student and an adult employee. The Department is also persuaded that the prohibition is more appropriately limited to the context of sex-based harassment—in which there is a unique risk of physical harm and associated severe emotional trauma. As such, the Department has revised § 106.44(k)(1) to prohibit informal resolution if the complaint includes an allegation that an employee engaged in sex-based harassment of an elementary school or secondary school student. By removing the prohibition as to postsecondary students, the Department has also addressed concerns and questions regarding the application of the prohibition to student-employees.

The Department disagrees with commenters who objected to otherwise giving a recipient the discretion to decide when to offer informal resolution. As described by many commenters, informal resolution is an important avenue for addressing allegations of sex discrimination. The final regulations give a recipient discretion to offer informal resolution within the bounds set forth in § 106.44(k). The Department disagrees that § 106.44(k) grants a recipient unfettered discretion to offer, or decline, informal resolution under these final regulations. As explained in the July 2022 NPRM, even though § 106.44(k) will entrust the decision about whether to offer informal resolution to the recipient's discretion, that discretion will remain subject to important guardrails. 87 FR 41454. Consistent with § 106.44(f)(1)(i), a recipient must exercise this discretion in a manner that treats the parties equitably. Moreover, as discussed below, recipients: must not require or pressure the parties to participate in an informal resolution process; must obtain the parties' voluntary consent to the informal resolution process and must not require waiver of the right to an investigation and determination of a complaint as a condition of enrollment or continuing enrollment, or employment or continuing employment, or exercise of any other right; must provide notice to the parties that describes the allegations, the requirements of the informal resolution process, the right to withdraw from the informal resolution process and initiate or resume the recipient's grievance procedures prior to agreeing to a resolution, the effect of entering into a resolution agreement, the potential terms of a resolution agreement, and the information that will be maintained and could be disclosed; and must ensure that facilitators are

trained and do not have a conflict of interest or bias. These guardrails will ensure that informal resolution is an effective means of addressing sex discrimination prohibited under Title IX.

The Department appreciates the opportunity to clarify that § 106.44(k)(1)(ii) is intended to identify only one illustrative situation in which a recipient might reasonably decide not to offer parties the option of informal resolution. As the wording of § 106.44(k)(1)(ii) indicates (''include but are not limited to''), there may be other circumstances when a recipient may also decline to offer the parties informal resolution, depending upon the facts and circumstances. The Department declines to strike § 106.44(k)(1)(ii) because, contrary to the commenters' concern, the language of that provision clearly conveys that the circumstances identified there are not exhaustive. There may be other circumstances in which a recipient would properly decline to allow informal resolution, and nothing in § 106.44(k) will bar a recipient from doing so. Additionally, in response to commenters' requests for clarification as to how to assess the future risk of harm to others, the Department emphasizes that a recipient has flexibility to structure a process to determine how it makes this assessment, as well as whether such an assessment is necessary in a particular circumstance. Notwithstanding this discretion, such an assessment may depend on the particular allegations that the parties seek to resolve informally and may take into account relevant factors, such as whether either party has a history of engaging in violent conduct or made credible threats of self-harm or harm to others.

There may be cases in which both parties wish to resolve an allegation informally, but because of the nature of the allegations or information involved, or other factors, such as the risk of future harm to others, or repeated allegations against the same respondent, the recipient believes it is more appropriate to pursue resolution through grievance procedures. This fact-specific inquiry depends, in part, on the allegations, the identity of the parties, and a recipient's ability to exert control over them.

In response to the commenter who suggested that it would be inappropriate for a recipient to offer an informal resolution process to resolve a complaint involving conduct at an off-campus recipient-sponsored event or involving a third party, such as a contractor or vendor, the Department disagrees, and reiterates that in such circumstances, the recipient should conduct the same fact-specific inquiry it does in other contexts to determine whether informal resolution is appropriate.

The Department also maintains that a recipient must retain discretion to decline informal resolution to fulfill its obligation to address sex discrimination in its education program or activity, similar to its discretion to initiate grievance procedures absent a complaint.

Finally, the Department declines to require a recipient to provide its reasons for declining to offer informal resolution in writing because doing so would be overly burdensome and is not required to fulfill Title IX's nondiscrimination mandate.

Changes: The Department has revised § 106.44(k)(1) to state that a recipient may offer to a complainant and respondent an informal resolution process, unless the complaint includes allegations that an employee engaged in sex-based harassment of an elementary school or secondary school student. For clarity, at the beginning of § 106.44(k)(1)(i), the Department has added the phrase ''[s]ubject to the limitations in paragraph (k)(1),'' and at the beginning of § 106.44(k)(1)(ii), the Department has added the phrase ''[i]n addition to the limitations in paragraph (k)(1).'' In addition, consistent with changes elsewhere in the final regulations, § 106.44(k)(1)(i) clarifies that a recipient has discretion to determine whether it is appropriate to offer an informal resolution process when it receives information about conduct that ''reasonably'' may constitute sex discrimination under Title IX ''or this part.''

Section 106.44(k)(2) Voluntary Consent

Comments: Some commenters supported proposed § 106.44(k)(2) on the ground that it would require a recipient to avoid bias, remain impartial, and ensure that protections and opportunities are available to students during an informal resolution process.

Other commenters expressed concern that proposed § 106.44(k)(2) would not sufficiently prevent a recipient or party from coercing someone into informal resolution, including when a recipient wants to avoid creating a formal record of sex discrimination.

Some commenters argued that an elementary school or secondary school student would be more likely to feel that they have no choice other than to consent to participate if an adult administrator encouraged informal resolution or would be vulnerable to accepting whatever resolution an adult facilitator offered even if it was not adequate or responsive to their needs.

Some commenters urged the Department to modify proposed § 106.44(k)(2) to make clear coercion is prohibited, and to consider replacing ''pressure'' with ''coerce'' because ''coerce'' is a clearer and more objective term. Another commenter suggested the Department state explicitly that declining to engage in informal resolution would not affect a recipient's grievance procedures or outcomes therefrom. One commenter recommended that the Department clearly prohibit a recipient from applying negative or positive pressure to influence either party's decision to proceed with the informal resolution process.

Some commenters urged the Department to clarify the meaning of ''voluntary consent'' in proposed § 106.44(k)(2). Some commenters urged the Department to specify that ''voluntary consent'' must be ''informed'' and in writing to better document the agreement and reduce confusion.

Some commenters asked the Department to require a recipient to offer informal resolution to the respondent only after the complainant has agreed to informal resolution. The commenters stated that this modification would prevent a complainant from feeling coerced, and one commenter argued that this would be consistent with the definition of ''restorative practice'' in the Violence Against Women Act.[42]

Discussion: The Department disagrees with commenters' concern that § 106.44(k)(2) will not sufficiently prevent a recipient or party from coercing a party into informal resolution. Final § 106.44(k)(2) explicitly states that a recipient must not require or pressure a party to participate in informal resolution, and informal resolution cannot be pursued unless both parties voluntarily consent. In addition, Title IX Coordinators and facilitators must be free from conflict of interest or bias, which will prohibit a recipient from using informal resolution to protect a particular party or the recipient's own financial, reputational, or other interests.

The Department recognizes that as minors, elementary school and secondary school students are in a special position relative to administrators and other adults, and in certain circumstances, may feel pressured to consent to informal

[42] The commenter cited 34 U.S.C. 12291(a)(31)(B).

resolution if offered. For this reason, as well as (1) a recipient's obligation to comply with laws related to sexual abuse of minors, and (2) the heightened risk of physical harm and severe emotional trauma presented by an allegation that an adult engaged in sex-based harassment of a minor, final § 106.44(k)(1) prohibits informal resolution of a complaint that includes allegations that an employee engaged in sex-based harassment of an elementary school or secondary school student. In addition, under final § 106.6(g), nothing in Title IX or the regulations may be read in derogation of any legal right of a parent, guardian, or other authorized legal representative to act on behalf of a complainant, respondent, or other person, subject to § 106.6(e), including with respect to a student's participation in informal resolution—which also guards against potential coercion of minor students to participate in informal resolution.

The Department agrees with commenters that, in order to provide voluntary consent, a party must have notice and information about the informal resolution process, which the final regulations require in § 106.44(k)(3), as discussed below. With these guardrails, we believe § 106.44(k) will give parties an efficient, fair, and accessible avenue to resolve allegations of sex discrimination while continuing to offer a recipient flexibility to make choices appropriate in light of the particular facts and circumstances.

Accordingly, the Department declines to incorporate the commenters' suggested modifications because they are either already captured in the final regulations, and thus are unnecessary and redundant, or would be contrary to the purpose of informal resolution under § 106.44(k), which is to provide a recipient an informal avenue to address allegations of sex discrimination through a process that is most appropriate for the parties. For example, we believe that § 106.44(k)(2) already makes sufficiently clear that a recipient may not coerce parties, whether through positive or negative pressure, into participating in an informal resolution process, and do not believe the term ''pressure'' is any less objective, clear, or precise than ''coerce.'' We also believe it unnecessary to specify how a recipient obtains the voluntary consent required by § 106.44(k)(2). We instead believe it appropriate to entrust such decisions to a recipient's discretion and judgment. The Department notes that nothing in § 106.44(k) prohibits a recipient from obtaining a party's voluntary consent in writing or obviates a recipient's recordkeeping requirements under § 106.8(f). The Department declines the suggestion to require a recipient to offer informal resolution to the respondent only after the complainant has agreed. Although this approach may be appropriate in some cases, it may not be important in all cases and the recipient is in the best position to make that determination. However, nothing in the regulations prevents a recipient from offering informal resolution to the complainant first.

The Department disagrees that a recipient will improperly pressure individuals to use an informal resolution process out of a desire to avoid a formal record of sex discrimination. Section 106.8(f)(1) requires a recipient to ''document[ ]'' and retain records of ''the informal resolution process under § 106.44(k)'' as well as grievance procedures under § 106.45, and if applicable § 106.46, for each complaint of sex discrimination. A recipient thus cannot avoid creating records of sex discrimination by encouraging the use of informal resolution instead of grievance procedures.

The Department also declines to incorporate other specific suggestions, such as dictating other conditions for when a recipient may offer informal resolution, in order to avoid overly formalizing the informal resolution process. As explained above, we continue to believe that the recipient is in the best position to decide when informal resolution is appropriate, and how to structure those processes to suit the parties' and its own needs within the guardrails set forth in the regulations. We note again, though, that a recipient retains the discretion to initiate or resume grievance procedures, consistent with the final regulations.

Finally, upon its own review, for clarity and to maintain consistency with other parts of the regulations, the Department changed ''adjudication'' in § 106.44(k)(2) to ''determination.''

Changes: In final § 106.44(k)(2) the Department has changed ''adjudication'' to ''determination.''

Section 106.44(k)(3) Notice Prior to Informal Resolution

Comments: Some commenters generally supported the notice provisions in proposed § 106.44(k)(3). However, one commenter stated that requiring notice consistent with § 106.44(k)(3) before the initiation of informal resolution would formalize a process that is meant to be informal. The commenter also interpreted § 106.44(k)(3) as requiring a recipient to disclose the names of the parties, which could be in tension with the requirement in proposed § 106.44(j) prohibiting the disclosure of certain information.

Some commenters asked the Department to consider additional terms that should be included in the notice.

Some commenters urged the Department to require a recipient to provide clear written materials that describe the informal resolution process and potential outcomes, explain the difference between informal resolutions and grievance procedures, inform complainants about the availability of a recipient's grievance procedures if they are dissatisfied with the informal resolution process, provide clear timeframes for informal resolution, and clarify that informal resolution is optional.

One commenter asked the Department to revise proposed § 106.44(k)(3)(iii) to state that, prior to agreeing to a resolution at the conclusion of the informal resolution process, any party has the right to withdraw from the informal resolution process and to initiate or resume the recipient's grievance procedures.

In connection with proposed § 106.44(k)(3)(iv), one commenter recommended that the Department add ''unless the alleged behavior continues'' to the end of the provision, because if behavior continues after informal resolution, the decisionmaker in grievance procedures should be able to consider the totality of the allegations, not just those behaviors that occurred after the informal resolution agreement.

Some commenters specifically opposed proposed § 106.44(k)(3)(v) and urged its removal on the grounds that a generic list of possible terms that could be included in an informal resolution agreement would be overly prescriptive, impractical, unhelpful, and fail to recognize the purpose and process of informal resolution. Commenters expressed concern that if a party saw a general list that included inappropriate terms for the situation at hand, it could dissuade the party from pursuing informal resolution.

Alternatively, one commenter suggested that the Department revise proposed § 106.44(k)(3)(v) to refer to ''some of the potential terms that may be requested or offered in an informal resolution agreement'' to avoid limiting the terms of an agreement. One commenter noted that sometimes a complainant may request that people who are not parties to an informal resolution process, such as other members of a respondent's student organization (*e.g.,* a fraternity), attend a training or take some other action. The

commenter urged the Department to clarify that parties cannot agree to terms on behalf of people who are not part of the informal resolution process.

One commenter also asked the Department to clarify which records and in what circumstances information related to a complaint or informal resolution could be disclosed under the proposed regulations.

Some commenters recommended that the Department remove proposed § 106.44(k)(3)(vii), regarding limiting access to information obtained solely through informal resolution, some asked for clarification regarding its application, and others supported it. Commenters asserted that this provision may allow a party to use informal resolution to strategically disclose information that they can then suppress from being used as evidence during a recipient's grievance procedures if informal resolution is unsuccessful. One commenter stated that a rule conferring absolute confidentiality during informal resolution is rarely effective in practice and stated that either party should be able to ask for confidentiality as a term of the informal resolution agreement, but that it should not be a default term. Other commenters argued that proposed § 106.44(k)(3)(vii) is in tension with statements in the July 2022 NPRM regarding information obtained through informal resolution being shared with law enforcement.

Some commenters asserted that a lack of privacy protections would make informal resolution challenging even if the parties are willing to pursue it. The commenters urged the Department to allow the parties to agree that communications and information shared in the informal resolution process will remain confidential regardless of whether the parties reach an informal resolution or pursue a formal administrative or criminal complaint.

Some commenters expressed concern or confusion with proposed § 106.44(k)(3)(viii), which would permit an informal resolution facilitator to serve as a witness if the grievance procedures were resumed. Several commenters stated that proposed § 106.44(k)(3)(viii) would exceed the Department's authority. Commenters argued that proposed § 106.44(k)(3)(viii) could directly conflict with proposed § 106.44(k)(3)(vii), would be unworkable, could create conflicts of interest, and would chill the use of informal resolution. Another commenter recommended that the Department add the word ''only'' between ''witness'' and ''for purposes'' in proposed § 106.44(k)(3)(viii) to further limit when an informal resolution facilitator can be a potential witness in a recipient's grievance procedures.

One commenter recommended that the Department add a provision in proposed § 106.44(k)(3) that neither party can appeal an agreement that is reached through informal resolution.

Another commenter recommended that the Department modify proposed § 106.44(k)(3) to allow the informal resolution facilitator to stop the process and present the option of initiating or resuming the recipient's grievance procedures before the parties agree to, or the Title IX Coordinator approves, an informal resolution.

One commenter urged the Department to issue supplemental guidance that instructs a recipient on how to create agreements with the parties and local prosecutors that prohibit the use of information, including records, obtained solely through an informal resolution process in a civil or criminal legal proceeding.

Discussion: The Department acknowledges the range of comments in response to proposed § 106.44(k)(3). The Department is persuaded that several changes are necessary to address concerns raised in response to this proposed provision in the July 2022 NPRM. First, the Department has modified paragraph (v) to state that the recipient must provide notice of the potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties. Second, the Department has modified paragraph (vi) to state that the recipient must provide notice of what information the recipient will maintain and whether and how the recipient could disclose such information for use in grievance procedures under § 106.45, and if applicable § 106.46, if grievance procedures are initiated or resumed. Finally, the Department has deleted proposed paragraph (vii), regarding disclosure, and proposed paragraph (viii), regarding facilitators as witnesses.

The Department declines to make changes to § 106.44(k)(3)(iii) because the provision is already clear that any party has the right to withdraw from the informal resolution process and to initiate or resume the recipient's grievance procedures prior to an agreed-upon resolution at the conclusion of the informal resolution process.

Likewise, the Department declines to modify § 106.44(k)(3)(iv) because the provision is clear that the parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations. If sex discrimination were to continue after the conclusion of the informal resolution process, it would not be covered under the agreement, and the complainant could initiate the grievance procedures to address such conduct.

The Department disagrees that providing notice of the potential terms as described in § 106.44(k)(3)(v) is unhelpful or impractical, because providing the parties with examples of the potential outcomes and limitations of informal resolution is particularly helpful for individuals who may be unfamiliar with informal resolution generally or specific informal resolution processes offered by the recipient. Additionally, the Department has modified § 106.44(k)(3)(v) to clarify that a recipient must advise the parties that an informal resolution agreement is binding only on the parties, which will prevent a facilitator from offering, and a party from agreeing to, a term in informal resolution that cannot be enforced because it depends on a non-party's action (such as requiring in an informal resolution that a non-party undergo training). Paragraph (v) does not limit the parties' opportunity for resolution, because the notice need not cover every possible measure, remedy, or sanction to which the parties may agree. Rather, the terms covered by paragraph (v) would provide the general framework and parameters of the resolution agreement so that the parties can provide informed consent.

The Department is persuaded that additional clarification is required related to the information obtained through informal resolution that may be maintained or disclosed. Accordingly, the Department has revised § 106.44(k)(3)(vi) to clarify that a recipient must explain to the parties what information related to informal resolution it may maintain or disclose if grievance procedures are initiated or resumed. We believe that the revised § 106.44(k)(3)(vi) strikes the right balance between ensuring that parties are aware of the possible consequences related to pursuing informal resolution and providing a recipient the flexibility needed to structure an informal resolution process that suits its education program or activity.

The Department is also persuaded by concerns commenters raised about potential implementation difficulties and conflicts with other provisions of the proposed regulations. As a result, the Department strikes proposed paragraphs (vii)–(viii). The Department also now maintains that these

provisions are inapposite given the changes the Department has made to § 106.44(k)(3)(vi), which now requires a recipient to tell parties what information related to informal resolution it may or may not disclose if grievance procedures proceed.

The Department also acknowledges the concern that the requirements of § 106.44(k)(3) formalize a process that was intended to be informal. We nevertheless continue to believe these additional notice requirements provide important information to the parties so that they have a complete understanding of all aspects of the informal resolution process and can therefore choose to participate in that process on an appropriately informed basis. We stress, however, that a recipient must comply with § 106.44(j) when conducting an informal resolution process and must therefore not disclose personally identifiable information about the participants in an informal resolution process except in the circumstances enumerated in that provision.

Additionally, we note that § 106.44(k)(3) will require many of the specific points that commenters believed a recipient should provide to parties, including a description of what the informal resolution process requires, potential terms of any informal resolution agreement, and the right of the parties to withdraw from that process and pursue the recipient's grievance procedures instead. We believe that these notice requirements will adequately inform the parties of the contours of the informal resolution process and provide them the information they need to decide whether to choose or continue with informal resolution.

Changes: The Department has modified § 106.44(k)(3)(v) to state that the recipient must provide notice of the potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties, and has modified paragraph (vi) to state that the recipient must provide notice of what information the recipient will maintain and whether and how the recipient could disclose such information for use in grievance procedures under § 106.45, and if applicable § 106.46, if grievance procedures are initiated or resumed. The Department has deleted proposed paragraphs (vii) and (viii) in the final regulations.

Section 106.44(k)(4) Informal Resolution Facilitators

Comments: One commenter appreciated that proposed § 106.44(k)(4) would require any informal resolution facilitator to be properly trained, consistent with research on best practices in the implementation of restorative justice. Other commenters urged the Department to require a recipient to provide formal training to any person who would be involved in carrying out informal resolution processes.

Another commenter expressed concern that proposed § 106.44(k)(4) would prohibit the informal resolution facilitator from also serving as the investigator, which would require additional staff to implement informal resolution. The commenter stated that many recipients currently offer voluntary, informal resolution processes facilitated by the investigator as an alternative to a hearing. The commenter stated that, in these situations, there is a minimal risk of investigator bias because the investigator has made no determination regarding responsibility. Another commenter said that any informal resolution facilitator should be impartial and have no conflict of interest. Another commenter urged the Department to modify proposed § 106.44(k)(4) to allow Title IX investigators to facilitate informal resolution because they are often best positioned to recommend appropriate supportive measures, recourse, or follow-up actions and that requiring a separate facilitator would be inefficient and impede expedited resolution of complaints. The commenter argued that concerns about bias or conflict of interest should be allayed because investigators are trained to be neutral and are likely to also play a role in other aspects of Title IX compliance.

One commenter asked the Department to provide more concrete guidance for how a recipient that uses a single investigator model can avoid bias and a conflict of interest under proposed § 106.44(k)(4). Some commenters suggested that the Department specify that the use of an outside entity to conduct investigations or facilitate informal resolutions may alleviate such concerns.

Discussion: The Department acknowledges the comments in support of proposed § 106.44(k)(4) and recognizes the concerns raised about the requirements this provision will impose on facilitators for informal resolutions. However, the Department declines to modify this provision because it is necessary to guard against the appearance of bias or a conflict of interest, which could erode trust in a recipient's grievance procedures and decrease the ability to ensure fair and reliable outcomes in the event a party terminates informal resolution and grievance procedures under § 106.45, and if applicable § 106.46, are initiated or resumed.

We also decline to incorporate suggested modifications in final § 106.44(k)(4) because they are either already captured in the final regulations, and thus are unnecessary and redundant, or would be contrary to other guardrails that protect the integrity of informal resolutions under § 106.44(k). For example, § 106.44(k)(4) specifically provides that any person facilitating informal resolution must receive training under § 106.8(d)(3), and that person must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

Changes: None.

Section 106.44(k)(5) Informal Resolution Agreements

Comments: One commenter supported proposed § 106.44(k)(5)(ii) because it would clarify that the parties may agree to informal resolution terms that the recipient could have imposed at the conclusion of a recipient's grievance procedures.

In contrast, one commenter recommended that the Department move proposed § 106.44(k)(5) to the preamble of the final regulations because it is an incomplete list of examples that can be read as exhaustive rather than illustrative. Another commenter stated that the use of an incomplete list of potential informal resolution agreement terms in proposed § 106.44(k)(5) fails to recognize that informal resolution varies greatly from case-to-case.

Several commenters urged the Department to clarify what information regarding the informal resolution agreement will be shared with parents if a written report does not need to be provided but may be retained in the recipient's records.

One commenter expressed concern that the inclusion of restrictions on contact in proposed § 106.44(k)(5)(i) could amount to a mutual no-contact order that restricts a complainant and respondent alike. The commenter stated that the mention of a term that only applies to the respondent in § 106.44(k)(5)(ii) supports the interpretation that § 106.44(k)(5)(i) could create a term similar to a mutual no-contact order. In contrast, the

commenter stated that under a recipient's grievance procedures, a recipient may only impose such a consequence on a respondent after a determination that sex discrimination occurred. The commenter stated that although a complainant must agree to any term in the informal resolution agreement, without legal advice a complainant may not understand the risk involved in agreeing to a no-contact order. Other commenters expressed concern that students could not rely on external actors, such as a lawyer or survivor advocate, for advice about their rights in an informal resolution process, because these actors often lack the expertise needed to navigate a recipient's internal Title IX system.

Discussion: The Department acknowledges the comments in support of § 106.44(k)(5) and disagrees with commenters' suggestion that the list of examples offered in § 106.44(k)(5)(i) and (ii) could fairly be read as anything but illustrative because it states that potential terms may ''include but are not limited to'' those specifically described in those provisions.

The Department declines to incorporate modifications suggested by some commenters, such as describing what a recipient may offer in informal resolution, because they are either already captured in the final regulations, and thus are unnecessary and redundant, or would be contrary to the purpose of informal resolutions under § 106.44(k), which is to provide a recipient and the parties more options in resolving complaints of sex discrimination.

With respect to a parent's role in informal resolution, the Department appreciates the opportunity to clarify that nothing in Title IX or these regulations may be read in derogation of any legal right of a parent, guardian, or other authorized legal representative to act on behalf of a complainant, respondent, or other person, subject to § 106.6(e), in proceedings such as an informal resolution process under § 106.44(k), including the right access to any document or other information to which they otherwise would be legally entitled in that role. *See* § 106.6(g).

The Department appreciates the opportunity to clarify that restrictions on contact under § 106.44(k)(5)(i) may be non-mutual or mutual. As explained in the July 2022 NPRM, although the 2020 amendments only included references to mutual no-contact orders, these final regulations eliminate the term ''mutual'' to ensure that a recipient understands that it is not limited to imposing mutual restrictions on contact between the parties. *See* 87 FR 41450 (as applied to the non-exhaustive list of supportive measures a recipient may offer under § 106.44(g)(1)). The Department also appreciates the opportunity to clarify that a recipient may impose restrictions on contact prior to the completion of grievance procedures either as a supportive measure during the pendency of grievance procedures and prior to a determination whether sex discrimination occurred, *see* Types of Supportive Measures (§ 106.44(g)(1)); or as a term of an informal resolution agreement, which the final regulations specify may include restrictions the recipient could have imposed as remedies or disciplinary sanctions had the recipient determined at the conclusion of grievance procedures that sex discrimination occurred, *see* § 106.44(k)(5)(ii). Although the Department acknowledges concerns that unfamiliarity with a recipient's internal processes may limit an external actor's ability to advise a party of their rights in an informal resolution process, the requirements in § 106.44(k)(3) are designed to ensure the parties receive important information to help them understand the process and make an informed decision whether to participate in informal resolution. The Department emphasizes that nothing in these final regulations prevents a party from seeking further clarification of any aspect of a recipient's informal resolution process and consistent with § 106.44(k)(2) and (3)(iii), a party has the right to decline an offer to participate in, or withdraw from, a recipient's informal resolution process prior to agreeing to a resolution.

Finally, upon its own review, the Department determined that final § 106.44(k)(5)(ii) should make clear that restrictions on the respondent's participation in the recipient's programs or activities include those that the recipient could have imposed as remedies or disciplinary sanctions had the recipient ''determined at the conclusion of the recipient's grievance procedures that sex discrimination occurred.''

Changes: For clarity and consistency with the rest of the regulations, in final § 106.44(k)(5)(ii) the Department has changed ''had the recipient determined that sex discrimination occurred under the recipient's grievance procedures'' to ''had the recipient determined at the conclusion of the recipient's grievance procedures that sex discrimination occurred.''

Requests for Guidance on Informal Resolution Processes

Comments: Some commenters appreciated that § 106.44(k) would allow a recipient to offer informal resolution processes, such as mediation, restorative justice, and transformative justice, which one commenter asserted could suitably address intersectional discrimination, provide community education, and allow for non-punitive or less severe outcomes.

However, several commenters requested that the Department clarify the role of restorative justice processes in informal resolution and which informal resolution processes are inappropriate based on the nature of alleged harassment. Some commenters reported that the Department previously stated in its 2001 Revised Sexual Harassment Guidance that mediation would not be appropriate to resolve an allegation of sexual assault. Several commenters also requested that the Department clarify the role of mediation in informal resolutions. Some commenters stated that mediation or conflict resolution is an inappropriate method for resolving a sex-based harassment complaint because it assumes each party shares responsibility or blame for the harassment, could allow a respondent to pressure a complainant into an inappropriate resolution, and often requires direct and possibly retraumatizing interaction between the parties. One commenter noted that this was especially true for Black girls, who are commonly blamed for the sex-based harassment they experience. One commenter identified these same concerns and urged the Department to prohibit mediation from being used to address an allegation of sexual assault, when, according to the commenter, such concerns would be magnified. Commenters contrasted those methods with restorative processes, which require the harasser to admit that they harmed the complainant, focus on the complainant's needs, repair the harm caused, and change future behavior.

Commenters also asked the Department to issue supplemental guidance that describes various types of informal resolution processes that would be appropriate or inappropriate under Title IX, including more information about restorative practices and related sources of funding. One commenter asserted that guidance on effective informal resolution processes, such as restorative justice and transformative justice, would lessen the burden on a recipient that is likely to focus its resources and training on

compliance with the recipient's grievance procedures outlined in proposed §§ 106.45 and 106.46.

Some commenters encouraged the Department to issue guidance that would detail best practices for informal resolution. One commenter urged the Department to collaborate with recipients and community-based organizations that currently conduct restorative justice programs for sexual violence cases to create recommendations that would be included in best practices guidance.

Another commenter raised concerns about a recipient's ability to implement specific informal resolution processes. The commenter stated that the proposed regulations would be untenable for any recipient that has adopted restorative justice practices that seek to achieve mutual understanding between the complainant and respondent and avoid punishment for first-time offenders. Some commenters suggested that the Department modify the regulations to expand restorative and transformative justice practices and provide funding for these practices.

Several commenters, which included State and local survivor advocacy organizations, expressed support for the proposed regulations and urged the Department to explicitly allow and encourage restorative justice practices as an option for informal resolution. The commenters asserted that restorative justice practices are more trauma-informed and survivor-centered than mediation.

Discussion: The Department acknowledges the many comments it received requesting clarification of various informal resolution processes that a recipient may elect to use under § 106.44(k). As noted above, informal resolution may encompass a wide variety of alternative dispute resolution processes, and these final regulations provide a recipient discretion to choose a resolution option that is best for them, the parties, and their educational communities. As discussed in the July 2022 NPRM, in the elementary school setting, for example, options might include requiring the respondent to take steps to repair the relationship with the complainant without requiring the students to interact face-to-face. 87 FR 41454. In the postsecondary setting, an informal resolution process could involve mediation or a more complex restorative justice process. *Id.* The Department acknowledges the commenters' concerns regarding mediation (including the Department's previous statements dissuading a recipient from using mediation to resolve an allegation of sexual assault), as well as the evidence of the potential benefits of restorative justice practices. In the last two decades, based on its enforcement experience, the Department has come to believe it should offer a recipient more flexibility in designing alternative procedures, and nothing prohibits a recipient from declining to offer mediation if it concludes such a process would be inappropriate. The final regulations do not preclude the use of restorative or transformative justice practices, nor did commenters identify any specific conflict between § 106.44(k) and restorative or transformative justice models. Accordingly, a recipient could include such practices in its informal resolution processes. The Department acknowledges the request for further information regarding informal resolution, and the Department will offer technical assistance, as appropriate, to promote compliance with these final regulations.

Changes: None.

C. Framework for Grievance Procedures for Complaints of Sex Discrimination

Section 106.45 of these final regulations specifies grievance procedures for the prompt and equitable resolution of complaints of sex discrimination generally, while § 106.46 specifies further grievance procedures for the prompt and equitable resolution of complaints of sex-based harassment involving a student party in a postsecondary institution. The Department is authorized by statute to promulgate regulations to effectuate the purpose of Title IX, *see* 20 U.S.C. 1682, including by requiring grievance procedures that provide for the prompt and equitable resolution of sex discrimination complaints. *See Gebser,* 524 U.S. at 292 (noting that the Department can administratively enforce the requirement that a school ''promulgate a grievance procedure'').

The Department received a range of comments on these provisions. Some commenters supported the requirements for grievance procedures in §§ 106.45 and 106.46 as proposed. Other commenters preferred the grievance procedures established by the 2020 amendments, in whole or in part. Still other commenters recommended streamlining § 106.45 and eliminating § 106.46; or eliminating § 106.45 and extending § 106.46 to all sex discrimination complaints. In addition, other commenters requested that the Department modify the procedures depending on the type of recipient, the conduct alleged, or the identity of the parties. The discussion below explains more specific bases for commenters' views, incorporates responses received to the directed question in the July 2022 NPRM about a recipient's obligation to provide an educational environment free from sex discrimination (proposed §§ 106.44, 106.45, and 106.46), 87 FR 41544, and presents the Department's reasoning and conclusions. Unless otherwise noted, the term ''grievance procedures'' refers to grievance procedures set forth in § 106.45, and if applicable § 106.46, that provide for the prompt and equitable resolution of complaints made by students, employees, or other individuals who are participating or attempting to participate in the recipient's education program or activity, or by the Title IX Coordinator, alleging any action that would be prohibited by Title IX or this part. *See* § 106.8(b)(2).

1. General Support

Comments: Many commenters supported the proposed grievance procedures framework for a range of reasons. For example, some commenters appreciated that the procedures would ensure that a recipient takes sexual harassment seriously, outline how a recipient must address any allegation of sex discrimination beyond just sex-based harassment, remove the need for additional or separate grievance procedures for any subset of sex discrimination complaints, and return to a decades-old standard that required a recipient to respond appropriately and provide support to complainants. One commenter stated that the procedures would increase transparency, equity, and trauma-informed care for complainants, address systemic forms of discrimination, and resolve grievances in a prompt, fair, and equitable manner.

Other commenters appreciated that the proposed grievance procedures reflect public input from a range of stakeholders, and provide flexibility, clarity, and streamlined procedures for recipients. On flexibility, one commenter specifically identified the removal of requirements related to written reports, cross-examination, and informal resolution, as well as the inclusion of provisions permitting a recipient to adopt the single-investigator model. Another commenter stated that the structural and operational differences between recipients—such as population size and demographics, staffing, financial resources, and student needs and experiences—make inflexible rules particularly inappropriate.

Other commenters addressed regulatory stability and appreciated that the proposed grievance procedures retained some of the 2020 amendments. Some commenters stated that flexibility in the proposed regulations and

retention of some of the 2020 amendments would deter future proposed rulemaking in favor of stability and resilience.

Discussion: The Department acknowledges these comments and agrees that these regulations will provide a recipient greater flexibility and clarity in designing Title IX grievance procedures that are consistent with both due process principles and procedures to address other violations of its student code of conduct, including discrimination based on other protected traits. Final § 106.45 establishes the basic elements of a fair process, sets clear guideposts for prompt and equitable resolution of complaints of sex discrimination, including sex-based harassment, and ensures transparent and reliable outcomes for recipients, students, employees, and others participating or attempting to participate in a recipient's education program or activity. Additionally, the requirements in final § 106.46—which are incorporated from § 106.45 of the 2020 amendments with modifications, as explained in greater detail in the discussion of individual sections in § 106.46, and which apply only to complaints of sex-based harassment involving a student party at a postsecondary institution—afford additional procedural requirements that are appropriate to the age, maturity, independence, needs, and context of students at postsecondary institutions.

The Department appreciates the opportunity to clarify that all recipients must implement grievance procedures consistent with § 106.45 or offer informal resolution consistent with § 106.44(k), as available and appropriate, to resolve a complaint of sex discrimination. At the same time, only postsecondary institutions have an additional obligation to implement grievance procedures consistent with § 106.46 (or offer informal resolution consistent with § 106.44(k), as available and appropriate), and this obligation is limited to resolving an allegation of sex-based harassment in which either the complainant or respondent is a student. Final § 106.45 sets forth baseline requirements to resolve any allegation of sex discrimination, including sex-based harassment, that may occur at a wide range of recipients, including an elementary school, secondary school, and other recipients such as State educational agencies, State vocational rehabilitation agencies, public libraries, museums, and other entities that receive Federal financial assistance from the Department. *See* 87 FR 41460.

The Department shares commenters' concerns about the importance of regulatory stability and the need for a recipient and all members of its educational community to have clear information about rights and responsibilities under Title IX, including the framework for addressing any alleged sex discrimination. By retaining and enhancing many of the requirements in the 2020 amendments, these final regulations provide the regulatory stability that promotes broad understanding of Title IX's nondiscrimination mandate and the rights and responsibilities it confers in educational settings that receive Federal financial assistance from the Department. At the same time, the Department recognizes the need to modify some of the changes made by the 2020 amendments (including by codifying longstanding interpretations of the statute) in order to fully effectuate Title IX's nondiscrimination mandate.

Other commenters objected to various aspects of §§ 106.45 and 106.46. We summarize and respond to their comments in the sections below.

Changes: None.

2. Due Process Generally

Comments: The Department received an array of comments about §§ 106.45 and 106.46 that related to due process. Some commenters expressed general support for the due process considerations reflected in the proposed regulations. For example, some commenters stated that it is reasonable for the Department to update the regulations to ensure effective implementation of Title IX while also safeguarding parties' due process rights. Other commenters concluded that the regulations would be fairer and less adversarial than the 2020 amendments, particularly at postsecondary institutions, and would also afford a recipient flexibility to establish effective and fair procedures tailored to a recipient's educational environment, including applicable State laws. One commenter stated that the proposed regulations would more appropriately balance flexibility, accountability, and due process concerns compared to the current regulations, while another commenter criticized the 2020 amendments for being excessively prescriptive and administratively burdensome.

In contrast, other commenters expressed concern that the proposed regulations would erode or deprive students of due process. For example, some commenters asserted that the 2020 amendments were fair and protected the rights of complainants and respondents alike, while the proposed regulations would mistakenly assume a tension between due process and Title IX's nondiscrimination mandate and would only require a recipient to provide as few procedural requirements as possible. In addition, one group of commenters asserted that the Department's justification for retaining certain procedural requirements from the 2020 amendments in proposed § 106.46 recognized the importance of procedural requirements, and that such recognition was in tension with the Department's proposal to omit many of those procedural requirements from proposed § 106.45 and revoke some provisions of the 2020 amendments.

Other commenters opposed the proposed regulations because, in their view, the regulations would effectively adopt procedures set forth in the Department's 2011 and 2014 guidance documents that, according to these commenters, pressured recipients to adopt unfair procedures that denied adequate notice, denied access to evidence, and failed to sanction false statements.

Some commenters suggested that courts have held that a postsecondary institution denied due process to a respondent while following procedures that the commenters describe as similar to those in the proposed regulations.

Discussion: The Department acknowledges commenters' support for the grievance procedures framework and agrees that the final regulations appropriately and fairly safeguard the due process rights of complainants and respondents while affording a recipient flexibility to address all types of sex discrimination complaints. The final regulations hold a recipient accountable for effectuating Title IX's nondiscrimination mandate while striking the right balance of all relevant considerations, including the preservation of due process, the ability of a recipient to tailor grievance procedures to suit its educational environment, and additional legal considerations under State or other laws.

The grievance procedures required in final § 106.46 retain many aspects of the 2020 amendments, including components that diverge from the framing in the 2011 Dear Colleague Letter on Sexual Violence and the 2014 Q&A on Sexual Violence. *See, e.g.,* § 106.46(e)(2) (opportunity to have an advisor of the party's choice at any meeting or proceeding); (f)(1)(ii)(B) (allowing a party's advisor to ask relevant and not otherwise impermissible questions to other parties and witnesses during a live hearing); and (i)(1) and (2) (providing an opportunity to appeal based on

procedural irregularity, new evidence, or conflict of interest or bias, as well as any other bases the recipient offers equally to the parties). And they include provisions that ensure that complainants and respondents have adequate notice and access to evidence and that preserve a recipient's authority to prohibit parties and witnesses from knowingly making false statements. *See* § 106.46(c), (d), (e)(1), and (e)(5) (written notice of allegations, dismissal of complaints, meetings, interviews, hearings, and delays); (e)(6) (equal opportunity to access to relevant and not otherwise impermissible evidence); (c)(1)(iv) (requiring written notices to inform the parties of any provision of a postsecondary institution's code of conduct that prohibits knowingly making false statements). With respect to complaints of sex discrimination other than those of sex-based harassment involving a student at postsecondary institutions, the Department notes that § 106.45 builds on the 2020 amendments by outlining grievance procedures that allow for the prompt and equitable resolution of such complaints in a manner that comports with the requirements of due process and is consistent with the standard set out in *Goss,* 419 U.S. at 579 (requiring schools to provide students facing up to a 10-day suspension with, at a minimum, ''some kind of notice'' and ''some kind of hearing''), as explained in the discussion of the individual provisions below. *See also* 87 FR 41456. The Department further disagrees with the commenters' assertion that the procedures set forth in final §§ 106.45 and 106.46 pressure a recipient to adopt unfair procedures. Instead—and as explained in greater detail below—these procedures appropriately account for a recipient's obligations to comply both with Title IX's nondiscrimination mandate and the requirements of due process.

The Department disagrees with assertions made by some commenters that the justification for additional requirements under § 106.46 is undermined because § 106.45 omits these additional requirements and the final regulations revoke some provisions of the 2020 amendments. As explained in the discussion of the individual provisions of § 106.46, these additional requirements in § 106.46 address unique considerations raised by sex-based harassment complaints involving students in a postsecondary setting but, in other circumstances, are unnecessary to preserve due process and may impair a recipient's ability to resolve sex discrimination complaints in a prompt and equitable manner. *See* discussion of § 106.46; *see also* 87 FR 41457–61. The Department's view comports with Supreme Court precedent that due process requirements vary with the particular circumstances. *See, e.g., Zinermon* v. *Burch,* 494 U.S. 113, 127 (1990); *Gilbert* v. *Homar,* 520 U.S. 924, 930 (1997); *Cafeteria & Rest. Workers* v. *McElroy,* 367 U.S. 886, 895 (1961).

The requirements for grievance procedures under § 106.45, and if applicable § 106.46, afford clear and predictable safeguards and will ensure fair, transparent, and reliable grievance procedures to resolve all forms of sex discrimination. Thus, by incorporating grievance procedures for the prompt and equitable resolution of sex discrimination complaints broadly in § 106.45, and retaining the aforementioned key provisions for the resolution of complaints that allege sex-based harassment involving a postsecondary student in § 106.46, the Department's final grievance procedure requirements strengthen the 2020 amendments' existing requirements to address sex-based harassment, expand those requirements to cover all forms of sex discrimination, and ensure all parties are afforded procedures that comport with the requirements of due process.

The Department has reviewed the court decisions cited by commenters and disagrees with the commenters' characterization that §§ 106.45 and 106.46 conflict with their holdings. Some of the decisions concluded that the procedures used by a particular recipient in resolving complaints of sexual assault violated due process,[43] while others did not draw final conclusions about whether the particular procedures a recipient provided were sufficient.[44] The decisions cited do not provide a basis for the view suggested by the commenters that the final regulations adopted here are inconsistent with due process requirements.

The Department notes that commenters voiced support and raised questions about specific provisions in proposed §§ 106.45 and 106.46. Those comments, and the Department's reasons for retaining or revising those provisions, are summarized and addressed in more detail in discussions of the relevant individual provisions below.

Changes: None.

Due Process Applied to Various Recipients and the Department

Comments: Whether supporting or opposing the proposed regulations, many commenters recognized the importance of due process in a recipient's response to conduct that allegedly violates Title IX. With respect to a public recipient, several commenters noted that a public postsecondary institution must apply constitutional due process protections before disciplining, terminating, or expelling a student. Other commenters addressed the application of due process principles to public elementary schools and secondary schools. In addition, some commenters noted the importance of applying due process principles to sex discrimination complaints in the private college context, drawing on theories of basic fairness under common law, statute, or contract law.

Other commenters addressed the application of constitutional due process requirements to OCR. Some commenters stated that, as a government actor, OCR cannot compel a public or private recipient to deprive a person of due process, nor compel a recipient to take actions that if taken by OCR would violate the Fifth Amendment's Due Process Clause.

Discussion: The Department acknowledges the thoughtful comments on the specific role constitutional due process principles should play in a recipient's grievance procedures to determine whether an individual engaged in unlawful sex discrimination while participating in an education program or activity.

As the Department acknowledged in the July 2022 NPRM, courts have held that public postsecondary institutions' disciplinary proceedings are subject to the requirements of procedural due process. 87 FR 41456. And while the Due Process Clauses of the Fifth and Fourteenth Amendments do not apply to a private recipient, the Department does not intend to impose, nor does Title IX require, different procedural standards for public and private recipients. 87 FR 41456. The Department agrees with commenters that as an agency of the Federal government subject to the U.S. Constitution, the Department is precluded from administering, enforcing, and interpreting statutes, including Title IX, in a manner that would require a recipient to deny the

[43] *See, e.g., Doe* v. *Miami Univ.,* 882 F.3d 579 (6th Cir. 2018); *Doe* v. *Baum,* 903 F.3d 575 (6th Cir. 2018); *Doe* v. *Univ. of Cincinnati,* 872 F.3d 393 (6th Cir. 2017).

[44] *See, e.g., Munoz* v. *Strong,* No. 20–CV–984, 2021 WL 5548081 (W.D. Mich. June 23, 2021) (denying university's motion to dismiss due process claim because the plaintiff has ''plausibly'' alleged that his rights to notice and an opportunity to be heard had been violated).

parties their constitutional rights to due process. The final regulations make clear that nothing in the regulations requires a recipient to restrict any rights guaranteed by the U.S. Constitution. 34 CFR 106.6(d).

Changes: None.

Method for Determining What Process Is Due

Comments: Commenters had differing opinions about the process a recipient should be required to provide. For example, one commenter stated that postsecondary institution proceedings are not judicial proceedings and do not have to mimic the latter to be fair and equitable. In contrast, other commenters asserted that the Department's Title IX regulations should adopt the same procedures used in criminal proceedings. Still others invoked the test in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), for determining what process is due, with one commenter asserting the proposed regulations would fail the *Mathews* test. One commenter asserted that minimum due process requires timely notice of the charges and an opportunity for the respondent to review the evidence and present their side of the story.

Discussion: The Department reiterates its strong agreement that procedures to resolve disputes about sex discrimination, including sex-based harassment, must comport with due process. However, as some commenters noted, this agreement does not answer the question of what specific process is due. ''[N]ot all situations calling for procedural safeguards call for the same kind of procedure.'' *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972); *see also Hannah* v. *Larche,* 363 U.S. 420, 442 (1960); *Zinermon,* 494 U.S. at 127; *Gilbert,* 520 U.S. at 930. That a particular procedure is required in criminal or civil judicial proceedings does not mean the same procedure is required in all situations. *See, e.g., Bd. of Curators of Univ. of Mo.* v. *Horowitz,* 435 U.S. 78, 88 (1978); *Baxter* v. *Palmigiano,* 425 U.S. 308, 321 (1976); 87 FR 41456; 85 FR 30051, 30531.

As explained in greater detail in the discussions of the individual grievance procedure provisions of the final regulations, the Department concludes that the framework set forth in §§ 106.45 and 106.46 allows a public recipient to meet the requirements of constitutional due process, including that a person be afforded notice and an opportunity to be heard before they may be deprived of ''life, liberty, or property.'' *Goss,* 419 U.S. at 579. Although different grievance procedures might also satisfy due process, the Department strongly disagrees that the requirements in the final regulations fall short of due process requirements. Moreover, the Department notes that adding further procedures may discourage an individual from making a complaint of sex discrimination or participating in grievance procedures, which would undermine Title IX's nondiscrimination mandate.

In determining whether an agency's administrative procedures afford constitutional due process, courts apply the factors described in *Mathews,* 424 U.S. at 334–35, which are satisfied here as well. Specifically, as several commenters noted and the Department acknowledged in the preamble to the 2020 amendments, *see* 85 FR 30283 n.1130, the factors described in *Mathews* determine what procedural protections due process requires in a particular situation. ''Under the *Mathews* balancing test, a court evaluates (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake.'' *Nelson* v. *Colorado,* 581 U.S. 128, 135 (2017); *see also Zinermon,* 494 U.S. at 127 (courts ''weigh several factors'' in determining what procedural protections the Due Process Clause requires in a particular case). Consistent with this understanding, the final grievance procedures set forth in §§ 106.45 and 106.46 are tailored to the unique settings and rights implicated by allegations of sex discrimination (including sex-based harassment) at educational institutions.

Changes: None.

Identifying Relevant Interests

Comments: Some commenters supported the framework for grievance procedures because it would make campuses safer by encouraging the use of grievance procedures. Other commenters opposed the framework because they thought the procedural protections went too far, which would discourage the filing of complaints, or subject complainants to retaliation.

Some commenters expressed concern that the proposed framework for grievance procedures lacked adequate definitions, due process, and fundamental fairness for a student respondent. Commenters raised concern about a recipient wrongfully punishing innocent students, including for sexual assault, which would have significant consequences for such respondents. One commenter asserted that even being named a respondent in a sex discrimination complaint would likely damage a person's reputation if known to others or if added to written records. One group of commenters asserted that ''efficiency'' is not a valid justification for departing from procedural requirements that would ensure fairness.

Discussion: The Department recognizes that grievance procedures will have significant impact not only on how a recipient investigates sex discrimination allegations, but also on the various interests that commenters identified. Among these is a recipient's interest in ensuring that it operates its education program and activity in a manner that is free from sex discrimination—including through grievance procedures that do not discourage reports of sex discrimination and that protect participants from retaliation. They also include the interest that all parties share in the fairness and reliability of such procedures. The Department describes in greater detail how the requirements for grievance procedures in the final regulations address these important interests in its discussion of the specific provisions in §§ 106.45 and 106.46 and explains the final regulations' robust protections against retaliation in its discussion of § 106.71. For the reasons discussed in those specific sections, the Department strongly disagrees that the requirements for grievance procedures in the final regulations fail to afford due process or ensure fundamental fairness to respondents.

The Department also disagrees that the requirements for grievance procedures in the final regulations ignore concerns about wrongful punishment or the harms respondents experience when they are named in sex discrimination complaints. On the contrary, the final regulations protect these interests, including by adopting specific provisions that operate to ensure fair procedures that result in accurate and reliable outcomes. *See, e.g.,* § 106.45(b)(1), (2), and (6) (requiring equitable treatment of the parties, addressing questions of conflict of interest and bias, setting standards for the objective evaluation of relevant and not otherwise impermissible evidence, and ensuring determinations are not reached before the conclusion of the grievance procedures), (d)(3), (i) (providing bases for appeals of decisions under § 106.45); § 106.46(a) (§ 106.46's grievance procedures ''must include provisions that incorporate the requirements of § 106.45''), (i) (providing bases for appeals of decisions under § 106.46). The Department recognizes that being named as a respondent can impose harm (including reputational harm), especially if that

information is made known to others or added to written records. Accordingly, the grievance procedures include provisions to regulate the disclosure of certain types of information related to alleged sex discrimination, as discussed in greater detail below. *See, e.g.,* § 106.45(b)(5), (7) (requiring a recipient to take reasonable steps to protect parties' privacy and to exclude certain evidence and questions as impermissible), (f)(4)(iii) (requiring a recipient to take reasonable steps to prevent and address unauthorized disclosure of information). In addition, these final regulations require a recipient to ensure that respondents have access to supportive measures. *See* §§ 106.44(f)(1)(ii), (g), 106.45(l)(1).

Moreover, the Department notes a respondent's interest is not the only individual interest that must be considered in the *Mathews* analysis. The Supreme Court has explained that when more than one private party's interests are implicated in a proceeding (*i.e.,* both a complainant and a respondent as private parties), both parties' interests must be considered in determining what process is due. *See Brock* v. *Roadway Exp., Inc.,* 481 U.S. 252, 263 (1987). Similar to respondents, complainants likewise have an important interest in remaining enrolled in school and completing their education, an interest that can be threatened if discrimination they face is allowed to continue unremedied. The Department must take these interests into account, and the final regulations reflect these concerns. And contrary to the concerns voiced by some commenters, the final regulations do not go too far in the direction of dissuading a complainant from making a complaint or fail to protect such complainants from retaliation for doing so. Rather, as explained in greater detail in the discussions of §§ 106.45(a)(2) and 106.71, the final regulations ensure that a complainant can make a complaint if they experience sex discrimination (including sex-based harassment) and are protected from retaliation, while also ensuring that all parties receive the process they are due. The Department also notes that under the final regulations a Title IX Coordinator must take certain actions upon being notified of conduct that reasonably may constitute sex discrimination, including offering and coordinating supportive measures or, if available and appropriate, offering to resolve a complaint using an informal resolution process. *See* § 106.44(f)(1)(ii), (f)(1)(iv), (g), (k). These measures will help mitigate any deterrent effect the grievance procedures might have.

In addition to acknowledging the overlapping, but distinct, private interests involved, the *Mathews* analysis asks what procedures will decrease the likelihood that a decisionmaker reaches the wrong conclusion. Because ''a primary function of legal process is to minimize the risk of erroneous decisions,'' there must be a close assessment ''of the relative reliability of the procedures used and the substitute procedures sought.'' *Mackey* v. *Montrym,* 443 U.S. 1, 13 (1979). For the reasons explained in greater detail in the discussions of specific provisions of §§ 106.45 and 106.46, the Department has concluded that the grievance procedures set forth in the final regulations meet this standard. But the Department notes here that in conducting this analysis, courts do not simply ask whether a particular additional procedure would improve reliability. Instead, they also inquire into how much the procedure would do so and at what cost. Even if some ''marginal gains from affording an additional procedural safeguard'' would occur, due process does not require that additional procedure if it is ''outweighed by the societal cost of providing such a safeguard.'' *Walters* v. *Nat'l Ass'n of Radiation Survivors,* 473 U.S. 305, 321 (1985). Contrary to commenters' statements, such ''societal costs,'' *id.,* can include considerations of ''administrative efficiency,'' *see Dixon* v. *Love,* 431 U.S. 105, 114 (1977). But they also include other considerations, including the concern—voiced by some commenters—that adopting additional procedures could discourage individuals who experience sex discrimination from making a complaint.

Changes: None.

Issues of Bias

Comments: Some commenters raised concerns about biased grievance procedures.

Discussion: The Department shares commenters' concerns about the potential for bias in grievance procedures and the disproportionate impact biased procedures may have on respondents who come from a range of backgrounds. The Department stresses that the final regulations' grievance procedures must not be tainted by bias. To guard against bias, the final regulations require that any person designated as a Title IX Coordinator, investigator, or decisionmaker not have a conflict of interest or bias against complainants or respondents generally or an individual complainant or respondent. § 106.45(b)(2); *see also* § 106.46(a) (requiring postsecondary institutions to incorporate § 106.45's requirements into its grievance procedures for resolving complaints of sex-based harassment involving a student party). The final regulations impose the same requirement for any person designated by a recipient to facilitate an informal resolution process under § 106.44(k). *See* § 106.46(k)(4). They also explicitly provide that bias is a ground for appeal from a dismissal or determination whether sex-based harassment occurred. *See* §§ 106.45(d)(3), 106.46(i)(1)(iii). The final regulations also require a presumption that the respondent is not responsible for the alleged sex discrimination until a determination is made at the conclusion of the recipient's grievance procedures. *See* § 106.45(b)(3). And the final regulations include strong protections that build on provisions in the 2020 amendments that seek to prevent biased procedures through appropriate training. *See* § 106.8(d)(2)(iii), (3); 85 FR 30112. The Department explains these anti-bias provisions in greater detail in the discussion of §§ 106.8(d), 106.44(k)(4), and 106.45(b)(2).

Changes: None.

3. Administrative Burdens

Comments: Some commenters expressed concern that the proposed requirements for grievance procedures would place unmanageable administrative burdens on a recipient. Other commenters suggested the regulations would detract from efforts to identify, prevent, and remedy sex discrimination. Some commenters asserted that having one set of grievance procedures to address sex-based harassment and another for other forms of sex discrimination would create confusion for a recipient as to which requirements apply to which complaints. In addition, some commenters asserted that the revised definition of ''sex-based harassment'' and the application of § 106.45 to all other sex discrimination complaints would be more burdensome than current regulations.

Some commenters recommended changes to the proposed regulations to alter the burdens on certain recipients. For example, one commenter suggested a ''safe harbor'' to accommodate religiously affiliated postsecondary institutions that have codes of conduct and progressive discipline policies that do not align with the proposed regulations. The commenter said a ''safe harbor'' might include an institution stating that it takes allegations of sexual

assault seriously and maintains a Clery Act reporting record accordingly. One commenter, a school district, urged the Department to allow a recipient to develop its own process for responding to complaints of sex discrimination, including sex-based harassment. The commenter stated that it conducted three Title IX investigations under the 2020 amendments, which each averaged 30 hours in mostly paperwork and document writing. Another commenter estimated that a recipient would need at least seven employees to administer grievance procedures under the proposed framework and urged the Department to reduce the number of staff required to prevent overburdening small recipients.

Discussion: The Department acknowledges the vast diversity among recipients, the variety of systems used to enforce codes of conduct, and each recipient's desire to retain flexibility and discretion. The need for consistent and predictable enforcement of Title IX weighs in favor of Federal rules standardizing the investigation and resolution of allegations of sex discrimination under these final regulations. *See* 85 FR 30096.

The Department acknowledges both that the Title IX grievance procedures afford strong civil rights protections and ensure a nondiscriminatory educational environment, and that as commenters noted, a recipient needs to have a degree of flexibility in structuring its internal affairs, including with respect to disciplinary decisions. Under §§ 106.45 and 106.46, a recipient retains significant flexibility and discretion, including with respect to decisions to: designate the reasonable timeframes that will apply to grievance procedures (as long as they are ''reasonably prompt''), § 106.45(b)(4); use a recipient's own employees as investigators and decisionmakers or outsource those functions to contractors, §§ 106.8(a)(2) and 106.45(b)(2); use an individual decisionmaker or a panel of decisionmakers, § 106.45(b)(2); offer informal resolution options, § 106.45(k); determine which remedies to provide a complainant or disciplinary sanctions to impose against a respondent following a determination that sex discrimination occurred, § 106.45(h)(3) and (4); and formulate appeal procedures, §§ 106.45(i) and 106.46(i). *See also* § 106.46(a) (requiring a postsecondary institution's grievance procedures for resolving complaints of sex-based harassment involving a student to incorporate the requirements of § 106.45).

The Department also notes that the final regulations remove requirements imposed by the 2020 amendments that stakeholders and commenters identified as overly prescriptive, restrictive, and time-consuming, including requirements related to written notice in elementary schools and secondary schools, the requirement to hold a live hearing, and the prohibition on the single-investigator model. *See* 87 FR 41467, 41473, 41482. The Department notes that the final regulations include other specific changes to the requirements of the 2020 amendments that also aim to make grievance procedures less burdensome without reducing their efficacy or fairness. For example, the Department leaves it to recipients' discretion to determine whether to provide written notice of allegations outside the context of complaints of sex-based harassment involving a postsecondary student. *See* §§ 106.45(c) and 106.46(c). The Department also gives postsecondary institutions the discretion to assess credibility through a live hearing or through another live questioning process when investigating complaints of sex-based harassment involving a student. *See* § 106.46(f)–(g). In addition, like the 2020 amendments, the final regulations do not require specific disciplinary sanctions after a determination that sex discrimination occurred or prescribe any particular form of sanctions or remedy. *See* 85 FR 30071. Rather, §§ 106.45 and 106.46 prescribe grievance procedures focused on reaching fair, transparent, and reliable determinations so that a recipient can address sex discrimination in its education program or activity and ensure that a complainant receives remedies designed to restore or preserve equal access to the recipient's education program or activity.

The Department further disagrees with the assertion that the additional administrative burden imposed by these regulations would detract from efforts to identify, prevent, and remedy sex discrimination. On the contrary, by creating a predictable and clear framework for resolving complaints of sex discrimination, the final grievance procedures in §§ 106.45 and 106.46 will enhance those efforts. The Department therefore declines to amend the regulations in the ways suggested by the commenters, such as allowing a recipient to develop its own processes to respond to complaints of sex discrimination.

The Department also disagrees that having one set of grievance procedures for sex-based harassment and another for other forms of sex discrimination will create confusion about which requirements apply to which complaints. The final regulations clearly define ''sex-based harassment.'' *See* discussion regarding the definition of ''sex-based harassment'' in § 106.2. And recipients already have experience determining what conduct constitutes sex-based harassment, as the 2020 amendments included grievance procedures that applied only to sexual harassment complaints. These final regulations, which apply to all forms of sex discrimination and include discrete additional requirements for a subset of sex-based harassment complaints involving students at postsecondary institutions, clarify and streamline a recipient's Title IX compliance obligations as compared to the 2020 amendments.

The benefits of ensuring that sex discrimination complaints are resolved in a manner that is fair, aims to ensure reliable outcomes, and meets the requirements of Title IX, justify the burdens of the final regulations. The Department's discussion in the *Regulatory Impact Analysis* provides additional information about how the Department reached this conclusion.

The Department also declines to adopt a safe harbor to exempt a recipient from its obligation to adopt and implement grievance procedures consistent with §§ 106.45 and 106.46. With respect to religious institutions, the Department notes that Title IX does not apply to an educational institution controlled by a religious organization for which compliance with Title IX would conflict with religious tenets of the controlling organization. 20 U.S.C. 1681(a)(3). Since Congress enacted the exemption for religious institutions, the authority to eliminate or expand it rests with Congress. For further explanation of Title IX's religious exemptions, see the discussion of Religious Exemptions (Section VII).

Further, the Department emphasizes that these final regulations are promulgated under Title IX and not under the Clery Act. Unlike the Clery Act, these final regulations apply to all recipients of Federal financial assistance, which include many entities that are not institutions of higher education that participate in the Federal student aid programs under Title IV of the Higher Education Act. For example, these final regulations apply to elementary schools, secondary schools, State educational agencies, State vocational rehabilitation agencies, public libraries, museums, and a range of other entities that receive Federal financial assistance from the Department and are not subject to the Clery Act. Accordingly, a safe harbor from a recipient's obligation to

implement grievance procedures that partially relies on a recipient's Clery Act reporting record would be unworkable under Title IX regulations.

For these reasons, the Department maintains that the final regulations account for both the administrative concerns commenters have raised and the need to ensure a nondiscriminatory educational environment through procedures that are designed to promote fair and accurate outcomes in addressing sex discrimination complaints.

Changes: None.

4. Bifurcation of Sex-Based Harassment Complaints Between Students and Employees at a Postsecondary Institution

Comments: Several commenters raised concerns about the distinction drawn by the proposed regulations between students and employees. Some expressed confusion about which provision—§§ 106.45 or 106.46—applied to which population. Another argued that the distinction lacked adequate justification, arguing that a postsecondary student has the same status as an employee and is capable of self-advocacy. Still others questioned why a recipient's grievance procedures in the postsecondary context would change based on the complainant's identity, and asserted instead that due process rights typically attach to individuals based on their status as a respondent with a property or liberty interest in their education or employment. And some commenters urged the Department to only require a postsecondary institution to comply with grievance procedures articulated in § 106.46 for sex-based harassment complaints when the respondent is a postsecondary student, and otherwise apply grievance procedures established in § 106.45 when the respondent is an employee.

Discussion: The Department believes that some commenters may have misunderstood the Department's reasoning for requiring different grievance procedures. To clarify, a postsecondary institution must apply grievance procedures consistent with § 106.45 to any complaint of sex discrimination—including all employee-to-employee sex-based harassment complaints. *See* § 106.46(a). In contrast, a postsecondary institution must apply grievance procedures consistent with § 106.46 to any sex-based harassment complaint that involves a student party—including sex-based harassment complaints in which an employee is the other party. *See id.*

Contrary to a commenter's assertion that postsecondary employees and students have the same status, an employee's legal status is distinct due to the employment relationship between the recipient and employee. As noted in the July 2022 NPRM, Title IX grievance procedures must be sufficiently flexible to allow a recipient to also comply with its obligations under Title VII, using a framework that is suited to these types of complaints. 87 FR 41459. A recipient may also have employees who hold a variety of designations, including temporary, part-time, full-time, at-will, unionized, tenured, and student-employees—and each category may be entitled to unique grievance procedures based on their respective employment designations. The requirement that the recipient's grievance procedures be prompt and equitable means, in this context, that a recipient's Title IX grievance procedures for complaints of sex-based harassment involving employees must function alongside the procedures it uses to implement Title VII and, to the extent not inconsistent, other laws and collective bargaining agreements that govern the employment relationship. In contrast, students at postsecondary institutions do not have the protection of Title VII in their capacity as students. *Id.* In addition, as explained in the discussion of Employees below, § 106.45's requirements are fundamental to a fair process, and the Department anticipates that many recipients either already (or can easily) incorporate them in their grievance procedures for sex discrimination complaints.

To the extent § 106.46 imposes additional requirements, the benefits of affording a postsecondary student party equitable participation in grievance procedures justify the limited burdens of requiring the additional procedural requirements of § 106.46 for employee-to-student sex-based harassment complaints at a postsecondary institution. For similar reasons, although some commenters asked the Department to revise § 106.46 to apply only in cases involving a student respondent, which the commenters stated would make it easier for recipient employers to meet other obligations, including under collective bargaining agreements, the Department does not agree that such a change is necessary. For additional explanation of the application of the final regulations' grievance procedures requirements to employees, see the discussion of Employees below.

Additionally, the Department disagrees with the commenter's assertion that the justification for imposing additional procedural requirements when a complaint of sex-based harassment involves a student party is unsound because students and employees are both capable of self-advocacy. While many students in postsecondary institutions are older or nontraditional—including graduate and professional students—undergraduate students, who tend to be younger and newly independent adults, make up a significant portion of the postsecondary student population.[45] As such, many postsecondary students would benefit from the additional procedural requirements of § 106.46. And although the commenter notes that some postsecondary students may be able to effectively self-advocate, the Department recognizes that others may not. These final regulations ensure that all students have the opportunity to participate meaningfully and effectively in grievance procedures to protect their right to equal educational opportunities. For similar reasons, the Department declines the suggestion to limit § 106.46 to complaints of sex-based harassment to only those cases in which a student is the respondent. Section 106.46 provides important protections for students who are complainants even when the respondent is an employee. As noted above and in the July 2022 NPRM, postsecondary students are often newly independent, still learning to advocate, and would not be entitled to have a parent, guardian, or other authorized legal representative present at meetings or proceedings, unlike students in elementary schools and secondary schools. 87 FR 41462. Thus, the additional requirements of § 106.46 are particularly beneficial for a student in a complaint that involves an employee respondent because an employee may be afforded additional rights or protections that a student complainant lacks.

The Department is also unpersuaded by commenters' assertions that the framework for grievance procedures as

[45] According to the National Center for Education Statistics, of the 18.6 million students enrolled in degree-granting postsecondary institutions in 2021, 15.4 million were undergraduate students and 3.2 million were graduate students. U.S. Dep't of Educ., Institute of Education Sciences, National Center for Education Statistics, *Characteristics of Postsecondary Students* (Aug. 2023), *https://nces.ed.gov/programs/coe/indicator/csb/postsecondary-students.* Of the undergraduate student population, 85 percent of full-time undergraduates and 60 percent of part-time undergraduates were age 25 or younger in 2021. *Id.* Additionally, the overall college enrollment rate for 18- to 24-year-olds was 38 percent in 2021. U.S. Dep't of Educ., Institute of Education Sciences, National Center for Education Statistics, *College Enrollment Rates* (May 2023), *https://nces.ed.gov/programs/coe/indicator/cpb/college-enrollment-rate.*

applied to sex-based harassment complaints that involve a postsecondary student diverges from how courts have construed due process requirements. The Supreme Court has made clear that Federal agencies may use standards in administrative enforcement that differ from those used by courts to litigate private actions for monetary damages, *cf. Davis,* 526 U.S. at 639, and nothing in the final regulations precludes a recipient from complying with the Due Process Clauses of the Fifth and Fourteenth Amendments. *See* 34 CFR 106.6(d); *see also* discussion of § 106.6(b).

The Department recognizes that the U.S. Constitution affords due process protections to individuals who are facing a possible deprivation of property or liberty interests. However, grievance procedures specifically adopted for the student population in a postsecondary institution are needed to carry out Title IX's nondiscrimination mandate. Accordingly, the Department continues to believe that the requirements of § 106.46 afford protections that are appropriate to the age, maturity, independence, needs, and context of students at postsecondary institutions. The Department also views the additional provisions of § 106.46 as necessary to address postsecondary sex-based harassment complaints, which often allege conduct that is highly personal and of a different nature than other types of alleged sex discrimination and which typically require greater participation by a complainant and respondent in grievance procedures than other complaints of sex discrimination.

Moreover, the additional requirements of § 106.46 are not necessary for other individuals, including employees, who have different relationships with postsecondary institutions and may be afforded additional rights or protections under Title VII or other laws, agreements, or commitments by the recipient. Affording additional procedural requirements for postsecondary students is also consistent with the Department's understanding of, and commitment to, due process as dictated by the particular circumstances. Accordingly, as recognized in the July 2022 NPRM, the demands of a sex-based harassment complaint involving a postsecondary student may dictate different procedures than what might be appropriate in other situations. 87 FR 41462.

Changes: None.

5. Ability To Respond to Threats, Promptly Impose Discipline, or Address Sex Discrimination

Comments: Some commenters expressed concern that the proposed regulations would interfere with a recipient's ability to promptly respond to threats, harassment, and discrimination, even when significant evidence would support disciplinary action or when the respondent's conduct also violated rules unrelated to Title IX. Similarly, another commenter asserted that § 106.45 would create a separate and more cumbersome process for investigating and disciplining sex discrimination than what is required for other offenses, and that such a distinction is not equitable. The commenter used the example of a recipient being able to take immediate disciplinary action against a student who commits vandalism, while being required to first implement grievance procedures for a student who commits the potentially more serious offense of sexual misconduct. The commenter also asserted that no other Federal nondiscrimination laws require a complaint process that would restrict student discipline under State law.

Other commenters expressed concern that the proposed framework would deter a complainant from pursuing grievance procedures because they may find them complicated and intimidating.

Discussion: The Department disagrees with assertions that grievance procedures under §§ 106.45 and 106.46 would unnecessarily delay resolution of complaints or prevent a recipient from removing a respondent who presents a threat to persons within its education program or activity. Sections 106.45 and 106.46 specifically require a recipient to address complaints of sex discrimination and sex-based harassment ''prompt[ly].'' §§ 106.45(a)(1), 106.46(a). Further, the Department disagrees that the grievance procedures set forth in § 106.45 prevent a recipient from promptly resolving a complaint involving an elementary school or secondary school student, and the commenters have provided no reason to believe that they will. The Department also notes that it has modified the requirements of the 2020 amendments to address concerns about the length of time it takes to impose discipline in response to concerns when raised by stakeholders who expressed difficulty implementing the prior procedures. *See* 87 FR 41457 (describing stakeholder concerns with lengthy grievance procedures at the elementary school and secondary school level); *id.* at 41459 (explaining changes the Department proposed to § 106.45 to address concerns about challenges the 2020 amendments' grievance process requirements posed for younger students).

While the Department acknowledges that schools have different procedures for responding to other types of offenses, it maintains that the grievance procedures adopted in the 2020 amendments as enhanced and revised in these final regulations are specifically suited and necessary to address allegations of sex discrimination, which involve considerations that are distinct from many other student conduct offenses, including safeguards to assist a recipient in ensuring an educational environment free from sex discrimination during the pendency of grievance procedures. With respect to recipients' ability to respond to threats, the Department notes that the final regulations permit a recipient to remove a respondent from its education program or activity on an emergency basis in certain circumstances, *see* § 106.44(h), or place an employee respondent on administrative leave from employment responsibilities during the pendency of a recipient's grievance procedures, *see* § 106.44(i). *See also* discussion of § 106.44(g)(2) and (3), (h), –(i).

The Department acknowledges that a complainant may not wish to pursue grievance procedures for a variety of reasons. In such circumstances, the availability of confidential resources, as well as other actions that a Title IX Coordinator must take upon being notified of conduct that reasonably may constitute sex discrimination, including offering and coordinating supportive measures or, if available and appropriate, offering to resolve a complaint using an informal resolution process, will mitigate any deterrent effect the grievance procedures might otherwise have. *See* § 106.44(f)(1)(ii), (iv), (g), (k).

Changes: None.

6. Grievance Procedures Appearing as Quasi-Judicial Proceedings

Comments: Some commenters supported removing requirements for grievance procedures adopted as part of the 2020 amendments that appear quasi-judicial or mimic the criminal or civil legal system. For example, some commenters appreciated that §§ 106.44, 106.45, and 106.46 would establish a baseline for grievance procedures that can be used by non-attorneys, which the commenters stated is more likely to achieve fairness and safeguards equity and equality. Other commenters stated

that the quasi-judicial nature of the procedures adopted in the 2020 amendments deterred students who experienced sexual harassment or sexual assault from coming forward and weakened protections for these students. Another commenter stated that the proposed regulations would allow for a streamlined process more aligned with a recipient's code of conduct as well as responses to individual complaints. One commenter indicated that deemphasizing quasi-judicial elements in the proposed regulations would allow a recipient to apply Title IX in a manner that addresses systemic forms of abuse, including the potential that an institution might try to ''cover up'' the discrimination, and that the proposed requirements for grievance procedures correctly emphasize preventing re-traumatization and connecting survivors to resources.

Other commenters expressed various concerns about the proposed regulations. Some stated that recipients are not equipped to adjudicate complaints, and that even with the Department's proposed changes to the 2020 amendments, the proposed regulations would turn disciplinary proceedings into overly legalistic quasi-court proceedings. Other commenters similarly argued that the grievance procedures adopted by §§ 106.45 and 106.46 would create an inappropriate adversarial environment in educational settings, which they argued would be particularly inappropriate in an elementary school or secondary school setting. Still other commenters questioned whether recipient officials can or should appropriately adjudicate allegations of rape, attempted rape, sexual assault, or other criminal violations, or whether any allegation of potentially criminal misconduct should be investigated only by law enforcement.

Discussion: The Department acknowledges, and agrees with, the commenters who have expressed support for the revisions to the grievance procedures adopted in the 2020 amendments. As the Department explained in the July 2022 NPRM, it proposed to revise some of these procedures in response to comments from stakeholders that these procedures were unduly burdensome, deprived recipients of necessary flexibility to respond to certain circumstances (like addressing certain behavior on the playground), and discouraged individuals who had experienced sex discrimination or sex-based harassment from filing complaints. *See* 87 FR 41457–63.

The Department agrees that elementary schools, secondary schools, postsecondary institutions, and other recipients are not courts of law, but disagrees that the final regulations create overly legalistic or adversarial grievance procedures in any of these school settings. Rather, the procedures promote Title IX's nondiscrimination mandate. They provide a structure for schools to determine whether sex discrimination or sex-based harassment has occurred, and if it has, to determine the proper remedies to provide and disciplinary sanctions to impose, while also complying with due process requirements. Moreover, with limited exceptions, the final regulations allow a recipient to address concerns of sex discrimination or sex-based harassment through other, informal means, when appropriate. *See* §§ 106.44(k), 106.45(k), 106.46(j); *see also* discussion of § 106.44(k).

With respect to commenter suggestions that serious allegations of sex-based harassment (such as rape, sexual assault, and other criminal violations) should be handled by law enforcement as opposed to a recipient, the Department reiterates what it explained in the preamble to the 2020 amendments—the Supreme Court has held that sex-based harassment constitutes sex discrimination under Title IX,[46] and the Department is responsible for enforcing Title IX. *See* 85 FR 30099. Title IX does not replace redress through civil litigation or the criminal legal system. Title IX requires a recipient to evaluate, and as necessary address, allegations that sex discrimination, including sex-based harassment, has deprived a complainant of equal access to education, and remedy such situations. *Id.* And in many instances, a recipient is the only entity that can take specific action to remedy sex discrimination in its education program or activity and prevent its recurrence, such as through changes in academic schedules or living arrangements, modifications to maintain access to extracurricular activities or other educational resources, or the imposition of disciplinary sanctions aligned with a recipient's code of conduct. Further, Title IX prohibits conduct that is not necessarily criminal in nature, such as a professor offering to raise a student's grade in exchange for sexual favors. Accordingly, recipients—not law enforcement or the courts—are uniquely positioned and required to carry out Title IX's nondiscrimination mandate.

The Department further acknowledges commenters' concerns that recipients exist primarily to educate, and are not courts with a primary purpose, focus, or expertise in administering procedures to resolve factual disputes. The Department also notes that a recipient may view its code of conduct as an educational process rather than a punitive process and acknowledges that such a recipient may be uncomfortable with grievance procedures in which the fact-finding process is more adversarial. With respect to sex discrimination covered under Title IX, however, the recipient must administer grievance procedures designed to reach reliable factual determinations and do so promptly and equitably. Doing so is necessary to ensure that all members of a recipient's community are not discriminated against on the basis of sex. The Department recognizes that in the context of sex-based harassment, the grievance procedures may be more adversarial in light of the serious nature of the alleged misconduct, and the high stakes that the outcome of the process will have for all parties. But the Department does not see any basis for concluding that the grievance procedures set forth in § 106.46 are inconsistent with a recipient's desire to maintain a code of conduct that prioritizes education and accountability over punishment. The Department also notes that §§ 106.45 and 106.46 provide a recipient discretion to create grievance procedures that may be more or less adversarial, such as by deciding whether to hold live hearings (§ 106.46(g)) or how parties and witnesses are questioned (§§ 106.45(g) and 106.46(f)).

Changes: None.

7. Consistency With Other Civil Rights Laws That OCR Enforces

Comments: Some commenters expressed concern that the proposed regulations would apply different standards to allegations of sex-based harassment than to allegations of discrimination under the other civil rights laws that OCR enforces, which commenters asserted could lead to inconsistent enforcement of civil rights laws.

Commenters noted a single complaint may allege discrimination on multiple bases and asked the Department to clarify how a recipient should respond to such complaints. Commenters also suggested that the proposed regulations permit a recipient to consider more than one identity at a time (*e.g.,* sex, race,

[46] *See, e.g., Gebser,* 524 U.S. at 278, 292 (holding that a sex offense by a teacher against a student—and noting that the offense was one for which the teacher had been arrested—constituted sex discrimination prohibited under Title IX).

disability, citizenship status, national origin) when responding to complaints to promote efficiency, reduce any burden on the parties, and recognize the multidimensional nature of sex-based harassment, and some commenters included the example of Asian women being especially vulnerable to attacks based on race and sex. One commenter recommended that the Title IX Coordinator collaborate with a recipient's staff who coordinate compliance with Title VI and Section 504 so students do not have to go through multiple processes.

Discussion: As commenters noted, these final regulations are limited to Title IX and impose no new requirements for grievance procedures under Title VI, Section 504, or the ADA. The Department will continue to enforce regulations under those laws, and a recipient must comply with all regulations that apply to a particular allegation of discrimination (including allegations of harassment on multiple bases) accordingly. For more information on the standards applicable to grievance procedures under the civil rights laws that the Department enforces, see the discussion of § 106.44(a). The Department does not agree that the final regulations' requirements for sex-based harassment cases are incongruous with standards under other laws. In fact, these final regulations set forth grievance procedure requirements in §§ 106.45 and 106.46 to align more closely with the standards used to address harassment under the other statutes that OCR enforces. *See* 34 CFR 104.7(b). For example, the definition of ''sex-based harassment'' in § 106.2, which is applied in grievance procedures consistent with §§ 106.45 and 106.46, more closely aligns with the hostile environment analysis that OCR applies to complaints of harassment based on race, color, national origin, or disability for administrative enforcement purposes. *See* 87 FR 41416 (citing 1994 Racial Harassment Guidance; U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter: Prohibited Disability Harassment (July 25, 2000), *https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html;* 2010 Harassment and Bullying Dear Colleague Letter, at 1–2).

The Department agrees that a single complaint can raise allegations of discrimination on multiple bases. If all of the allegations in a complaint relate to sex discrimination (*e.g.,* harassment based on sexual orientation and gender identity), the allegations can be made in a single complaint and investigated and resolved at the same time under a recipient's Title IX grievance procedures. When allegations involve sex discrimination and discrimination on another basis, a recipient must handle the allegations of sex discrimination under its Title IX grievance procedures but would not be required to handle allegations not alleging sex discrimination under its Title IX grievance procedures. As noted in the preamble to the 2020 amendments, a recipient has discretion to determine whether a non-sex-discrimination issue such as race discrimination should go through grievance procedures like those set forth in Title IX regulations. 85 FR 30449. The same is true under these final regulations. For instance, if allegations of sex-based harassment arise out of the same facts and circumstances as allegations of race discrimination under Title VI, the recipient has the discretion to use grievance procedures consistent with § 106.45, and if applicable § 106.46, to address sex and race discrimination or choose a different process that complies with the Department's regulations implementing Title VI to address the allegations of race discrimination. *Cf. id.* (explaining that a recipient has discretion to use a grievance process consistent with the 2020 amendments to address a sexual harassment allegation that also implicates Title VI). Similarly, if a complaint raises allegations pertaining to sex and disability discrimination, a recipient has flexibility to use a single grievance procedure provided such procedure complies with relevant standards under Title IX and any disability laws that may apply. *See, e.g.,* 34 CFR 104.7(b). Nothing in the final regulations precludes a recipient from processing allegations that do not involve sex discrimination simultaneously with allegations of sex discrimination as long as doing so does not prevent the recipient from complying with these final regulations. The Department emphasizes that these final regulations apply to all individuals who allege or who have allegedly engaged in sex discrimination under Title IX irrespective of race or other demographic characteristics. In addition, nothing in the final regulations precludes a recipient from having its Title IX Coordinator collaborate with staff who coordinate compliance with Title VI and Section 504.

Changes: None.

8. Elementary Schools and Secondary Schools

General Support and Opposition

Comments: Some commenters supported the proposed regulations because they would improve Title IX enforcement in elementary schools or secondary schools, and some commenters asserted that instances of sex-based harassment are both underreported and on the rise. Some commenters appreciated that the proposed regulations included less complex grievance procedures for an elementary school or secondary school—such as oral complaints without signatures—which would be less burdensome, more developmentally appropriate, and more likely to help young students draw connections between a behavior and its outcome.

Other commenters argued that some provisions in the 2020 amendments, including requirements to share evidence and mandatory investigative reports, are inappropriate in an elementary school or secondary school and could also conflict with State laws related to student discipline. One commenter, a school district, noted that its student disciplinary proceedings are subject to the U.S. Constitution, State law, local regulations, and other Federal regulations. The commenter asserted that this complex legal framework already provides students substantive and procedural due process such as, under New York law, a requirement to conduct a hearing within five days of imposing a suspension of five or more days, including the opportunity to present and question evidence and witnesses; and a manifestation determination review hearing no more than ten school days after imposing a disciplinary change in placement for a student with a disability.

Other commenters appreciated that the proposed regulations would allow informal resolution of some complaints and provide an educator flexibility to address harassment consistent with the age of the student and nature of the allegation. Some commenters stated that under the 2020 amendments, the time to complete investigations related to bullying and harassment increased significantly. Commenters stated that those delays exacerbated harms to K–12 students who have experienced (and are still experiencing); increased mental health and academic challenges related to the COVID–19 pandemic; and made it more difficult for administrators—who are already figuring out how to comply with legal requirements related to sex and gender identity that differ from State to State, and historic teacher

and administrator staffing shortages—to respond to these concerns.

In contrast, some commenters expressed concern that the proposed regulations would increase administrative and staffing burdens on elementary schools and secondary schools. One commenter asserted that the Department underestimated the resources required to implement the proposed regulations and overestimated recipients' administrative capacity.

Still other commenters argued the Department should limit differences in grievance procedures requirements between educational levels and suggested that the Department broadly apply one set of reasonable requirements for grievance procedures for sex-based harassment that would afford flexibility regardless of the recipient or status of the parties.

Finally, one commenter suggested that the Department draw from State anti-bullying laws in its grievance procedures' requirements because these laws are in effect in all 50 States, have been in practice over a lengthy period, and set forth investigative models uniquely suited to the educational contexts in which they are used.

Discussion: The Department acknowledges comments in support of the proposed framework for grievance procedures as applied to an elementary school or secondary school. As noted in the July 2022 NPRM, § 106.45 reflects significant feedback from stakeholders related to the unique needs of elementary and secondary students and school communities, as well as requests to reduce some of the burdens the 2020 amendments imposed on these schools. 87 FR 41457–58. The Department has determined that grievance procedures that apply to complaints of sex discrimination at elementary schools and secondary schools must account for the particular context of those schools, including the younger student population, which is distinct from the postsecondary context. In addition to compulsory attendance rules and the need for age-appropriate standards for classroom behavior, parents, guardians, or other authorized legal representatives have a legal right to be present and assist their child in Title IX grievance procedures in the elementary school and secondary school setting. Section 106.45 would not alter those rights, as explained in the discussion of the rights of parents and other authorized individuals in § 106.6(g). This legal authorization for an adult representative does not apply to most students at postsecondary institutions. The Department also agrees with commenters that a lengthier process for elementary and secondary students is less effective and less developmentally appropriate for addressing sex discrimination.

The Department recognizes that some commenters would have preferred that § 106.45 include fewer requirements for grievance procedures at the elementary school and secondary school level based on their assertion that the proposed regulations insufficiently address the challenges schools faced implementing the 2020 amendments. However, as explained in the discussion of due process above and in greater detail in the discussion of each of § 106.45's provisions, these requirements are necessary to afford fair, reliable grievance procedures. *See generally* discussion of § 106.45. The Department also heard from a range of commenters in response to the proposed regulations—including elementary schools and secondary schools and entities that represent them—that the proposed grievance procedures requirements were well suited to address sex discrimination complaints in their settings. Accordingly, we disagree with comments asserting that § 106.45 would overburden a recipient, deprive complainants or respondents in elementary schools or secondary schools of procedural protections necessary to ensure fairness, or inadequately account for the differences between a postsecondary institution and an elementary school or secondary school. For additional discussion of how the Department assessed the benefits and burdens of the grievance procedures requirements, see the *Regulatory Impact Analysis,* below.

The grievance procedures under § 106.45 provide important protections to ensure an educational environment that is free from sex discrimination as required by Title IX. The grievance procedure requirements are also consistent with Supreme Court precedent governing student discipline cited by commenters [47] because they include notice and an opportunity for the respondent to be heard before the imposition of discipline. *Compare Goss,* 419 U.S. at 579 (''[a]t the very minimum . . . students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing.'' (emphasis in original)), *with* § 106.45(c) (requiring notice of allegations), (f)(2) (requiring equal opportunity for the parties to present fact witnesses and relevant and otherwise not impermissible evidence), (f)(4) (requiring equal opportunity for the parties to access and respond to relevant and not otherwise impermissible evidence), (h)(4) (requiring compliance with grievance procedures before the imposition of any disciplinary sanction against a respondent). To the extent there are conflicting State law requirements or differences between the Department's Title IX regulations and a recipient's other student conduct processes, the Department reiterates that a recipient must fulfill its obligations under Title IX, as explained in greater detail in the discussion of § 106.6(b). *See* discussion of § 106.6(b).

Moreover, to the extent some recipients expressed a preference for greater flexibility, the Department appreciates the opportunity to reiterate that a recipient retains discretion to offer an informal resolution process under § 106.44(k) for most allegations of sex discrimination. Informal resolution processes can play a significant role in addressing commenters' concerns that complying with each of § 106.45's requirements might not be appropriate in every case.

Further, nothing in the final regulations prohibits a recipient from using an existing process that otherwise satisfies the requirements of § 106.45 to investigate and resolve Title IX complaints, such as investigation and grievance procedures that are consistent with State anti-bullying or student discipline laws. Although processes required under different laws and policies may in some instances comply with the requirements of § 106.45, and in those cases may be used by a recipient to address complaints of sex discrimination as discussed below, the Department continues to believe that a uniform Federal standard is required for compliance with Title IX. *See* discussion of Administrative Burdens above (discussing the need for a uniform standard, while also preserving recipients' flexibility); *see also* 85 FR 30096 (''The need for Title IX to be consistently, predictably enforced weighs in favor of Federal rules standardizing the investigation and adjudication of sexual harassment allegations under these final regulations, implementing Title IX.'').

Changes: None.

Applicability and Other Considerations

Comments: Some commenters asserted that the proposed regulations' application to elementary schools and secondary schools would violate Title IX because, in their view, Title IX applies only to postsecondary institutions. Some commenters urged the Department to provide more

[47] Commenters cited *Goss,* 419 U.S. 565.

descriptions and examples of how grievance procedures can be implemented effectively and appropriately for different age groups in an elementary school or secondary school. One commenter requested clarification on how definitions and terms should be explained in an elementary school setting where, the commenter asserted, students and parents may lack the necessary maturity and legal context, respectively, to understand defined terms. Other commenters expressed concern that § 106.45 would subject minor complainants to repeated questioning about alleged abuse and suggested that the Department clarify it is not an elementary school or secondary school's role to investigate an allegation of child abuse, but rather to refer such a case to appropriate entities that are better equipped to investigate and coordinate wrap-around services, such as child advocacy centers and multidisciplinary teams.

Discussion: The Department appreciates the opportunity to correct the misunderstanding that Title IX is limited to postsecondary institutions. As recipients of Federal financial assistance, elementary schools and secondary schools are also subject to Title IX and its regulations. 20 U.S.C. 1681. Accordingly, a recipient has a legal duty to operate its education program or activity free from sex discrimination, which necessitates grievance procedures for the prompt and equitable resolution of sex discrimination complaints.

The Department also appreciates the opportunity to clarify that nothing in the final regulations requires a recipient to repeatedly question a complainant who may be a minor about alleged sex discrimination, which the Department acknowledges could be traumatizing depending on the nature of the allegation. This consideration is one of the reasons these final regulations, consistent with the 2020 amendments, do not require live hearings at the elementary school and secondary school level. *See* 85 FR 30484–85; 87 FR 41460–63. The Department also notes that these final regulations do not require a recipient to create separate grievance procedures if an existing process satisfies the requirements of § 106.45, which could further reduce the need for a minor student to repeatedly disclose a traumatic experience in multiple proceedings. The Department acknowledges that a recipient may want to take into account the age and developmental level of their students when structuring grievance procedures, and notes that any questions a decisionmaker asks of parties and witnesses as part of the process for assessing a party's or witness's credibility under § 106.45(g) must be relevant and not otherwise impermissible under §§ 106.2 and 106.45(b)(7). Further, when child abuse allegations arise during the course of Title IX grievance procedures, the Department has determined that a recipient has an important role to play in addressing that abuse. Nothing in the final regulations prohibits a recipient from consulting or partnering with organizations that have expertise in trauma-informed investigations of child sexual abuse in a manner consistent with § 106.44(j), such as child advocacy centers and multidisciplinary teams, to create and implement grievance procedures that satisfy § 106.45.

In response to questions about how proposed definitions and terms should be explained to elementary school students and parents, the Department notes that a recipient retains discretion in how it communicates with students, parents, and other stakeholders about what constitutes sex discrimination, including sex-based harassment, and how the grievance procedures operate, as long as the recipient effectively conveys what its obligations are and what rights other parties have under Title IX. The Department notes that, in general, using terminology in the final regulations facilitates the Department's enforcement efforts by making it easy to compare a recipient's published grievance procedures to the Title IX regulations. Nonetheless, the Department acknowledges that different terminology may be more appropriate and understandable depending on the age, maturity, and educational level of a recipient's student population, and therefore has provided a recipient with that flexibility.

The Department declines to provide examples for how grievance procedures can be implemented effectively and appropriately for different age groups in an elementary school or secondary school at this time. However, it will offer technical assistance, as appropriate, to promote compliance with these final regulations.

Changes: None.

9. Employees

General Support and Opposition

Comments: Some commenters supported the proposed framework for grievance procedures, which they stated would allow Title VII and collective bargaining agreements to primarily govern employee-to-employee harassment. Commenters also appreciated that the framework would acknowledge that a postsecondary institution may have a variety of employee designations, which may be entitled to unique grievance procedures based on their designation and applicable collective bargaining agreement.

In contrast, several commenters questioned the appropriateness of the proposed framework to a complaint involving an employee. Some commenters argued that applying these procedures to employees is unnecessary because such complaints are addressed by Title VII, collective bargaining agreements, employee handbooks, and institution-specific regulations. Others asserted that applying § 106.45 to employees would conflict with or displace well-established processes under Title VII and State employment and nondiscrimination laws; or asked for clarification on how the proposed regulations would interact with contradictory State and local laws, recipient policies governing faculty rights, and union grievance procedures or collective bargaining agreements. Still other commenters expressed concern that § 106.45 would require a recipient to maintain one set of grievance procedures for workplace sex discrimination complaints and another set of procedures for other kinds of workplace discrimination complaints (such as those involving race), which commenters stated would expose the recipient to an allegation that they deprived a party of due process by choosing the wrong set of procedures. Other commenters further asserted that applying the more detailed requirements of § 106.46 to employee-involved complaints would be even more likely to conflict with procedures in employee handbooks, collective bargaining agreements, and at-will employment than would § 106.45.

Some commenters sought clarification on whether § 106.46 would require identical grievance procedures for both student and employee respondents. Commenters asserted that requiring a postsecondary institution's grievance procedures to be the same for any sex-based harassment complaint could result in complicated and confusing grievance procedures for some recipients, due to various obligations under State law regarding student discipline and tenured faculty agreements.

One commenter suggested that the Department consult with the EEOC and issue joint guidance on how to minimize potential conflicts between the obligations of claimants under Title VII and respondents under Title IX.

Finally, a few commenters asked for clarification regarding employees and the grievance procedures set forth in §§ 106.45 and 106.46. One commenter requested clarification on the definition of ''employee'' under the proposed regulations. Another commenter asked the Department to clarify when an OCR complaint that pertains to employee-to-employee harassment would be investigated by OCR and when such a complaint would be dismissed and transferred to the EEOC.

Discussion: The Department acknowledges support for the framework for grievance procedures as applied to complaints that involve an employee, which the Department agrees provides the flexibility needed to align with a recipient's existing workplace policies. The Department disagrees that these regulations are unnecessary because of Title VII, collective bargaining agreements, employee handbooks, or institution-specific policies or procedures. Congress did not limit the application of Title IX to students. *See* 20 U.S.C. 1681. Title IX, thus, applies to all sex discrimination occurring in a recipient's education program or activity in the United States. The Department's regulations have long addressed employees. For example, 34 CFR part 106, subpart E expressly addresses discrimination on the basis of sex in areas unique to employment. Indeed, prior to the establishment of the Department of Education, the Supreme Court noted that the Department of Health, Education, and Welfare's ''workload [was] primarily made up of 'complaints involving sex discrimination in higher education academic employment.' '' *Cannon,* 441 U.S. at 708, n.42.

The Department acknowledges that Title VII and Title IX impose different requirements in some respects and that many recipients will need to comply with both Title VII and Title IX. The Department disagrees that there are inherent conflicts in complying with the two laws and commenters did not identify any such conflict. We are also unpersuaded by the assertion that a recipient will be exposed to an allegation that it deprived a party of due process by choosing the wrong set of procedures. As noted in the preamble to the 2020 amendments, Congress enacted both Title VII and Title IX to address discrimination in different contexts. *See* 85 FR 30442. Congress enacted Title IX to address sex discrimination in any education program or activity receiving Federal financial assistance, whereas Congress enacted Title VII to address sex discrimination (and discrimination on other bases) in the workplace. *Id.* As commenters also acknowledge, the Supreme Court has recognized differences in the circumstances under which liability may be incurred for sex discrimination under Title IX and Title VII. *See, e.g., Burlington Indus., Inc.* v. *Ellerth,* 524 U.S. 742, 765 (1998) (affording affirmative defense to vicarious liability of employers for the sexual harassment of their employee supervisors when ''the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior'' and the employee plaintiff ''unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer''); *Gebser,* 524 U.S. at 283 (describing differences between Title VII and Title IX to explain the scope of relief available under Title IX's judicially recognized implied private cause of action); *see* 85 FR 30199, 30443. In light of these differences, the Department may reasonably establish protections for complainants and respondents in education-related sex discrimination complaints that are not the same as for parties in employment-related sex discrimination complaints under Title VII, and that could result in different outcomes. 85 FR 30442.

As discussed in the July 2022 NPRM, the requirements for grievance procedures under § 106.45 set baseline standards to ensure a fair process under Title IX, including the equitable treatment of the parties; decisionmakers who are free of bias or conflicts of interest; adequate notice to the parties of the allegations and timeframes for grievance procedures; guidelines for ensuring the adequate, reliable, and impartial investigation of the complaint; the opportunity for parties to present evidence; and guidelines for how a decisionmaker must assess such evidence and credibility. 87 FR 41461. The Department anticipates that many recipients already have similar protections in their existing procedures for addressing discrimination, but to the extent that the additional procedural requirements imposed by the final regulations exceed the protections that a recipient already has in place, the benefits of these procedures justify any burden. The Department also wishes to clarify that nothing in these regulations prohibits a recipient from using an existing process to satisfy the requirements of §§ 106.45 or 106.46, such as grievance procedures set forth in a collective bargaining agreement or other contractual agreement between the recipient and its employees, as long as those procedures do not conflict with the requirements of §§ 106.45 and 106.46. Although the Department anticipates that a recipient will be able to implement §§ 106.45 and 106.46 in a manner that does not conflict with State and local law, collective bargaining agreements, union grievance procedures, and recipient policies governing faculty rights, it reiterates that if a conflict arises, a recipient must fulfill its obligations under Title IX. *See* § 106.6(b); discussion of § 106.6(b).

The Department appreciates the opportunity to clarify that all recipients must implement grievance procedures that are consistent with § 106.45 or offer informal resolution consistent with § 106.44(k), as available and appropriate, to resolve an allegation of sex discrimination. Only a recipient that is a postsecondary institution has an additional obligation to implement grievance procedures consistent with § 106.46, and this obligation is limited to resolving allegations of sex-based harassment in which either the complainant or respondent is a student. Consistent with this framework, final § 106.45 sets forth baseline requirements to resolve any allegation of sex discrimination, including sex-based harassment, that occurs in an elementary school, secondary school, and other recipients such as State educational agencies; as well as any allegation of employee-to-employee sex-based harassment and student-involved sex discrimination complaints that do not allege sex-based harassment. And while a recipient may choose to implement a single procedure for all of its complaints (as long as the single procedure satisfies the requirements of § 106.45, and if applicable § 106.46), it may choose otherwise for various reasons, such as to comply with its other obligations under Federal, State, or local law. Nothing in the final regulations prohibits a postsecondary institution from, for example, choosing to maintain one set of grievance procedures for employee-to-employee sex-based harassment complaints that are consistent with § 106.45 and its legal or contractual requirements on employee-involved complaints; one set of grievance procedures for employee-to-student sex-based harassment complaints that are consistent with § 106.46 and those same legal or contractual requirements; and another set of grievance procedures for student-to-student sex-based harassment complaints that are consistent with § 106.46 and State law governing student discipline.

The Department appreciates the opportunity to note that OCR's Case Processing Manual explains which complaints that allege employee-to-

employee discrimination within a recipient's education program or activity OCR will investigate and which it will refer to the EEOC. *See* Case Processing Manual, at 26–27 (citing 29 CFR 1691.11697.13; 28 CFR 42.60142.613). The Department notes that its existing procedures require coordination with the EEOC and reiterates its longstanding commitment to working closely with other Federal agencies, including the EEOC, to ensure robust enforcement of Federal civil rights protections. The Department understands that supporting a recipient in the implementation of these regulations and ensuring that individuals know their rights under Title IX is important and will offer technical assistance, as appropriate, to promote compliance with these final regulations.

The Department declines to further clarify the definition of ''employee'' or to otherwise specify the types of individuals who are considered employees. As explained in the discussion of training requirements in § 106.8(d), given the wide variety of arrangements and circumstances in place across recipients and variations in applicable State employment laws, a recipient is best positioned to determine who is an ''employee.'' For further explanation of the scope of individuals covered by the employee reporting obligations in § 106.44(c) and the scope of employees who must be trained under § 106.8(d), see the discussion of those provisions.

Changes: None.

At-Will Employment and Collective Bargaining

Comments: Some commenters expressed concern that the grievance procedure requirements would interfere with a recipient's at-will relationship with its employees and erode at-will employment. They also stated that the grievance procedure requirements would create an arbitrary layer of extra protection for an employee who allegedly engaged in sex discrimination that does not exist for other alleged employee misconduct, such as race-based discrimination, stealing from the employer, bullying, or general poor performance.

Some commenters also argued that, because at-will employees typically are not entitled to any due process protections under existing Federal and State law, imposing such requirements through § 106.45 would exceed the Department's regulatory authority. In contrast, one commenter recommended that the Department revise the proposed regulations to account for inequities in a postsecondary institution's hierarchy that provide different procedural protections depending on an employee's status.

In addition, some commenters stated that §§ 106.45 and 106.46 would interfere or conflict with the collectively bargained or other contractual employment relationships that many recipients have with their employees, which already include procedures and justifications for discipline and termination of employment. Some commenters noted that this concern is especially acute for a recipient that has multiple bargaining units or collective bargaining agreements, each of which may have different disciplinary grievance procedures. Indeed, some commenters noted that some recipients had changed or initiated collective bargaining procedures in response to the 2020 amendments, and that those changes had created confusion and inconsistent treatment of civil rights matters. Another commenter noted that the 2020 amendments had effectively required a recipient to institute a cumbersome two-tiered process for employee respondents in order to comply with both those amendments and State civil service laws. The commenter argued that this approach likely results in a chilling effect for complainants who do not wish to testify in multiple hearings or risk re-traumatization. The commenter added that lengthy Title IX grievance procedures could cause a recipient to miss the narrow statute of limitations outlined in certain collective bargaining agreements for discipline charges.

Other commenters asked for clarification about the interaction between collective bargaining agreements and the grievance procedures. One commenter noted that a recipient may have processes in place that comply with collective bargaining agreements that are unrelated to a recipient's grievance procedures but that would not comply with all of the requirements for grievance procedures in the proposed regulations, and asked whether the Title IX regulations should take precedence over other procedures. Finally, one commenter recommended that the Department ensure that a recipient consult with unions to write grievance procedures that comply with applicable collective bargaining agreements, while another added that recipients have lacked sufficient guidance about how to appropriately renegotiate or clarify collective bargaining agreements.

Discussion: The Department acknowledges that a recipient, like most employers, may have different types of employees, including unionized and at-will employees. As was the Department's position in the preamble to the 2020 amendments, the Department maintains that all employees covered by Title IX should be afforded prompt and equitable grievance procedures when they are subjected to, or alleged to have engaged in, sex discrimination; and that an employee's position, tenure, part-time status, or at-will status, should not dictate whether that employee is subject to the procedural requirements of the Department's Title IX regulations. *See* 85 FR 30445.

As explained above in the discussion of due process and the Department's assessment of what process is due in different circumstances, the Department has determined that, when Title IX is implicated, the protections and rights set forth in these final regulations represent the most effective ways to promote Title IX's nondiscrimination mandate while also ensuring that all parties receive the process they are due. Contrary to commenters' assertions, the fact that the protections required under the final regulations may exceed the due process protections afforded to at-will employees under other Federal and State law does not mean that the final regulations exceed the Department's authority under Title IX. Moreover, a recipient of Federal financial assistance operating an education program or activity agrees to comply with Title IX obligations as a condition of receiving Federal funds. Those requirements include the longstanding obligation to adopt and publish grievance procedures to promptly and equitably resolve sex discrimination complaints that has existed in Title IX regulations since 1975. 34 CFR 106.8(c) (formerly 45 CFR 86.8); *see* 40 FR 24139. Recipients' contractual arrangements with employees must conform to Federal law, as a condition of receipt of Federal funds.

The Department acknowledges commenters' concern that the final regulations may impede a recipient's ability to terminate an at-will employee who is engaging in sex discrimination. However, Title IX does not distinguish amongst employees based on employment status. The procedural protections afforded by these final regulations for Title IX investigations and grievance procedures promote fair, transparent, and reliable outcomes for all employees. And requiring certain measures before the imposition of disciplinary sanctions—including sanctions imposed upon employees—ensures that those sanctions are not themselves applied in a way that

discriminates on the basis of sex. *See, e.g., New York,* 477 F. Supp. 3d at 295 (stating that the Department can impose grievance procedures ''in order to ensure nondiscriminatory treatment of both complainants and respondents''). For a description of the Department's assessment of the benefits and costs of complying with the grievance procedures' requirements, including the Department's determination that the benefits outweigh any burdens, see the discussion of the *Regulatory Impact Analysis.*

For related reasons, the Department declines to modify the grievance procedures to eliminate any employment ''hierarchy'' or otherwise interfere with the different statuses or employee designations within a recipient. The requirement that the recipient's grievance procedures must be prompt and equitable means, in this context, that a recipient's grievance procedures under Title IX must function well alongside the procedures it uses to implement Title VII and, to the extent not inconsistent, other laws and collective bargaining agreements that govern the employment relationship for complaints of sex-based harassment involving employees. Such flexibility addresses recipient concerns about overly prescriptive requirements because a range of different procedures could address what a recipient understands as differing needs while still satisfying a recipient's obligations under Title IX and these final regulations.

The Department disagrees with commenters' assertions that §§ 106.45 and 106.46 may chill complainants from accessing grievance procedures or cause a recipient to miss the statute of limitations to impose discipline on an employee respondent. First, as explained above, these final regulations do not require a recipient to create separate grievance procedures if an existing process satisfies the requirements of § 106.45, and if applicable § 106.46. Accordingly, a recipient may avoid undue delay or multiple proceedings by using a single set of procedures that meet a recipient's obligations under Title IX and any other obligations that are not contrary to those obligations, including current collective bargaining or other agreements governing employee discipline procedures.

Further, the Department reiterates that the procedural requirements under §§ 106.45 or 106.46 are important to protect the due process rights of complainants and respondents, and, therefore, they are not arbitrary to the extent they differ from protections afforded for other types of misconduct.

Additionally, the Department notes that nothing in these regulations interferes with a recipient's ability to negotiate a grievance process within a collective bargaining agreement that is distinct from grievance procedures under Title IX. Nor do these regulations interfere with a recipient employee's right to pursue remedies under an applicable collective bargaining agreement instead of making a complaint to initiate grievance procedures under Title IX. However, if an employee chooses to pursue a remedy under a collective bargaining agreement, and that process does not include baseline requirements consistent with § 106.45, and if applicable § 106.46, there can be no finding of responsibility or disciplinary action against an individual respondent for sex discrimination under Title IX. Further, an employee's decision to pursue a remedy under an applicable collective bargaining agreement rather than under the Title IX grievance procedures would not alleviate the Title IX Coordinator's obligation to determine whether to initiate a sex discrimination complaint under the recipient's Title IX grievance procedures by making a fact-specific determination consistent with § 106.44(f)(1)(v) and to comply with § 106.44(f)(1)(vii).

The Department acknowledges that a recipient may have relied on or incorporated the 2020 amendments into new collective bargaining agreements, and the Department considered such reliance interests in crafting these final regulations, which either maintain the requirements of the 2020 amendments or make certain provisions permissive rather than mandatory. *See, e.g.,* §§ 106.45(d)(1), 106.46(g). The Department also notes that collective bargaining agreements generally recognize an entity's obligation to comply with applicable laws and contain procedures for consultation and discussion when the law or applicable regulations change.

To the extent a collective bargaining agreement applies to Title IX complaints and does not currently comply with the Title IX regulations, recipients may need to renegotiate their collective bargaining agreements. While such negotiations may cause disruptions, the Department concludes that the benefits of the final regulations—both in terms of ensuring that a recipient complies with Title IX's nondiscrimination mandate and ensuring that all participants in the grievance procedures receive the process they are due—justify the burdens. However, nothing in these regulations prohibits a recipient from using an existing process to satisfy the requirements of §§ 106.45 or 106.46, such as grievance procedures under a collective bargaining agreement or other contractual agreement between the recipient and employees, as long as they meet the requirements of these final regulations. An existing collective bargaining agreement would not be out of compliance with this part if it adopts an option presented in the final regulations, such as a live hearing, or if it sets forth additional procedural requirements, such as designated timeframes for stages of an investigation, as long as such provisions apply equally to the parties. *See* § 106.45(j). As discussed in the July 2022 NPRM, equal treatment does not require identical treatment and a recipient's grievance procedures may recognize that an employee party may have distinct rights in a collective bargaining agreement with the recipient or by other means that are not applicable to parties who are not employees. 87 FR 41491.

The Department does not have the authority to require consultation between a recipient and a union. *See generally* 29 U.S.C. 151–169 (codifying the National Labor Relations Act). However, the Department's final regulations do not prohibit a recipient from consulting with unions to create grievance procedures within collective bargaining agreements that comply with §§ 106.45 and 106.46.

The Department declines to further specify how collective bargaining agreements may interact with a recipient's obligation to implement grievance procedures consistent with § 106.45, and if applicable § 106.46, because this is a fact-specific inquiry that depends on the specific contractual agreement and regulatory provision at issue.

Changes: None.

Request To Modify the Application of Grievance Procedures

Comments: Commenters suggested a range of modifications to alter the proposed framework for grievance procedures as applied to sex discrimination complaints that involve an employee. Some commenters recommended that the Department not prescribe specific grievance procedures for sex discrimination or sex-based harassment complaints involving an employee respondent, asserting that applying §§ 106.45 and 106.46 to an employee-to-student complaint may intimidate potential student complainants and substantially impede reporting.

Discussion: For reasons articulated above, the Department declines to modify the framework for grievance procedures as applied to sex discrimination complaints that involve an employee complainant or respondent. Title IX applies to all sex discrimination occurring under a recipient's education program or activity in the United States, regardless of the identity of the person that alleged or engaged in sex discrimination.

The Department declines to remove the requirement that a recipient apply §§ 106.45 and 106.46 grievance procedures to employee-involved complaints because students and employees in such complaints, including faculty and student workers, should have access to equitable grievance procedures that are designed to ensure a fair, transparent, and reliable process, including procedures that may result in the termination or suspension of a respondent. Grievance procedures consistent with § 106.45 will meet this standard for sex discrimination complaints that involve an employee.

Regarding concerns that such grievance procedures may be intimidating to student complainants in student-to-employee complaints, these final regulations include several provisions to mitigate power imbalances and address concerns that some complainants may be chilled in reporting sex discrimination. For example, § 106.8(d) requires a recipient to ensure that certain persons receive training related to their duties under Title IX and § 106.44(g) requires a recipient to offer and coordinate supportive measures, as appropriate, both of which will support complainants in reporting sex discrimination. The final regulations also ensure that a recipient fulfills its obligation to address sex discrimination in its education program or activity by requiring its Title IX Coordinator to take other prompt and effective steps to address sex discrimination under § 106.44(f)(1)(vii).

Changes: None.

10. Section 106.45 Grievance Procedures for the Prompt and Equitable Resolution of Complaints of Sex Discrimination

Comments: Some commenters expressed general support for proposed § 106.45 because it would establish a baseline for a recipient responding to sex discrimination complaints by setting clear guidelines for prompt and equitable grievance procedures, and ensure transparent and reliable outcomes for students, employees, or others participating in an education program or activity. One commenter appreciated that § 106.45 would be less prescriptive and resource-intensive than, but as effective as, current regulations. Other commenters supported § 106.45 because it requires consistent grievance procedures for all forms of sex discrimination, rather than just sex-based harassment.

Other commenters raised general concerns about proposed § 106.45. For example, one commenter expressed concern that a postsecondary institution could accidentally violate the Clery Act if it only complied with § 106.45 with regard to an employee-to-employee complaint.

Additionally, some commenters suggested that elementary schools and secondary schools should be required to publish their proposed grievance procedures and hold public hearings to receive input from parents and community members before the recipient adopts and implements grievance procedures consistent with the final regulations.

Discussion: The Department agrees that § 106.45 establishes a baseline for a recipient to respond to sex discrimination complaints by setting clear guidelines for prompt and equitable grievance procedures and acknowledges the comments in support.

Regarding concerns that a postsecondary institution may violate the Clery Act by implementing grievance procedures consistent with § 106.45, the commenter did not articulate, and the Department does not see, any reason why a postsecondary institution cannot comply with both its obligations under § 106.45 and the Clery Act as applied to employee-to-employee complaints—particularly in light of a postsecondary institution's discretion under § 106.45(j) to adopt additional provisions in its grievance procedures that apply equally to the parties. The Department notes that a postsecondary institution's obligation to implement grievance procedures to resolve employee-to-employee sex discrimination complaints under § 106.45 is distinct from its obligation to maintain procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking under the Clery Act. A recipient must ensure that it complies with its separate obligations under the Clery Act. Nothing in these final regulations obviates those obligations.

Regarding the commenters' suggestion that the final regulations require an elementary school or secondary school to receive public input before adopting grievance procedures consistent with § 106.45, the Department notes that State and local law may govern the procedures a school district must follow to revise its policies. The commenter did not identify, and the Department is not aware of, how the failure to solicit public input on proposed grievance procedures contravenes a recipient's ability to prevent and address sex discrimination in its education program or activity. Accordingly, requiring such action is beyond the scope of this rulemaking—as long as the adopted grievance procedures are consistent with the final regulations. However, the Department notes that nothing in these regulations prohibits a recipient from soliciting public input from parents and other stakeholders to create and adopt grievance procedures that are consistent with § 106.45, and if applicable § 106.46. Moreover, a recipient must comply with the requirements of § 106.8(b)(2) by adopting, publishing, and implementing grievance procedures that comply with these final regulations. For additional information about the requirement to adopt a nondiscrimination policy and written grievance procedures, see the discussion of § 106.8(b).

Changes: None.

11. Section 106.46 Grievance Procedures for the Prompt and Equitable Resolution of Complaints of Sex-Based Harassment Involving a Student Complainant or Student Respondent at Postsecondary Institutions

Comments: Some commenters supported proposed § 106.46 because it would provide additional flexibility to postsecondary institutions. One commenter stated that § 106.46 would return grievance procedures for sex-based harassment at postsecondary institutions to a more survivor-centered and trauma-informed process that is appropriate for the educational setting, specifically by continuing to require written notice of allegations under § 106.46(c), requiring postsecondary institutions to provide parties the same opportunity, if any, to have persons other than their advisor present under § 106.46(e)(3), granting a recipient discretion to determine whether to allow expert witnesses under § 106.46(e)(4) or limit their use, and making live hearings and cross-examination by a party's advisor discretionary under § 106.46(f) and (g). Another group of commenters indicated that § 106.46 would reinforce Title IX's nondiscrimination mandate, ensure a fair process for all parties, and align with civil rights law and Title IX's intent by making live hearings optional; introducing flexibility into the process

of assessing credibility; removing the requirement that advisors conduct cross-examination; excluding certain sensitive or harassing evidence from grievance procedures; no longer mandating dismissal of complaints; and providing guidance regarding whether Title IX grievance procedures apply when the individuals involved are both students and employees.

In contrast, other commenters raised general concerns about proposed § 106.46. For instance, one commenter urged the Department to remove § 106.46 and apply § 106.45 to any sex discrimination complaint, to provide postsecondary institutions flexibility. Some commenters asserted that the Department's justification for applying § 106.46 to employee-to-student sex-based harassment complaints only applied when students are respondents, and that the Department therefore did not adequately justify applying proposed § 106.46 to a complaint that involves an employee respondent.

Another commenter, who believed that § 106.46 applied only to student-to-student complaints, recommended instead that the procedures outlined in § 106.46 apply to all sex-based harassment. The commenter also interpreted § 106.46 as excluding an applicant or third party from accessing a recipient's grievance procedures. One commenter went further and recommended that § 106.46 apply to any sex discrimination complaint in a postsecondary institution to provide a consistent and more robust level of due process.

Discussion: The Department appreciates commenters' support of § 106.46 and agrees that these provisions will afford protections that are appropriate to the age, maturity, independence, needs, and context of students at postsecondary institutions. The Department also appreciates commenters' concerns, including their preferences for a single set of grievance procedures that would apply to all parties and all types of sex discrimination, or their preferences for procedures that include more or less specificity. After fully considering the public comments on its proposed grievance procedures' requirements, the Department maintains that the final regulations best effectuate the requirements of Title IX, for reasons explained in the discussion of the specific provisions of §§ 106.45 and 106.46.

Regarding concerns about whether § 106.46 would only apply to student-to-student sex-based harassment complaints or complaints in which a non-student or non-employee is a respondent, the Department appreciates the opportunity to clarify that § 106.46 applies to any sex-based harassment complaint in which a postsecondary student is either a complainant or a respondent, including complaints in which the other party is an employee, another student, or an individual who is neither a student nor an employee but who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination. Specifically, § 106.46(a) incorporates § 106.45(a)(2)(iv)(B), which allows a person who is not a student or employee but who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination to make a complaint to initiate grievance procedures, and § 106.45(d)(1)(ii), which allows a recipient to dismiss a complaint when the respondent is not participating in the recipient's education program or activity and is not employed by the recipient. Because the final regulations allow a non-student or non-employee complainant or respondent to access grievance procedures in certain circumstances, the Department declines the commenter's suggestions to further modify § 106.46.

The Department disagrees with the assertion that applying § 106.46 to employee-to-student sex-based harassment complaints does not adequately accommodate the needs of student complainants. As the Department explained in the July 2022 NPRM, the additional requirements in § 106.46 are justified in recognition that postsecondary students are often younger, may be still learning to self-advocate, and would not be entitled to have a parent, guardian, or other authorized legal representative present at meetings or proceedings, unlike students in elementary schools and secondary schools. 87 FR 41462. Thus, the additional requirements of § 106.46 are particularly beneficial for a postsecondary student complainant in a complaint involving an employee respondent because an employee may be afforded additional rights or protections that a student complainant would otherwise lack absent the requirements for grievance procedures under § 106.46. For example, a recipient may be required to afford an employee certain procedural protections consistent with State employment laws, or a collective bargaining, tenured faculty, or other contractual agreement. Accordingly, § 106.46 affords postsecondary students with appropriate procedural protections, such as the opportunity to be accompanied by an advisor under § 106.46(e)(2), an equal opportunity to access relevant and not otherwise impermissible evidence under § 106.46(e)(6), and the opportunity to appeal a dismissal or determination under § 106.46(i). Further, even in circumstances in which an at-will employee respondent is not entitled to additional procedural requirements, the additional requirements of § 106.46 are necessary to address power differentials between a student complainant and employee respondent, as well as to ensure transparent and reliable outcomes in sex-based harassment complaints that involve a postsecondary student.

Similarly, because sex-based harassment complaints subject to the provisions of § 106.46 could, and often would, involve a student respondent who faces a potential disciplinary sanction as an outcome of the grievance procedures, the potential for a disciplinary sanction of a student respondent necessitates affording additional procedural requirements to ensure an equitable outcome.

The Department acknowledges the concerns raised by commenters that due process requires a recipient to implement grievance procedures consistent with § 106.46 for all sex discrimination complaints but maintains that the structure of these final regulations strikes an appropriate balance to ensure protections while maintaining appropriate flexibility at different levels of education. The additional requirements of § 106.46 are not necessary to ensure accuracy in grievance procedures outside the context of sex-based harassment complaints involving a student at the postsecondary level and may impair a recipient's ability to resolve sex discrimination complaints in a prompt and equitable manner, which many commenters stressed is a critical need for elementary school and secondary school recipients. The Department emphasizes that Title IX's regulations have required promptness in grievance procedures since 1975 (*see* 34 CFR 106.8(c); 40 FR 24139) and avoiding unnecessary delay in the resolution of sex discrimination complaints serves Title IX's nondiscrimination mandate.

Additionally, as stated in the July 2022 NPRM and reiterated here, the Department views the additional provisions of § 106.46 as necessary to address postsecondary sex-based harassment complaints involving a student, which involve allegations of conduct that is highly personal and often of a different nature than other

types of alleged sex discrimination. 87 FR 41462. Sex-based harassment complaints may require greater participation by a complainant and respondent in grievance procedures than other complaints of sex discrimination. In contrast, other sex discrimination complaints may not involve two parties in a contested factual dispute in which credibility determinations often play a critical role. For example, in complaints alleging unequal treatment of student athletes based on sex, there will not be two parties whose conduct and credibility are closely scrutinized. Instead, these cases require analysis of available information regarding the specific factors that apply to equal opportunity in athletics. Similarly, alleged different treatment in grading or in providing opportunities to benefit from specific programs will require a close analysis of grading rubrics, opportunities offered, and other evidence, if any, of sex discrimination. *Id.* Contrary to the commenter's assertion, grievance procedures consistent with § 106.45 include basic requirements to ensure transparency and reliability in outcomes. *See* discussion of Employees—General Support and Opposition below (enumerating provisions in the final regulations that ensure a fair process under Title IX).

Changes: None.

D. Grievance Procedures for the Prompt and Equitable Resolution of Complaints of Sex Discrimination (Section 106.45)

1. Section 106.45(a)(1) and Section 106.46(a)

General Support and Opposition

Comments: One commenter expressed general support for proposed §§ 106.45(a)(1) and 106.46(a), requiring grievance procedures to be in writing. Some commenters supported informing a recipient of its obligations under Title IX, including by clearly explaining required grievance procedures. Other commenters generally believed the grievance procedure requirements in proposed § 106.45 would be detrimental to those recipients they would govern. Some commenters generally opposed aspects of the grievance procedure requirements in the proposed regulations, stating they were inconsistent with various cases without specifying the nature of the inconsistency.

Discussion: The Department acknowledges commenters' support for the requirements in §§ 106.45(a)(1) and 106.46(a) that the grievance procedures must be in writing and agrees that it is important to inform a recipient of its obligations under Title IX, including by clearly explaining required grievance procedures.

The Department disagrees with commenters' view that the grievance procedure requirements in § 106.45 would be detrimental to those recipients they would govern and notes that the commenters did not specifically state how the grievance procedure requirements would negatively impact recipients. As the Department explained in the July 2022 NPRM, the requirement for a recipient to adopt grievance procedures dates back to 1975 and has remained constant in the Department's Title IX regulations, including under the 2020 amendments. *See* 87 FR 41456. The final regulations take into account both this longstanding requirement, the concerns expressed by stakeholders regarding the grievance process under the 2020 amendments, and the comments received in response to the July 2022 NPRM. The grievance procedure requirements in the final regulations provide appropriate procedural protections that account for the age, maturity, and level of independence of students in various educational settings, the particular contexts of employees and third parties, and the need to ensure that a recipient's grievance procedures provide for the prompt and equitable resolution of sex discrimination complaints in its particular setting. As stated in the July 2022 NPRM, the Department maintains that all parties and recipients require clear guidance for grievance procedures that lead to fair and reliable outcomes, which the final regulations provide in §§ 106.45 and 106.46. *See* 87 FR 41461.

The Department disagrees with commenters who asserted that the grievance procedure requirements set forth in the regulations are inconsistent with case law. The Department has carefully examined relevant case law and has determined that the procedures outlined in §§ 106.45 and 106.46 are consistent with that case law. The approach taken in these final regulations on these issues is consistent with all applicable authorities, within the Department's discretion, and supported by the reasons given in the sections of the preamble discussing these issues. *See, e.g.,* the sections on conflicts of interest and bias in § 106.45(b)(2); notice of allegations in § 106.45(c) and written notice of allegations in § 106.46(c); complaint investigation in §§ 106.45(f) and 106.46(e); evaluating allegations and assessing credibility in §§ 106.45(g) and 106.46(f); live hearings in § 106.46(g); and standard of proof in § 106.45(h)(1).

Changes: The Department has made minor revisions to the order of the words ''prompt and equitable'' and added ''resolution of'' in §§ 106.46(a)(1) and 106.46(a) for clarity. Any other revisions to other provisions within §§ 106.45 and 106.46 are discussed in the preamble sections related to those provisions.

Agency Authority and Consistency With Case Law

Comments: Some commenters asserted that various provisions within the proposed grievance procedure requirements in §§ 106.45 and 106.46 would exceed the Department's authority or be inconsistent with Title IX and established case law under Title IX, the U.S. Constitution, contract law, and State law.

Discussion: The Department disagrees that any provisions within §§ 106.45 and 106.46 exceed the agency's authority or are inconsistent with Title IX and case law under Title IX, the U.S. Constitution, contract law, or State law. In adopting §§ 106.45 and 106.46, the Department is acting within the scope of its congressionally delegated authority under 20 U.S.C. 1682, which directs the Department to issue regulations to effectuate the purposes of Title IX. The Supreme Court has recognized the Department's ''authority [at 20 U.S.C. 1682] to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate,'' including requiring that a recipient adopt and publish grievance procedures for resolving complaints of sex discrimination. *Gebser,* 524 U.S. at 292.

Further, the Department interprets Title IX and the final regulations consistent with the U.S. Constitution. As the Department noted in the July 2022 NPRM, § 106.6(d), to which the Department did not propose any changes, states that nothing in the Title IX regulations ''requires a recipient to . . . [r]estrict any rights . . . guaranteed by the U.S. Constitution.'' *See also* 87 FR 41415.

In addition, nothing in §§ 106.45 or 106.46 prevents a recipient from honoring contractual obligations to the extent that they do not conflict with Title IX or the final regulations. While State laws may impose different requirements than these final regulations, in most circumstances compliance with both State law and the final regulations is attainable. When a State has acted on its own authority to require a recipient to adopt grievance procedures, nothing in the final regulations prevents a recipient from adopting and publishing grievance procedures that comply with §§ 106.45

and 106.46 and align with its State's requirements. A recipient may continue to comply with State law to the extent that it does not conflict with the requirements in these final regulations. In the event of an actual conflict between State or local law and the provisions in §§ 106.45 and 106.46, the latter would have preemptive effect over conflicting State or local law. The Supreme Court has held that ''[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.'' *La. Pub. Serv. Comm'n* v. *FCC,* 476 U.S. 355, 369 (1986). In addition, Federal courts have generally held that when a State law purportedly conflicts with Federal statutes enacted under the Spending Clause, such claims should be analyzed under traditional preemption doctrine. *See, e.g., Planned Parenthood of Hous.,* 403 F.3d at 330; *O'Brien,* 162 F.3d at 42–43. For further explanation of preemption in the final regulations, see the discussion of § 106.6(b).

Changes: None.

Removal of Language From the 2020 Amendments That Treatment of a Complainant or Respondent May Be Sex Discrimination

Comments: Some commenters objected to the removal of language in § 106.45(a) of the 2020 amendments stating that a recipient's ''treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX'' because, in their view, it would remove protections for respondents. Another commenter questioned the Department's view in the July 2022 NPRM that the statement was redundant. One commenter asserted that case law shows that postsecondary institutions have deficient processes that lead to inappropriate discipline of boys and men.

Discussion: The Department recognizes that some commenters would prefer as a policy matter that the Department retain the language from the 2020 amendments stating that ''treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX.'' The Department also acknowledges that in certain cases courts have determined that a postsecondary institution's application of its grievance procedures violated a party's rights under Title IX or raised constitutional concerns. The Department notes that a formal complaint is not required under the final regulations and maintains that it is not necessary to include language in the grievance procedure requirements stating that treatment of a complainant or a respondent in response to a complaint of sex discrimination may constitute discrimination on the basis of sex under Title IX, because the Title IX regulations already address this point in § 106.31(a)(1) and (b)(4). As explained above and in the July 2022 NPRM, *see* 87 FR 41463, these provisions require that a recipient carry out its grievance procedures in a nondiscriminatory manner and prohibit a recipient from discriminating against any party based on sex. Anyone who believes that a recipient's treatment of a complainant or respondent constitutes sex discrimination may file a complaint with OCR, which OCR would evaluate and, if appropriate, investigate and resolve consistent with these regulations' requirement that a recipient carry out its grievance procedures in a nondiscriminatory manner.

Changes: None.

Recipient Is Not a Respondent

Comments: Some commenters said that grievance procedures should only apply to a sex discrimination complaint for which there is a complainant and a respondent. One commenter stated that the language in proposed § 106.45(a)(1) that a recipient is not considered a respondent when a sex discrimination complaint challenges the recipient's policy or practice could be read to suggest that respondents' only rights under Title IX are those specified in §§ 106.45 and 106.46 and that individuals who are named as respondents do not have other substantive Title IX rights, including the right to be free from sex discrimination. Another commenter was concerned that the language could be interpreted to mean that a recipient is not required to comply with the grievance procedure requirements when a complaint accuses the recipient of engaging in a policy or practice of sex discrimination and suggested adding ''as it relates to the respondent's rights in these regulations'' to the end of the text in proposed § 106.45(a)(1) to dispel that purported confusion.

Some commenters asked the Department to provide additional clarification for the language regarding a recipient not being a respondent. One commenter asked the Department to clarify that a complaint against an individual respondent based on actions the respondent took in accordance with a recipient's policy or practice should be handled the same way a recipient would handle a complaint about the recipient's policy or practice even if the complainant names an individual respondent.

Discussion: The Department has determined that grievance procedures should not be limited to sex discrimination complaints in which there is a complainant and respondent. Since 1975, the Department's Title IX regulations have required recipients to adopt and publish grievance procedures for complaints of sex discrimination and have not limited this requirement to only those that involve a complainant and a respondent. As explained in the July 2022 NPRM, the Department recognizes that not all complaints of sex discrimination involve active participation by complainants and respondents, including those alleging that the recipient's own policies and procedures discriminate based on sex. *See* 87 FR 41464. As a result, the Department recognizes that some provisions in § 106.45 will not apply to certain complaints of sex discrimination. *Id.* But the Department clarifies that recipients must fully implement and follow those parts of § 106.45 that do apply to such complaints, including when responding to a complaint alleging that the recipient's policy or practice discriminates on the basis of sex.

The Department notes that the language in § 106.45(a)(1) regarding a recipient not being considered a respondent is to clarify that when a complaint is against a recipient and not an individual respondent, the recipient would not be entitled to certain procedural rights and steps afforded to individual respondents. The Department agrees that respondents have the same rights as other students to be protected from sex discrimination in a recipient's education program or activity and clarifies that the language in § 106.45(a)(1) does not suggest otherwise.

The Department's view is that it is not necessary to add language to § 106.45(a)(1) regarding complaints about a recipient's policy or practice, but the Department appreciates the opportunity to clarify § 106.45(a)(1) in response to commenters' concerns and suggestions. As explained in the July 2022 NPRM, the grievance procedure requirements in § 106.45 related to a respondent apply only to sex discrimination complaints alleging that a person violated a recipient's prohibition on sex discrimination and do not apply when a complaint alleges that a recipient's policy or practice discriminates based on sex. *See* 87 FR 41464.

In response to a commenter's question regarding a complaint alleging that an individual engaged in sex discrimination based on actions the individual took in accordance with the recipient's policy or practice, the Department notes that the recipient must treat the individual as a respondent and comply with the requirements in § 106.45 that apply to respondents. This is because such complaints may involve factual questions regarding whether the individual was, in fact, following the recipient's policy or practice, what actions the individual took, and whether the individual could be subject to disciplinary sanctions depending on these facts. To the extent an individual was following the recipient's policy or practice, a recipient has flexibility to determine whether the original complaint must be amended to be a complaint against the recipient or whether this determination can be made based on the original complaint against the individual.

Changes: None.

2. Section 106.45(a)(2) Who Can Make Complaint

General Support

Comments: Commenters generally supported § 106.45(a)(2) and stated that its additional information on reporting sex discrimination, including who can make a complaint, was needed. A group of commenters praised the proposed regulations for returning flexibility to Title IX Coordinators to decide whether a complaint should be initiated and added that the 2020 amendments' restrictions on who may file a complaint were inflexible, too prescriptive, and created barriers to investigating sex discrimination. One commenter noted that the mandatory dismissal provision of the 2020 amendments left a number of individuals who were subject to sex-based harassment without protections.

Some commenters expressed particular support for the requirement that a recipient address complaints from individuals who are not current students or employees. For example, one commenter stated that proposed § 106.45(a)(2) would empower survivors of sexual violence to make a complaint even if they had left the recipient's education program or activity, and that allowing complaints of sex discrimination to be made by a person who is not a student or employee as long as they were participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination would help ensure that a recipient's education program or activity is free from sex discrimination and would align with the statutory language of Title IX, which says that ''no person'' shall be discriminated against on the basis of sex. *See* 20 U.S.C. 1681.

Discussion: The Department acknowledges commenters' support for § 106.45(a)(2) and agrees that the final regulations provide needed clarity. The Department also appreciates commenters' concerns about the impact of the 2020 amendments on the ability of a recipient to effectively address sex discrimination in its education program or activity. The Department shares commenters' goals of ensuring accurate reporting and safety in a recipient's educational community and removing barriers to reporting while also protecting complainant confidentiality and autonomy.

Changes: None.

''Third-Party'' Language

Comments: Some commenters requested that the Department clarify what it meant by ''third party'' in proposed § 106.45(a)(2)(iv) and who can initiate a Title IX complaint, observing that the definition of ''complainant'' in proposed § 106.2 did not use the term ''third party.'' One commenter noted that proposed § 106.45(a)(2)(i) stated that a complaint may be filed by a complainant, but the definition of ''complainant'' in proposed § 106.2 did not include any of the qualifications of proposed § 106.45(a)(2)(iv). Commenters further expressed confusion based on their observations that proposed § 106.45(a)(2) stated that any student or employee, or any third party participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination, may make a complaint, while the July 2022 NPRM preamble used the term ''third party'' to describe a person who does not have a legal right to act on behalf of a student, *see* 87 FR 41519, 41520 (referencing a third party who does not have such a legal right), and in another part of the preamble the Department gave examples of third parties and used the phrase ''such as a friend, parent, or witness to sexual harassment,'' *id.* at 41440 (referencing the 2020 amendments).

One commenter asserted that the language in proposed § 106.45(a)(2)(iv) was not clear because of the placement of a semicolon after ''any student or employee.'' The commenter was confused about whether the Department intends the ''participating or attempting to participate'' requirement to apply to any student or employee, or only to any third party. Overall, the commenter asked the Department to clarify: (1) when complaints by a non-student, non-employee third party would initiate Title IX grievance procedures, including whether these complaints are limited to sex discrimination that is not sex-based harassment and in which the third party is participating or attempting to participate in the recipient's education program or activity at the time of the alleged discrimination; and (2) when a person's student or employee status would initiate Title IX grievance procedures.

Commenters also expressed confusion about whether someone who merely observes or becomes aware of potential discrimination can make a complaint. One commenter expressed concern that the way proposed § 106.45(a)(2)(iv) was drafted, it was not clear whether a person who has a right to make a complaint on behalf of a complainant (paragraph (a)(2)(ii) of the proposed regulations) or a Title IX Coordinator (paragraph (a)(2)(iii) of the proposed regulations) could make a complaint of sex discrimination other than sex-based harassment.

Discussion: Based on these comments and to avoid confusion, the Department has revised § 106.45(a)(2)(iv) in these final regulations by removing the term ''any third party.'' In addition, it has created two new paragraphs: § 106.45(a)(2)(iv)(A), which now reads ''Any student or employee''; and § 106.45(a)(2)(iv)(B), which now reads ''Any person other than a student or employee who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination.'' As these revisions make clear, the qualifier ''who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination'' applies only to a person who is neither a student nor an employee of the recipient; such a limitation is not necessary for a student or employee because they already have an affiliation with the recipient.

Upon further reflection, the Department has also revised § 106.45(a)(2)(ii) by removing ''a person who has a right to make a complaint on behalf of a complainant under § 106.6(g)'' and replacing it with ''a parent, guardian, or other authorized legal representative with the legal right to act on behalf of a complainant.'' This change was made to avoid confusion because § 106.6(g) does not create any legal rights, but instead merely provides that nothing in the regulations infringes on the right of a parent, guardian, or

legal representative to make a complaint or take other action on behalf of a complainant, respondent, or other person.

To answer commenters' questions, a person who observes or becomes aware of potential discrimination may submit a complaint only for allegations of non-harassment sex discrimination, and the person may only do so if they are one of the following: a student or employee, or any person other than a student or employee who is participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination. *See* § 106.45(a)(2)(iv). Under the final regulations, a sex-based harassment complaint may only be made by a complainant; a parent, guardian, or other authorized legal representative with the legal right to act on behalf of a complainant; or, in limited circumstances, the Title IX Coordinator. *See* §§ 106.45(a)(2)(i)–(iii), 106.44(f)(1)(v). These persons may also make complaints of sex discrimination. *See* § 106.45(a)(2)(iv). The Department has limited the class of persons who may make complaints of sex-based harassment because such complaints may involve deeply personal aspects of the complainant's life, and because permitting complainants (or those with the legal authority to act on their behalf) to choose whether to ask the recipient to initiate grievance procedures, except in the very limited circumstances in which a Title IX Coordinator may initiate the recipient's grievance procedures, best protects complainant autonomy interests while effectuating Title IX. *See, e.g.,* 87 FR 41408, 41465; § 106.44(f)(1)(v)(B). Under the definition of ''complainant,'' an individual may only be a complainant if they themselves are alleged to have been subjected to conduct that could constitute sex discrimination under Title IX. *See also* discussion of § 106.2 (Definition of ''Complainant'').

In addition, the final regulations at § 106.2 include minor changes to the definition of ''complaint'' and the Department updated the introductory language in § 106.45(a)(2) to match the new definition, changing ''initiate its grievance procedures'' to ''investigate and make a determination about alleged discrimination under Title IX and this part.'' *See* section on the definition of ''complainant'' in § 106.2.

Changes: The Department has revised § 106.45(a)(2)(iv), to clarify that for complaints of sex discrimination other than sex-based harassment, the individuals listed in § 106.45(a)(2)(i)–(iii) can make a complaint, in addition to the individuals listed in paragraph (a)(2)(iv). In § 106.45(a)(2)(iv)(B), the Department has replaced the words ''third party'' with ''[a]ny person other than a student or employee who was'' and divided that paragraph into separate paragraphs (iv)(A) and (B). In § 106.45(a)(2)(ii), the Department has clarified that a parent, guardian, or other authorized legal representative with the legal right to act on behalf of a complainant may file a complaint of sex discrimination, including sex-based harassment, and removed the reference to § 106.6(g). The Department also has revised the introductory language in § 106.45(a)(2) to align it with the changes to the definition of ''complaint'' in final § 106.2. *See* section on the definition of ''complainant'' in § 106.2. The Department also has made a minor technical edit by replacing ''when the alleged sex discrimination occurred'' with ''at the time of the alleged sex discrimination'' in final § 106.45(a)(2)(iv)(B).

Complainant Autonomy

Comments: Some commenters supported the Department's continued exclusion of complaints by non-aggrieved persons for allegations of sex-based harassment, which the commenters acknowledged helps to preserve complainant autonomy in matters of sex-based harassment, but opposed the Department's proposal to allow complaints of other types of sex discrimination to be made by any student, employee, or other person participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination. Some commenters misunderstood proposed § 106.45(a)(2) and objected to allowing a non-aggrieved person to make a complaint of sex-based harassment even if the aggrieved person chooses not to. Some commenters expressed concern that sex-based harassment complaints could be made by bystanders who are not directly involved in an incident.

One commenter asserted that allowing complaints of sex discrimination other than sex-based harassment to be made by a non-aggrieved person could take autonomy away from the aggrieved person and give control to a person who has less knowledge of the alleged discrimination than the aggrieved person. Another commenter noted that even sex discrimination that does not constitute harassment still may be personal and sensitive for the aggrieved person.

Some commenters acknowledged that, under proposed § 106.45(a)(2)(iii), in limited circumstances a Title IX Coordinator may decide to initiate grievance procedures without the aggrieved person's consent but argued that such a decision should not be granted to third parties. One commenter asserted that it would be arbitrary and capricious for the Department to allow someone without training and possibly no affiliation with the recipient to make a complaint and trigger grievance procedures on behalf of an aggrieved person.

One commenter asserted that § 106.45(a)(2) defies the legal principle that a person with a personal stake in the outcome of the dispute is best situated to seek a remedy from a court. The commenter asserted the provision would give standing to any person who believes discrimination may have occurred, even if that person did not suffer any injury as a result of the alleged discrimination. Another commenter suggested that the Department adopt a ''standing'' requirement for third-party complaints as part of proposed § 106.45(a)(2)(iv) and require a third-party complainant to have firsthand knowledge of the facts that form the basis of the complaint to preserve resources. The same commenter recommended that the Department revise the language in proposed § 106.45(a)(2)(iv) to clarify what it means by ''complaints of sex discrimination other than sex-based harassment.''

Discussion: As the Department explained in the July 2022 NPRM, in drafting § 106.45(a)(2), the Department purposefully imposed different requirements for who may make a complaint of sex-based harassment and who may make a complaint of sex discrimination other than sex-based harassment. 87 FR 41464. Under § 106.45(a)(2)(i)–(iii), a complaint of sex-based harassment can only be made by a ''complainant,'' defined in § 106.2 as a person alleged to have been subjected to sex discrimination; by a person who has the legal right to make a complaint on behalf of a complainant; or by the Title IX Coordinator. The Department proposed that limitation to give a complainant autonomy over whether to request initiation of a recipient's grievance procedures (except in limited circumstances in which a Title IX Coordinator would be obligated to initiate the grievance procedures if the complainant chooses not to, *see* § 106.44(f)(1)(v)), recognizing that allegations of sex-based harassment may involve deeply personal and sensitive issues. Under § 106.45(a)(2)(iv), however, a complaint of sex discrimination that is not sex-based harassment can be made by any of the people listed in paragraphs (a)(2)(i)–(iii),

as well as by a non-aggrieved student, employee, or person other than a student or employee who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination. Allegations of sex discrimination that are not sex-based harassment often implicate a recipient's policies or practices, are more likely to represent community-wide experiences, and are made against a recipient instead of against another person, such as a peer. Expanding reporting options to include those who have not been subject to sex discrimination will help recipients root out prohibited discrimination, protect their communities from sex-based harms, and ensure that all community members impacted by sex discrimination can find support. While the interest in protecting communities from sex-based harassment is equally important, the Department finds that the heightened need for complainant autonomy in cases of sex-based harassment justifies limiting complaints of sex-based harassment to those who have been aggrieved.

The Department disagrees with a commenter's characterization that the proposed regulations would permit bystanders who are not directly involved in an incident to make complaints of sex-based harassment. Under the final regulations, a person who witnesses an incident that creates a hostile environment for them may make a complaint on their own behalf. A person with no connection to the educational institution and who thus has not experienced a hostile educational environment would not be able to make a complaint of sex-based harassment. Harassment law has consistently recognized that individuals may be subject to a hostile environment, even if they are not the target of the harassment; thus, contrary to the commenter's characterization, these ''bystanders'' may in fact be involved in the conduct in question in that they, too, may experience a hostile environment. *See, e.g., Jennings,* 482 F.3d at 695 (''A coach's sexually charged comments in a team setting, even if not directed specifically to the plaintiff, are relevant to determining whether the plaintiff was subjected to sex-based harassment.''); *id.* at 703 (Gregory, J., concurring) (''I agree with the majority that Anson Dorrance's sexually explicit, inappropriate, and harassing comments directed to other players on the team, but overheard by Jennings, are relevant to determining whether Jennings was subjected to a hostile environment.''); *Broderick* v. *Ruder,* 685 F. Supp. 1269, 1277–78 (D.D.C. 1988) (citing *Vinson* v. *Taylor,* 753 F.3d 141, 146 (D.C. Cir. 1985)). Individuals who do not fit these categories, whether an uninvolved bystander or otherwise, cannot make a Title IX complaint.

For the reasons discussed above, the Department notes again here that it edited § 106.45(a)(2)(iv) based on comments it received and to improve clarity on who may submit which types of complaints. Section 106.45(a)(2) does not permit anyone who does not have one of the specified relationships with the recipient to make a complaint of sex discrimination, and it does not allow a person who was not subject to alleged sex-based harassment to make a complaint of sex-based harassment, unless they are the Title IX Coordinator or are authorized to act on a complainant's behalf per § 106.45(a)(2)(ii). This framework will encourage reporting from persons in the recipient's educational community, which in turn will help the recipient learn about possible sex discrimination in its education program or activity and improve its ability to comply with Title IX. Far from being arbitrary and capricious, this approach was carefully considered by the Department, was explained in the July 2022 NPRM, *see* 87 FR 41465, and received support from commenters.

The Department declines to add a separate standing requirement for Title IX complaints because Title IX complaints are resolved by an educational entity, not a court of law. As explained above, all of the parties allowed to make a sex discrimination complaint have some relationship or connection to the recipient's education program or activity, mitigating the risk of a speculative complaint or that the person who made the complaint lacks a stake in the complaint's outcome. The Department also notes that Title IX's statutory language says ''no person'' shall be subject to sex discrimination in a recipient's education program or activity, *see* 20 U.S.C. 1681, which is broad and meant to protect everyone in a recipient's education community. Indeed, many commenters praised § 106.45(a)(2) because it will help recipients protect their education communities from harm and help ensure that all community members impacted by discrimination can find support.

Finally, the language ''complaints of sex discrimination other than sex-based harassment'' in § 106.45(a)(2)(iv) includes all complaints of sex discrimination that do not involve sex-based harassment, including, for example, allegations of retaliation under § 106.71, allegations that a recipient failed to make reasonable modifications under § 106.40(b)(3)(ii), or allegations that a recipient's policy or procedures discriminate on the basis of sex. As explained in more detail in the discussion of § 106.10, the final regulations clarify that sex discrimination includes, but is not limited to, discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

Changes: None.

Title IX Coordinator

Comments: Some commenters objected to giving the Title IX Coordinator authority to initiate grievance procedures even without receiving a complaint. One commenter was concerned that an aggrieved person could be stripped of the decision whether to move forward with a complaint because of a misunderstanding between the aggrieved person and the Title IX Coordinator. Other commenters argued that if the aggrieved person declines to participate or denies that the conduct occurred, the recipient should not proceed with an investigation unless there is compelling evidence that the misconduct occurred and that an investigation is necessary to ensure student safety.

One commenter asked whether, if a person alleges they were subject to sex discrimination but cannot make a complaint because they were not participating or attempting to participate in a recipient's education program or activity when the alleged conduct occurred, but the Title IX Coordinator makes a complaint to investigate the alleged conduct, the investigation would be subject to the ''resolution process'' in accordance with the Title IX regulations. In addition, this commenter requested that the Department clarify that it intends for a complaint initiated by the Title IX Coordinator under proposed § 106.45(a)(2)(ii) to not be a complaint made on behalf of the Title IX Coordinator, but rather on behalf of another person, and suggested adding ''on behalf of a complainant under § 106.6(g)'' (which recognizes that a parent, guardian, or other authorized legal representative can act on behalf of a complainant).

Discussion: The Department appreciates the points made by commenters on proposed § 106.45(a)(2)(iii). The Department disagrees, however, with commenters'

characterization of the regulations because the regulations do not give the Title IX Coordinator broad authority to initiate grievance procedures even without a complaint. Rather, as explained in more detail in the discussion of § 106.44(f), per the final regulations at § 106.44(f)(1)(v), in the absence of a complaint, the Title IX Coordinator may initiate a complaint only after determining that the alleged conduct ''presents an imminent and serious threat to the health or safety of a complainant or other person, or that conduct as alleged prevents the recipient from ensuring equal access based on sex to its education program or activity.'' *See* § 106.44(f)(1)(v)(B). In making this fact-specific determination, the Title IX Coordinator must consider, at a minimum, factors now listed in § 106.44(f)(1)(v)(A)(*1*)–(*8*). Those factors, which were also discussed in the preamble to the July 2022 NPRM, include the complainant's request not to proceed with a complaint investigation; the complainant's reasonable safety concerns regarding initiation of a complaint; the risk that additional acts of sex discrimination would occur if the grievance procedures are not initiated; the severity of the alleged sex discrimination, which would include but not be limited to discrimination that, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence; the age and relationship of the parties, including whether the respondent is an employee of the recipient; the scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or conduct alleged to have impacted multiple individuals; the availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred; and whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures under § 106.45, and if applicable § 106.46. *See* § 106.44(f)(1)(v)(A)(*1*)–(*8*); 87 FR 41445. These factors will help the Title IX Coordinator balance the complainant's wishes with the risk of future sex discrimination and the likely effectiveness of making a complaint and proceeding through the grievance procedures. An aggrieved person declining to participate or denying that the conduct occurred, as a commenter suggested, may affect the Title IX Coordinator's analysis of the above factors, such as the availability of evidence. Because the Title IX Coordinator must consider the factors in § 106.44(f)(1)(v)(A)(*1*)–(*8*) before initiating a complaint, it is extremely unlikely that such a decision could be made based on a misunderstanding with the complainant. For more about the Title IX Coordinator's initiation of a complaint, see the discussion of § 106.44(f)(1).

A complaint is essentially a request to initiate the recipient's grievance procedures and prompts an investigation and a determination whether sex discrimination occurred. Regarding the commenter's question about what procedures would be required if someone who is not one of the persons listed in § 106.45(a)(2)(i)–(iv) alleges that they were subject to sex discrimination and the recipient's Title IX Coordinator decides to make a complaint, this would only happen under the limited circumstances allowed in § 106.44(f)(1)(v). The commenter is correct that a complaint made by the Title IX Coordinator under § 106.45(a)(2) would be made on behalf of neither the Title IX Coordinator nor another person (including those mentioned in § 106.6(g)). Instead, complaints initiated by the Title IX Coordinator would be based on the Title IX Coordinator's determination, in accordance with § 106.44(f)(1)(v), that the alleged conduct presents an imminent and serious threat to the health or safety of a complainant or other person, or that the alleged conduct prevents the recipient from ensuring equal access based on sex to its education program or activity, taking into consideration a variety of factors. *See* § 106.44(f)(1)(v). Therefore, the change to the regulatory text proposed by the commenter to clarify on whose behalf the complaint would be made is not necessary.

Finally, the Department appreciates the opportunity to clarify that the final regulations and the preamble sometimes refer to the rights or obligations of ''the parties'' in connection with grievance procedures. In the case of a complaint initiated by a recipient's Title IX Coordinator rather than a complainant, the Department does not intend for the Title IX Coordinator to ''stand in'' for the complainant and become one of ''the parties.'' References to ''the parties'' in such cases should not be read to refer to the Title IX Coordinator as the complainant. This is consistent with the 2020 amendments, which said that ''[w]here the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45.'' 34 CFR 106.45(b)(1)(iii).

Changes: The Department has revised final § 106.44(f)(1)(v) to add a requirement that the Title IX Coordinator may make a complaint of sex discrimination only in the absence of a complaint or withdrawal of any or all of the allegations in a complaint, or in the event of a termination of the informal resolution process, and only if the Title IX Coordinator determines that the alleged conduct presents an imminent and serious threat to the health or safety of a complainant or other person, or that the alleged conduct prevents the recipient from ensuring equal access based on sex to its education program or activity. Final § 106.44(f)(1)(v)(A) includes a list of specific factors the Title IX Coordinator must consider, at a minimum, in making such a determination. The Department has also revised final § 106.45(a)(2)(iii) by adding the words ''after making the determination specified in § 106.44(f)(1)(v)'' after the words ''The Title IX Coordinator.'' This change is not a substantive change from the proposed regulatory text, but rather makes clear that a Title IX Coordinator may only make a complaint of sex discrimination in the limited circumstances specified in § 106.44(f)(1)(v). *See* 87 FR 41445.

Burden on Recipients

Comments: Some commenters expressed concern that allowing a non-aggrieved person who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged discrimination to make a complaint of sex discrimination other than sex-based harassment could create the potential for abuse and allow bad actors to use the procedures to overload recipients with complaints. Another commenter, a postsecondary institution, asserted that complaints by non-aggrieved parties may be difficult to investigate and that there may be little that a recipient can do to support a complainant who is not their student or employee. One commenter requested that the Department acknowledge that with respect to obligations toward a third party, such as supportive measures, a recipient may be limited by a lack of relationship with that party.

One commenter objected that proposed § 106.45(a)(2) would allow a complaint to be made by a non-aggrieved person, such as spectators at a recipient's sports games or visitors on campus tours, and expressed concern that persons might be pulled into grievance procedures when they did not perceive the alleged conduct to be discriminatory or were not aware of the

reported conduct. The commenter argued that such a broad sweep goes beyond Congress' intent in passing Title IX, which the commenter asserted was to ensure that girls and women get equal access to education programs and activities.

One commenter expressed concern that community colleges are likely to be affected by the proposed requirement that grievance procedures be available to a non-aggrieved person participating or attempting to participate in a recipient's education program or activity, because of the general openness of community colleges and their mission to serve their communities in a variety of ways. The commenter suggested that the regulations require a sex discrimination complaint brought by a non-aggrieved person to be addressed solely through the requirements of proposed § 106.44 instead of the grievance procedures of proposed § 106.45 unless a student respondent or the recipient chooses to use the grievance procedures.

Discussion: First, to address commenters' misunderstanding—and as clarified in final § 106.45(a)(2)—it is not correct that under § 106.45(a)(2) anyone who claims to have knowledge of sex discrimination can make a complaint that a recipient then would have to investigate. Rather, under § 106.45(a)(2)(i)–(iii), a complaint alleging sex-based harassment can only be made by a complainant—defined in § 106.2 as a person alleged to have been subjected to the sex discrimination themselves; a parent, guardian, or other authorized legal representative with the legal right to act on behalf of a complainant; or the Title IX Coordinator. A complaint of sex discrimination that is not sex-based harassment, on the other hand, could be made by any of those persons, *see* § 106.45(a)(2)(iv), as well as any student or employee, *see* § 106.45(a)(2)(iv)(A), or any person who is not a student or employee but who is participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination. Therefore, a scenario in which a complaint could be made by a student on behalf of another student is only possible for complaints of sex discrimination that are not sex-based harassment. Still, even without a complaint a recipient has an obligation to a student who is alleged to have experienced sex discrimination; under § 106.44(f)(1)(v) and (vii) the Title IX Coordinator must determine whether to initiate a complaint of sex discrimination or take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.

Second, the Department does not agree with commenters who asserted that the Department should revise § 106.45(a)(2) because it will cause recipients to be flooded with complaints of sex discrimination, some of which may be filed in bad faith. Even if the overall number of sex discrimination complaints increase somewhat, the Department's goal is to effectuate Title IX's nondiscrimination mandate, which § 106.45(a)(2) will do. After careful consideration, the Department has decided that the benefit of allowing a complaint to be made by some non-aggrieved persons with respect to some kinds of sex discrimination justifies the relatively low risk that a complaint will be made in bad faith.

Regarding commenters' concerns that there may be little a recipient can do to support someone who makes a complaint of sex discrimination but who is not a student or employee, that may be true in some cases but is not a reason to prohibit those who are not students or employees from making a complaint. The Department reiterates that anyone who makes a complaint must have some relationship with the recipient. The final regulations also provide that recipients need only offer supportive measures ''as appropriate'' and ''to restore or preserve that party's access to the recipient's education program or activity, including measures that are designed to protect the safety of the parties or the recipient's educational environment.'' §§ 106.2 (definition of ''supportive measures''), 106.44(g). Section 106.44(g) requires a recipient to fulfill its Title IX obligations in those instances, recognizing that when not appropriate or necessary to restore or preserve that party's access, the recipient would not have an obligation to offer supportive measures.

The Department disagrees with the commenter's contention that allowing a complaint to be made by a person who was not the target of the sex discrimination, such as a spectator at a recipient's sports game or a visitor on a campus tour, goes beyond Congress' intent in passing Title IX. The plain language of Title IX provides broad protection in stating that ''no person'' shall be subjected to sex discrimination in a recipient's education program or activity. 20 U.S.C. 1681. That statutory text does not state or suggest that only targets of sex discrimination have the ability to file complaints even when a complaint by a different individual would protect the target from sex discrimination in a recipient's education program or activity. The Department has long interpreted Title IX to require a recipient to take action to address discrimination regardless of who reports it, to ensure that the recipient's education program or activity is free from sex discrimination. *See, e.g.,* 2001 Revised Sexual Harassment Guidance, at 13. In addition, the permissive dismissal rules apply to all complaints, so the recipient can dismiss a complaint on any of the bases listed in § 106.45(d)(1)(i)–(iv), including if the recipient determines that the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX.

Finally, the Department appreciates hearing about the challenges a community college may face due to its mission to serve the community broadly. The Department disagrees, however, with the suggestion to revise the regulations so that complaints by non-aggrieved persons are addressed only through § 106.44 and not § 106.45 unless the student respondent or the recipient elects to go through the grievance procedures. As the Department explained in the preamble to the July 2022 NPRM, the grievance procedures required by § 106.45 are critical to effective enforcement of Title IX's prohibition on sex discrimination because they ensure that a recipient has a process in place for investigating and resolving complaints of sex discrimination. 87 FR 41456. The provisions in § 106.45 ''establish the basic elements of a fair process, set clear guideposts for prompt and equitable grievance procedures, and ensure transparent and reliable outcomes for recipients, students, employees, and others participating or attempting to participate in a recipient's education program or activity.'' 87 FR 41461.

Changes: None.

3. Section 106.45(b)(1) Treat Complainants and Respondents Equitably

General Support and Opposition

Comments: Some commenters supported proposed § 106.45(b)(1) because it would strike a balance between protecting the rights of a respondent and allowing a recipient to investigate claims of sex-based harassment. Other commenters stated that the provision would ensure the equitable resolution of sex-based harassment complaints by treating complainants fairly in contrast to the grievance procedure requirements in the 2020 amendments. One commenter stated that the proposed regulations

would correct the impression in the 2020 amendments that, to treat the parties equitably, a recipient need only offer supportive measures to a complainant and follow the grievance procedure requirements before imposing sanctions.

Some commenters opined that the Department should not remove the requirement that the regulations apply equally to both parties and questioned why access to equal protections for boys and men was not highlighted in proposed § 106.45(b)(1). Other commenters generally asserted, without further explanation, that the proposed grievance procedure requirements would favor some students and ignore all girls and women.

Discussion: The Department agrees that treating complainants and respondents equitably is necessary to ensure a fair resolution of sex discrimination complaints. The Department agrees that the requirement to treat complainants and respondents equitably is not limited to providing supportive measures and following the grievance procedure requirements before, potentially, imposing disciplinary sanctions. Section 106.45(b)(1) includes equitable treatment of complainants and respondents throughout the grievance procedures to ensure they can engage fully in the grievance procedures.

The Department clarifies that it has not removed the requirement in the 2020 amendments that any provisions adopted by a recipient as part of its grievance procedures beyond those required by the amendments must apply equally to both parties. Instead, the Department proposed moving the requirement from § 106.45(b) in the 2020 amendments to proposed § 106.45(i) and broadened this requirement to apply to grievance procedures for all forms of sex discrimination, not only sex-based harassment. *See* 87 FR 41491. These final regulations include this requirement at § 106.45(j). *See* § 106.45(j) (''If a recipient adopts additional provisions as part of its grievance procedures for handling complaints of sex discrimination, including sex-based harassment, such additional provisions must apply equally to the parties.'').

Regarding commenters who raised concerns related to the relative treatment of boys and men as compared to girls and women, § 106.45(b)(1) requires a recipient's grievance procedures to treat complainants and respondents equitably. This requirement applies regardless of the sex of the complainant or respondent. The Department notes that any person regardless of sex may be a complainant or a respondent, and, thus, requiring a recipient's grievance procedures to treat complainants and respondents equitably does not discriminate based on sex. In addition, the Title IX regulations at § 106.31(a) and (b)(4) require that a recipient carry out its grievance procedures in a nondiscriminatory manner and prohibit a recipient from discriminating against any party based on sex.

Changes: None.

Explanation of Equitable Treatment

Comments: Some commenters opposed removal of regulatory language explaining the meaning of the term ''equitably'' and asked the Department to retain the language from § 106.45(b)(1)(i) in the 2020 amendments.

One commenter requested that the Department use the term ''equally'' rather than ''equitably'' in proposed § 106.45(b)(1). In contrast, another commenter asked the Department to clarify that ''equitable'' does not mean strictly ''equal,'' and that the purpose of proposed § 106.45(b)(1) is fundamental fairness and not rigid application of procedural rules.

Another commenter asked the Department to define ''equitable'' in proposed § 106.45(b)(1) by adding ''which means without favoritism, presumption or bias'' to the end of the provision. The commenter suggested this language would help alleviate confusion between ''equitable'' and ''equal.'' Another commenter asked the Department to clarify that ''equitably'' means to treat complainants and respondents ''fairly and without prejudice.''

Discussion: The Department acknowledges that some commenters wanted the Department to retain the language from § 106.45(b)(1)(i) in the 2020 amendments referring to two examples of treating complainants and respondents ''equitably,'' but declines to do so. The Department agrees that a recipient is required to treat complainants and respondents equitably and § 106.45(b)(1) requires them to do so. As explained in the July 2022 NPRM, the Department proposed to remove the two examples of equitable treatment from § 106.45(b)(1)(i) of the 2020 amendments—providing remedies for the complainant when a determination of responsibility for sexual harassment had been made and following grievance procedures before imposing disciplinary sanctions on a respondent—to avoid the impression that these are the only two situations in which a recipient is required to treat complainants and respondents equitably. *See* 87 FR 41466. In the final regulations at § 106.45(b)(1), the Department makes clear that a recipient is required to treat complainants and respondents equitably throughout the grievance procedures; not only at the two stages the 2020 amendments identified. The Department also agrees with commenters that an impartial investigation is necessary for the equitable adjudication of sex discrimination complaints, and notes that the final regulations at § 106.45(f) require a recipient to provide for an adequate, reliable, and impartial investigation of complaints. The Department also notes that the final regulations retain language from the 2020 amendments requiring recipients to comply with the grievance procedure requirements in § 106.45, and if applicable § 106.46, before the imposition of any disciplinary sanctions against a respondent. *See* § 106.45(h)(4).

In response to requests from commenters to use the term ''equally'' instead of ''equitably,'' the Department clarifies that equitable treatment of complainants and respondents better effectuates Title IX's prohibition on sex-based discrimination. Equitable treatment of the parties has been a longstanding feature of the Department's Title IX regulations dating back to 1975, including the 2020 amendments. *See* 40 FR 24128 (codified at 45 CFR 86.8(b) (1975)); 34 CFR 106.8(b) (current); 34 CFR 106.45(b)(1)(i) (2020 amendments). Consistent with the position in the 2020 amendments, the Department maintains that the requirement for equitable treatment recognizes that the interests of a respondent and complainant may differ. Thus, it is appropriate and necessary for a recipient to treat complainants and respondents differently in some respects during the course of the grievance procedures and the outcomes of the grievance procedures will necessarily have different consequences for the complainant and the respondent. *See* 85 FR 30242. For example, under the final regulations, a recipient must provide remedies to the complainant as appropriate if there is a determination that sex discrimination occurred, *see* § 106.45(h)(3), must use its grievance procedures before imposing discipline on a respondent, *see generally* §§ 106.45 and 106.46, and must notify complainants and respondents about and offer supportive measures at different times, *see* § 106.44(f)(1).

The Department acknowledges the suggestions from some commenters to add language defining ''equitably'' as

''fair[ ] and without prejudice,'' or ''without favoritism, presumption, or bias.'' The Department declines these suggestions because the language in § 106.45(b)(1) requiring a recipient's grievance procedures to treat complainants and respondents equitably, along with the requirements in § 106.45(b)(2) and (3), already requires recipients to adopt procedures that are free of favoritism or bias. For example, any person designated as a Title IX Coordinator, investigator, or decisionmaker must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. § 106.45(b)(2). In addition, § 106.45(b)(3) promotes fairness by requiring a recipient's grievance procedures to include a presumption that the respondent is not responsible for the alleged sex discrimination until a determination is made at the conclusion of the recipient's grievance procedures.

Changes: None.

Trauma-Informed Approach, Fairness, Neutrality

Comments: Some commenters objected to a recipient using a trauma-informed approach in sex-based harassment cases, arguing that trauma-informed approaches create bias in favor of complainants that could influence the outcome of Title IX proceedings. Additionally, some commenters said that all recipients should be directed to use ''complainant/accuser'' or another neutral term instead of ''victim/survivor'' when implementing their Title IX grievance procedures. However, another commenter stated the grievance procedures must be complainant-centered and trauma-informed.

One commenter asked the Department to ensure that a recipient's disciplinary procedures are fair, and stated that stereotypes can lead to biased treatment of complaints from students of color, LGBTQI+ students, and students with disabilities.

Discussion: The Department understands the term ''trauma-informed approach'' to mean an approach that takes into consideration the signs and symptoms of trauma and takes steps to avoid re-traumatizing individuals participating in a recipient's Title IX grievance procedures. Consistent with the Department's position explained in the preamble to the 2020 amendments, a recipient has discretion to use a trauma-informed approach in handling sex discrimination complaints, as long as the approach complies with the requirements in the final regulations, including the grievance procedure requirements in § 106.45, and if applicable § 106.46. *See* 85 FR 30187. Under § 106.45(b)(2) and (6), recipients must be fair, unbiased, and impartial toward both complainants and respondents.

With respect to commenter concerns about the terminology used in grievance procedures, the Department declines to require a recipient to use or prohibit a recipient from using specific terms—including ''complainant,'' ''respondent,'' ''survivor,'' or ''victim''—when implementing its Title IX grievance procedures. In addition to final § 106.45(b)(1)'s general requirement that complainants and respondents be treated equitably, the final regulations at § 106.45(b)(2) require that persons designated as Title IX Coordinators, investigators, or decisionmakers not have conflicts of interests or bias for or against complainants or respondents. And final § 106.45(b)(6) provides that recipients' grievance procedures must require an objective evaluation of all evidence that is relevant and not otherwise impermissible, and provide that credibility determinations must not be based on a person's status as a complainant, respondent, or witness.

The Department agrees that a recipient's disciplinary procedures must be fair, and acknowledges that data and other evidence indicate that some complainants have been subjected to stereotyping based on sex and race, and that complainants of color, LGBTQI+ complainants, and complainants with disabilities have faced challenges in reporting sex-based harassment. For more information on the data and other evidence, see the discussion of Data Related to Sex-Based Harassment in Section I.C. The Department notes that the final regulations include requirements that outcomes not be based on stereotyping and that recipients remove barriers to reporting harassment, which would include those that the communities identified by the commenters have faced. *See* §§ 106.45(b)(6), 106.44(b). The Department emphasizes that every person, regardless of demographic or personal characteristics or identity, is entitled to the same protections against sex discrimination under these final regulations, and that every individual should be treated with fairness, equal dignity, and respect. The grievance procedure requirements in the final regulations—including the requirement to treat complainants and respondents equitably—appropriately protect the due process rights of the persons involved in a recipient's grievance procedures and provide for fair and reliable resolutions of complaints of sex discrimination. Final § 106.45(h)(4) requires a recipient to comply with the grievance procedure requirements in § 106.45, and if applicable § 106.46, before imposing discipline on a respondent. In addition, final § 106.45(h)(5) precludes a recipient from disciplining a party, witness, or others participating in the recipient's grievance procedures for making a false statement or for engaging in consensual sexual conduct based solely on the recipient's determination whether sex discrimination occurred. These provisions, along with others, protect individuals participating in the grievance process from unfair or improper sanctions that may chill reporting, improperly rely on stereotypes, or detract from the fairness of the process. Anyone who believes that a recipient has failed to comply with any of the requirements in the final regulations or the other civil rights laws enforced by OCR, including those that prohibit discrimination based on race and disability, may file a complaint with OCR.

Changes: None.

4. Section 106.45(b)(2) Conflicts of Interest or Bias

Prohibition on Conflicts of Interest and Bias

Comments: Commenters generally agreed that the bias and conflict of interest prohibitions in proposed § 106.45(b)(2) for the Title IX Coordinator, investigators, decisionmakers (as well as identical prohibitions in § 106.44(k)(4) for informal resolution facilitators) were important because bias persists in schools, and students and employees deserve to have confidence that their institution will uphold their rights without bias or conflicts of interest. However, one commenter recommended that the Department retain the version of § 106.45(b)(1) from the 2020 amendments. The commenter argued that version reflected many court decisions that found recipients biased in favor of complainants or girls and women in their resolution of Title IX complaints.

In addition, one commenter argued that proposed § 106.45(b)(2) would not sufficiently guard against bias that can arise in Title IX matters. The commenter expressed concern that policies that do not actively mitigate bias will have the effect of reinforcing bias and discrimination. Some commenters asserted that the proposed regulations would encourage Title IX Coordinators to measure success by the number of

reports received, investigations completed, and students found responsible rather than by the fairness of the proceedings and reduction of errors.

Some commenters reported personal experiences of dealing with bias or conflicts of interest in the Title IX process, including when they felt a school showed bias in favor of certain respondents, such as athletes, or bias against respondents generally.

Moreover, some commenters expressed concern that the proposed regulations failed to address the competence and integrity of investigators. To better protect against bias and conflicts of interest, some commenters proposed ensuring that the training requirements in § 106.8(d) explicitly address anti-bias training, ensuring that parties to a Title IX investigation are notified of the identity of the investigators and decisionmakers before the investigation begins so that they have the opportunity to raise concerns about bias, and including slow and deliberate processes and checks and balances.

Additionally, some commenters proposed alternative measures or approaches to addressing conflict of interest or bias. Some commenters maintained that Title IX allegations should only be investigated by law enforcement. One commenter suggested that decisionmaking should be assigned to independent, State-level commissions made up of trained Title IX officials elected for long terms and funded by dues from the recipients in each State. One commenter recommended that Title IX Coordinators be required to provide information verifying that the officials involved in the grievance procedures have no conflict of interest or bias with respect to the parties involved or the recipient. Another commenter expressed concern that § 106.45(d)(3), which addresses appeals of decisions dismissing a complaint, does not require the recipient to ensure there is no bias or conflict of interest, or to allow the parties to raise such an objection if so. Further, some commenters suggested that recipients ensure a neutral factfinder for cases in which the Title IX Coordinator pursues an investigation after the complainant decides not to do so. Other commenters stated that the regulations should specifically address bias in cases involving Multiple Perpetrator Sexual Assault (MPSA).

Other commenters asked the Department to clarify, possibly through supplemental guidance, which roles (such as principal, athletics director, or general counsel) may create a conflict of interest if they also serve as Title IX Coordinator. Some commenters who have represented complainants in Title IX investigations said that Title IX investigators are predisposed to issue findings of no responsibility and are reluctant to expel or suspend respondents to protect their institution from lawsuits. Some commenters asserted that a recipient's employees cannot be objective and unbiased decisionmakers because they rely on the recipient for their salary.

One commenter argued that proposed § 106.45(b)(2) might be particularly difficult for smaller postsecondary institutions because of the relationships that staff members develop with students at such institutions. This commenter further stated that avoiding conflicts of interest may affect how long it takes to resolve a complaint and increase costs for such institutions, by requiring them to hire outside personnel.

Discussion: The Department appreciates the variety of comments shared in support of § 106.45(b)(2). The Department agrees that the final regulations are important for ensuring a fair process, free from bias and conflicts of interest, that supports all members of a recipient's community and promotes trust in a recipient's grievance process.

With respect to a commenter's preference for the 2020 amendments, the Department notes that the proposed and final regulations' general prohibition on conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent largely mirrors the language of the 2020 amendments, except with respect to the categorical prohibition in 2020 on the use of a single-investigator model described in more detail below.

The Department disagrees with commenters' assertions that the proposed anti-bias provision does not adequately address the competence and integrity of investigators or other decisionmakers, including Title IX Coordinators or individuals who resolve appeals. In response to the commenter who expressed concern that § 106.45(d)(3) does not require the recipient to ensure there is no bias or conflict of interest, the Department notes that § 106.45(b)(2) applies to all decisionmakers, including those who decide appeals of dismissals, and it is therefore unnecessary for § 106.45(d)(3) to restate the obligation. The Department has determined that recipients should have discretion in determining the bases for appeal of dismissals, other than those that fall under § 106.46(i). *See* 87 FR 41489; § 106.45(i).

The Department maintains that § 106.45(b)(2) and the other anti-bias provisions in the final regulations contain adequate safeguards to maintain integrity and protect against investigator or decisionmaker misconduct. For example, § 106.45(b)(1) requires a recipient to treat complainants and respondents equitably; § 106.45(b)(3) requires the grievance procedures to, among other things, include a presumption that the respondent is not responsible for the alleged sex discrimination until a determination is made at the conclusion of the recipient's grievance procedures; § 106.45(b)(5) requires a recipient to take reasonable steps to protect the privacy of the parties and witnesses during the grievance procedures (subject to certain exceptions); and § 106.45(b)(6) requires an objective evaluation of all relevant and not otherwise impermissible evidence and provides that credibility determinations will not be based on a person's status as a complainant, respondent, or witness. Recipients are also required to train investigators on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. *See* § 106.8(d). For more explanation of the regulations' training requirements and investigator neutrality, see the discussion of § 106.8(d).

The Department declines to add additional grievance procedure requirements regarding conflict of interest and bias because the grievance procedures required by the final regulations provide fair resolution of complaints of sex discrimination and adequately protect against conflict of interest and bias. In addition to the protection just identified in § 106.45(b), § 106.45(i) requires a recipient to offer the parties an appeal that, at minimum, is the same as it offers in all other comparable proceedings, if any. Section 106.46(i) further requires a postsecondary institution to offer an appeal based on factors that would change material aspects of the matter, including, among other things, a procedural irregularity that would change the outcome, and decisionmaker conflict of interest or bias that would change the outcome. In addition, anyone who believes that a recipient has failed to comply with any of the requirements in the final regulations, including those related to conflicts of interest or bias and treating complainants and respondents equitably, may file a complaint with OCR.

Regarding commenters' request for supplemental guidance on whether allowing persons with particular job

responsibilities at a recipient—such as principal, athletics director, or general counsel—to also serve as Title IX Coordinator would constitute a conflict of interest, the Department declines to identify any roles that would presumptively constitute a conflict of interest for any recipient. The Department notes that determining whether a conflict of interest exists is likely to be fact-specific, and that recipients assign roles differently and are in the best position to determine to whom to assign the role of Title IX Coordinator. The Department agrees that supporting recipients and Title IX Coordinators in implementing these regulations is important, and the Department will offer technical assistance, as appropriate, to promote compliance with these final regulations.

The Department does not agree with commenters' broad-based assumption that a recipient's employees are inherently biased in favor of the recipient or that Title IX Coordinators are biased against respondents who are boys and men, and notes that commenters have provided no evidence to support such assertions.

The Department appreciates the opportunity to clarify the role of law enforcement in Title IX matters. While allegations of conduct that constitutes sex discrimination under Title IX sometimes also could constitute criminal offenses under other laws, the Department disagrees that law enforcement is better positioned than recipients to evaluate claims of sex discrimination under Title IX. Whereas the criminal justice system can address criminal conduct, only recipients can address equal access to their education programs and activities. The Department notes that in circumstances in which alleged sex discrimination may also be a crime, it would be appropriate for law enforcement to pursue their own investigation of such conduct.

With respect to the comment about establishing independent State commissions to resolve Title IX complaints, the Department notes that a recipient may delegate duties under these final regulations to designees, including designees who are not employees of the recipient, as long as implementation of its grievance procedures satisfies all of the requirements in these final regulations, including training designees consistent with § 106.8(d). *See* § 106.8(a)(2). The Department can offer technical assistance to recipients or States who seek to establish such a commission to meet their obligations under these final regulations.

The Department appreciates that a Title IX Coordinator, investigator, or decisionmaker may sometimes have relationships with students, particularly at smaller institutions, which could create a conflict of interest or bias for or against an individual complainant or respondent. This does not relieve recipients of their duty to comply with § 106.45(b)(2)'s requirement that the investigator or decisionmaker for any particular complaint be free of conflicts of interest or bias. The Department has long made clear that adequate, reliable, and impartial investigations are a critical component of grievance procedures. *See, e.g.,* 2001 Revised Sexual Harassment Guidance, at 15, 20. A recipient has flexibility in how it ensures its personnel are unbiased, which could include restricting Title IX personnel from pursuing close relationships with students, training more than one employee to perform Title IX roles so they can step in when conflicts of interest arise, or hiring outside personnel when conflicts of interest arise.

Changes: None.

Single-Investigator Model

Comments: Proposed § 106.45(b)(2) stated that the decisionmaker may be the same person as the Title IX Coordinator or investigator. Directed Question 3 in the July 2022 NPRM invited comments on recipients' experiences using the single-investigator model that was referenced in proposed § 106.45(b)(2). In response, commenters provided information and model policies, which the Department reviewed. Commenters also offered many differing views about the single-investigator model, and whether the regulations should permit recipients to adopt some form of it or instead prohibit its use.

Support for allowing the model. Some commenters expressed general support for allowing the single-investigator model in proposed § 106.45(b)(2). For example, some commenters stated that the model would provide a recipient more flexibility to respond promptly to sex-based harassment, and some stated it would better serve elementary school and secondary school children. One commenter noted that greater flexibility would make the Title IX grievance procedures less judicialized, and another commenter supported proposed § 106.45(b)(2) provided that a recipient has appropriate checks and balances in place to ensure a fair and impartial process. Some commenters noted that other parts of the proposed regulations provide additional protections to ensure a fair and equitable investigation—including by prohibiting conflicts of interest, allowing parties to respond to the investigative report or relevant evidence, and providing appeals based on conflict of interest or bias.

Other commenters, including a system of State postsecondary institutions, supported proposed § 106.45(b)(2) as more time- and cost-effective than the requirements in the 2020 amendments. They argued that the proposed provision would allow recipients to shorten grievance procedure timelines, allow the individual with the most knowledge of the investigation to make the determination, and increase efficiency in scheduling. One commenter added that proposed § 106.45(b)(2) would allow investigators to reach individuals when their memories are fresher and ensure witnesses are available. Another commenter supported the model as better suited to the scale of operations in large school districts and allowing a district Title IX Coordinator to have designees carry out some responsibilities at the school level. Some commenters stated that, in their experience, individuals who normally serve as a single investigator tend to have lower turnover and be more highly trained, are skilled in other types of investigations, and have the most investigative experience.

Further, some commenters supported proposed § 106.45(b)(2) because, they concluded, it would encourage reporting under Title IX by avoiding direct confrontations between the parties. Commenters observed that this would improve complainant confidence and a sense of safety. One commenter supported proposed § 106.45(b)(2) because it would encourage reporting by making the Title IX grievance procedures less prescriptive. Relatedly, some commenters said that parties and witnesses are usually more open to participating and sharing information in a private and contained process. One commenter asserted the model helps alleviate the anxiety that live hearings can create for complainants, respondents, and witnesses.

Opposition to or criticism of the model. Other commenters stated that the single-investigator model exceeds the Department's authority and is inconsistent with Title IX and established case law or State law. Some commenters asserted that proposed § 106.45(b)(2) would ignore what they claimed is a lengthy record of Federal court criticism of the model. Some commenters asserted that proposed § 106.45(b)(2) would force recipients to implement procedures like those under the 2011 Dear Colleague Letter on

Sexual Violence, or pressure recipients into adopting a single-investigator model, which one commenter asserted was the case prior to the 2020 amendments. Another commenter stated that restoring the single-investigator model would ignore the reliance interests that recipients have in the 2020 amendments.

Impartiality and arbitrariness. A number of commenters were concerned about bias and arbitrariness. For example, one commenter stated that single investigators cannot review their own work for fairness, completeness, neutrality, and lack of bias. Another commenter shared stories from clients who reported that investigators were biased in favor of the complainant, ignored evidence, failed to ask questions, and had opaque procedures. Other commenters expressed concerns about confirmation bias and motivated reasoning on the part of investigators. Some commenters asserted there is no evidence that additional training can mitigate the risk of errors and unconscious biases. Other commenters argued that potential bias renders the proposed regulations arbitrary and capricious. Relatedly, one commenter stated that the Department has recognized the perceived importance of separating the roles of Title IX Coordinator, investigator, and decisionmaker in proposed § 106.44(k)(4) and asserted that the failure to do so for grievance procedures would be arbitrary and capricious.

Due process. Other commenters opposed the model on due process grounds. For example, one commenter stated the model would make it more difficult to raise concerns with a recipient's grievance procedures and investigation if the Title IX Coordinator, investigator, and decisionmaker are the same person. One commenter said this is particularly concerning because proposed § 106.45(d)(1)(iv) would allow an investigator to clarify the allegations in a manner that validates their investigation. Some commenters objected that proposed § 106.45(b)(2) would curtail ''due process protections'' put in place under the 2020 amendments such as an independent adjudicator, a clear and convincing evidence standard, cross-examination, and hearing rights. Additional commenters claimed that the single-investigator model inhibits the ability to test credibility; those commenters raised concerns about questions posed to parties in private and during individual meetings, and about the absence of adversarial questioning at a live hearing. One commenter expressed concern that a person serving as Title IX Coordinator and decisionmaker might be influenced by irrelevant evidence they reviewed during the investigation that was never acknowledged or disclosed to the parties.

Resources and timeliness. Some commenters asserted that the single-investigator model would suffer from lack of resources, specialized training, and competence of campus Title IX staff. Some commenters were concerned that the model would cause delays in grievance procedures, and one commenter stated that proposed § 106.45(b)(2) would require a recipient to conduct a new procedure if it determines that the single investigator had a conflict of interest or bias. Other commenters stated that timeframes would be extended if a single person is responsible for multiple investigation phases at the same time. One commenter stated that the Department did not identify the potential length of delay when investigators are separate from adjudicators, whether this delay outweighs the risk of bias in a single-investigator model, and what length of delay would be appropriate to ensure due process. One commenter was concerned that proposed § 106.45(b)(2) would make it difficult for faculty members to participate in complaints that are academic in nature, asserting that the single-investigator model fails to utilize faculty expertise to reach reliable outcomes. Other commenters argued that § 106.45(b)(2) could lead to an increase in litigation.

Further, some commenters rejected financial savings and administrative capacity as justifications for the single-investigator model. For instance, one commenter asserted that short-term savings under the model would be outweighed by negative consequences to the accused and loss of due process rights. One commenter stated that although the Department and commenters asserted that small recipients struggle with the administrative capacity to handle grievance procedures, the Regulatory Impact Analysis in the 2020 amendments indicated that the regulatory changes adopted in 2020 would generate additional costs to small institutions of higher education of only approximately 0.28 percent of annual revenue. Another commenter stated that Department and stakeholder concern for parties who want to minimize their interaction with employees involved in Title IX cases can be better addressed by limiting the job duties of those responsible for grievance procedures. The commenter suggested recipients could pool resources to set up regional tribunals, and stated this option was not considered in the Department's Regulatory Impact Analysis in the July 2022 NPRM.

Suggested modifications. Other commenters suggested changes to strengthen the impartiality of the model. For example, one commenter recommended using more than one investigator, investigators from outside the unit from which the complaint arose, or investigators outside of the college or university. Other commenters recommended that appeals be required. Still other commenters suggested that the regulations be modified to allow investigators to make non-binding recommended findings of responsibility. And some commenters suggested best practices of, for example, investigators asking parties to review their interview summary, ensuring all parties can view and respond to all information, and capturing their responses in the investigation report. One commenter stated that the final sentence of proposed § 106.45(b)(2) should be revised to state, ''The decisionmaker may be the same person as the Title IX Coordinator and/or investigator.''

Other commenters recommended that the final regulations make the single-investigator model available on a limited basis. One commenter would prohibit its use by postsecondary institutions unless they can show that resource limitations or recipient size preclude the use of any other model, and require recipients that use the model to provide a full written decision of its determination to facilitate appeals. Another commenter suggested that a single-investigator model should not be allowed unless a respondent makes a voluntary and informed choice to proceed with the model, and some commenters recommended that the model only be allowed if both parties agree to its use. Other commenters stated that the model should not be allowed when conduct violations may result in a marked transcript, suspension, or expulsion.

Requests for clarification. Finally, several commenters asked for clarification. One commenter requested clarification about whether the individual who acts as the decisionmaker on appeal may serve in any other role during the grievance procedures and recommended against it. Another commenter requested clarification that using outside entities to conduct investigations may alleviate concerns of bias or conflicts of interest, and another commenter asked whether a recipient has discretion to employ a panel or board as a single investigator. Some commenters requested that the single-investigator model be more

clearly defined. For example, one commenter asked the Department to clarify whether a recipient has discretion to use a single-investigator model for some but not all cases, or to separate the role of decisionmaker from the individual who determines sanctions. One commenter, a State postsecondary institution, noted it is required to conduct a live hearing in certain cases under State law but would prefer to use a single-investigator model when possible. It requested clarification on whether different procedures could be used for student and employee respondents or if one procedure compliant with proposed § 106.46 is required. Another commenter asked the Department to clarify whether it is still true that the Title IX Coordinator cannot be the decisionmaker.

Discussion: The Department acknowledges commenters' support for proposed § 106.45(b)(2) and agrees with the reasons commenters gave for retaining proposed § 106.45(b)(2). We respond to comments below.

General opposition to the single-investigator model. The Department disagrees with commenters who asserted that proposed § 106.45(b)(2) would force recipients to implement procedures like those under the 2011 Dear Colleague Letter on Sexual Violence, or pressure recipients into adopting a single-investigator model. Similar to the proposed regulations, the final regulations permit, but do not require, a single-investigator model. As explained in the July 2022 NPRM, throughout listening sessions and the June 2021 Title IX Public Hearing, OCR heard about the importance of providing recipients flexibility in how to structure their Title IX grievance procedures to accommodate each institution's unique circumstances. 87 FR 41457–58. OCR also learned that requiring separate staff members to handle investigation and adjudication is burdensome for some recipients in a way that undermines their ability to ensure their education programs or activities are free from sex discrimination under Title IX. 87 FR 41466–67. The Department maintains that permitting, but not requiring, the single-investigator model (which would allow recipients to use a single investigator, a group of investigators, or internal or external investigators), in conjunction with the other measures designed to ensure equitable treatment of the parties as required throughout § 106.45, and if applicable § 106.46, addresses commenters' concerns by offering recipients reasonable options to structure their grievance procedures in compliance with Title IX, while accommodating each institution's administrative structure, educational community, and applicable Federal and State case law and State or local legal requirements.

The Department acknowledges that recipients and other stakeholders may have made changes to their policies or procedures in reliance on the 2020 amendments. But stakeholder feedback from the June 2021 Public Hearing, the 2021 listening sessions, the 2022 meetings held under Executive Order 12866, and responses to the July 2022 NPRM indicated that many recipients found that some of the procedural requirements in the 2020 amendments made compliance more difficult for them, including for example mandatory dismissal requirements and live hearing and cross examination requirements. Therefore, the Department has good reason to believe that many recipients will appreciate the flexibility these final regulations will afford them, including the option to use a single-investigator model, to better fulfill their obligation not to discriminate based on sex in their education programs or activities. *See* 87 FR 41397. The Department notes that recipients would have the discretion under the final regulations to keep in place policies and procedures adopted in reliance on the 2020 amendments that utilize separate investigators and decisionmakers or to change course and adopt a single investigator model as long as they meet their obligations under these final regulations. Recipients are well-suited to assess whether the benefits of using a single investigator model that complies with the final regulations outweighs any costs that recipients will incur as a result of making such a change.

The Department disagrees that § 106.45(b)(2) exceeds the Department's authority or is inconsistent with Title IX or established case law. In adopting §§ 106.45 and 106.46, the Department is acting within the scope of its congressionally delegated authority under 20 U.S.C. 1682, which directs the Department to issue regulations to effectuate the purposes of Title IX. The Supreme Court has recognized the Department's ''authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate,'' including requiring that a recipient adopt and publish grievance procedures for resolving complaints of sex discrimination. *Gebser,* 524 U.S. at 292. The final regulations, which include permissive use of a single-investigator model, govern how a recipient responds to sex discrimination in the recipient's education program or activity, and were promulgated to effectuate the purposes of Title IX and fully implement Title IX's nondiscrimination mandate. Because § 106.45(b)(2) permits but does not require a single-investigator model, recipients can choose a model that allows them to comply with legal requirements in their jurisdiction that may require separation of the investigator and decisionmaker functions.

Impartiality and arbitrariness. The Department disagrees that changes to § 106.45(b)(2) are necessary to protect against bias because the final regulations appropriately balance flexibility for recipients with protections against bias by investigators and decisionmakers. Section 106.45(b)(2) prohibits any person from serving as a Title IX Coordinator, investigator, or decisionmaker if they have a conflict of interest or bias, either for or against complainants or respondents generally or an individual complainant or respondent. Additionally, in circumstances in which an otherwise unbiased Title IX Coordinator, because of a close relationship with a particular party, may not be able to serve as investigator or decisionmaker, a recipient retains the flexibility to utilize an alternative investigator or decisionmaker. The final regulations, like the proposed regulations, contain other obligations to ensure overall fairness and accuracy in grievance procedures. As discussed in detail above in the discussion of bias and conflicts of interest, the final regulations contain numerous provisions directed at ensuring overall fairness and accuracy in grievance procedures.

The Department disagrees that § 106.44(k)(4) renders the single-investigator model arbitrary and capricious. The commenter is correct that under § 106.44(k)(4), the person who facilitates informal resolution cannot be the same person as the investigator or decisionmaker in order to allow the parties to participate fully and candidly in the informal resolution process. As explained in the July 2022 NPRM, the Department views this provision as furthering protections against any improper access, consideration, disclosure, or other use of information obtained solely through the informal resolution process, or conflict of interest, in the event a party terminates informal resolution and the complaint proceeds to grievance procedures under § 106.45, and if applicable § 106.46. 87 FR 41455. The Department's support for § 106.44(k)(4) is not inconsistent with allowing a single-investigator model under § 106.45(b)(2). The grievance procedures

at § 106.45, regardless of whether the investigator and decisionmaker are the same person, include numerous procedural protections.

For instance, the grievance procedures require an objective evaluation of all relevant and not otherwise impermissible evidence, consistent with the definition of ''relevant'' in § 106.2 and with § 106.45(b)(7)—including both inculpatory and exculpatory evidence. *See* § 106.45(b)(6). In an investigation, under § 106.45(f)(3), the recipient must review all evidence gathered through the investigation and determine what evidence is relevant and what evidence is impermissible regardless of relevance, consistent with § 106.2 and with § 106.45(b)(7). In the decisionmaking process, under § 106.45(h)(1), the decisionmaker must evaluate relevant and not otherwise impermissible evidence for its persuasiveness, and if the decisionmaker is not persuaded under the applicable standard of proof by the evidence that sex discrimination occurred, whatever the quantity of the evidence is, the decisionmaker must not determine that sex discrimination occurred. Thus, permitting the investigator and decisionmaker to be the same person will not result in improper access, consideration, or disclosure of information, nor will it create a conflict of interest, because the investigator and decisionmaker have the same responsibility—to evaluate all relevant evidence. The Department confirms, however, that a recipient's grievance procedure must still require that any person designated as an investigator or decisionmaker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. *See* § 106.45(b)(2). Therefore, if an investigator developed a conflict of interest or bias during an investigation, then the recipient must designate someone else to serve as the investigator and decisionmaker.

Similarly, the Department does not agree that the Title IX Coordinator must be categorically prohibited from serving as an investigator or decisionmaker because an evaluation of all relevant and not otherwise impermissible evidence is also not inherently inconsistent with the Title IX Coordinator's responsibility to coordinate the recipient's compliance with its obligations under Title IX and the final regulations. *See* § 106.44(f). However, a recipient must ensure that the Title IX Coordinator can serve in these roles without conflict of interest or bias.

The Department also disagrees that § 106.45(b)(2) gives too much power to the Title IX Coordinator. The Title IX Coordinator must treat the complainant and respondent equitably and must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. If the Title IX Coordinator cannot serve as an investigator or decisionmaker without conflict of interest or bias, then the Title IX Coordinator must not serve in that role.

Due Process. The Department also disagrees that the single-investigator model, if adopted by a recipient, would make it more difficult to raise concerns with a recipient's grievance procedures and investigation if the Title IX Coordinator, investigator, and decisionmaker are the same person. The final regulations contain a number of safeguards to ensure that any party is able to raise concerns related to Title IX and have such concerns fully and fairly heard. As stated above, the Title IX Coordinator must treat the complainant and respondent equitably, *see* §§ 106.45(b)(1) and 106.44(f)(1)(i), and must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent, *see* § 106.45(b)(2). If a party raises concerns regarding a recipient's grievance procedures, and the Title IX Coordinator cannot serve as an investigator or decisionmaker without conflict of interest or bias, then the Title IX Coordinator must not serve in that role. With respect to the commenter's concern that § 106.45(d)(1)(iv) would allow a recipient to clarify allegations in a manner that ''validates'' their initial determination to investigate, the Department notes that the decision to dismiss a complaint is appealable if a party believes that the decision to investigate was biased or that a conflict of interest impacted the recipient's efforts to clarify the initial allegations, and the recipient must ensure that the decisionmaker for the appeal did not take part in an investigation of the allegations or dismissal of the complaint. *See* § 106.45(d)(3)(iii).

The Department disagrees that the single-investigator model, if adopted by a recipient, inhibits the ability to test credibility. The final regulations require an objective evaluation of all relevant and not otherwise impermissible evidence, consistent with the definition of ''relevant'' in § 106.2 and with § 106.45(b)(7)—including both inculpatory and exculpatory evidence—and prohibit basing credibility determinations on a person's status as a complainant, respondent, or witness. § 106.45(b)(6). A recipient must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility, to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination. For additional discussion of the evaluation of allegations and assessment of credibility, see the discussion of § 106.45(g).

In addition, the Department disagrees that due process principles require the investigator and decisionmaker to be different individuals. As the Department has explained elsewhere, due process ''varies according to specific factual contexts.'' *Hannah* v. *Larche,* 363 U.S. at 442; *see also* discussion of Due Process Generally (Section II.C). Here, the safeguards detailed above—including the requirement that investigators and decisionmakers not have conflicts of interest or bias for or against complainants or respondents individually or generally, *see* § 106.45(b)(2), ensure that the process is consistent with due process. *See generally Mathews,* 424 U.S. at 335 (describing the factors weighed in determining whether the requirements of due process have been met).

Resources and timeliness. The Department continues to believe, as stated in the July 2022 NPRM, *see* 87 FR 41467, that permitting the single-investigator model will relieve administrative burden for some recipients, especially smaller institutions, without sacrificing the quality and reliability of investigations or decisionmaking. Although such recipients could engage outside investigators or adjudicators to separate the roles, permitting a single-investigator model is consistent with a fair grievance procedure and provides flexibility to recipients consistent with their compliance responsibilities under Title IX and these regulations. The Department acknowledges that under a single-investigator model, a recipient may choose not to have a faculty member in an investigatory or decisionmaking role in complaints involving academic matters, but the Department has determined that giving recipients discretion to determine who should conduct investigations and engage in decisionmaking is consistent with Title IX. As long as a recipient's grievance procedure comports with the requirements of § 106.45, and if applicable § 106.46, recipients have the discretion to use the model that works best for their educational community.

The Department disagrees that the single-investigator model will necessarily cause delays in the grievance process compared to other options, and notes that commenters had varying views of which model—a single-investigator model or hearing model—would cause more delay. The Department maintains that the flexibility that availability of the single-investigator model will provide to recipients is important, that permitting recipients to adopt a single-investigator model will not necessarily introduce more delay compared to the hearing model, and that any concerns about delay associated with that model are addressed by other provisions in the final regulations, including §§ 106.45(b)(4) and 106.46(e)(5), that protect against such delay. Regardless of whether a recipient uses the single-investigator model, or has separate investigators and adjudicators, recipients must establish prompt and reasonable timeframes for their grievance procedures, *see* § 106.45(b)(4), and have a broader duty to address complaints of sex discrimination in a ''prompt'' manner, *id.* § 106.45(a)(1).

In response to commenters who suggested that § 106.45(b)(2) and the single-investigator model will lead to an increase in private lawsuits against recipients and OCR complaints, the Department believes this to be speculative. Commenters who suggest that the single-investigator model will increase lawsuits and complaints assume there will be conflicts of interest and bias, undue delays, or other procedural irregularities, but the final regulations address these concerns, as discussed above. The Department agrees with commenters that considerations of financial savings and administrative capacity should not supersede considerations of fairness and due process, and—as evidenced by the comments the Department received in response to the July 2022 NPRM—the Department firmly maintains that the single-investigator model will sacrifice neither.

Suggested modifications. For the reasons explained in the prior sections discussing impartiality, bias, and due process, the Department maintains that further changes are not needed to ensure impartiality if a recipient decides to use a single-investigator model.

The Department declines commenters' suggestions to change the final regulations to make the single-investigator model available on a limited basis or to require the complainant and respondent to consent in writing before a postsecondary institution may utilize a single-investigator model because recipients are in the best position to determine whether the single-investigator model is appropriate and consistent with their compliance obligations related to grievance procedures under Title IX. The Department maintains that, by setting forth the specific requirements for prompt and equitable grievance procedures, while allowing some discretion for recipients within that framework to account for size, type, resources, administrative structure, expertise, and other unique factors at individual institutions, the final regulations set forth a highly effective compliance framework. Nothing in the final regulations precludes a postsecondary institution from deciding that it will only use a single-investigator model when both parties consent in writing.

The Department notes, however, that we have added § 106.45(b)(8) to the final regulations to ensure that a recipient's educational community is aware in advance of when a recipient will utilize a single-investigator model. We have done so partly in response to comments asking whether a recipient has discretion to use a single-investigator model in some but not all cases. *See also* discussion of § 106.45(b)(8). When a recipient chooses to adopt grievance procedures that apply to the resolution of some, but not all, complaints, § 106.45(b)(8) requires a recipient's grievance procedures to articulate consistent principles for how the recipient will determine which procedures apply. Under this provision, for example, a postsecondary institution that chooses to utilize a live hearing only for some types of sex-based harassment complaints and a single-investigator model for others would be required to explain in its grievance procedures the circumstances under which, or the types of complaints to which, either model would apply. A recipient's determination regarding whether to apply certain procedures to some, but not all, complaints must be made in a manner that treats complainants and respondents equitably, consistent with § 106.45(b)(1).

Requests for Clarification. The Department appreciates the opportunity to clarify that § 106.45 of the final regulations requires an appeal process that, at minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints. *See* § 106.45(i). The Department declines to require recipients to provide for a live hearing during the appeals process, but notes that nothing in the final regulations precludes a recipient from providing such a hearing in its discretion or when required by applicable case law or other sources of law. As explained in the prior section responding to requests for modifications, recipients have discretion to use a single-investigator model in some but not all cases, as long as the recipient articulates consistent principles for how it will determine which procedures will apply under § 106.45(b)(8). The Department also clarifies that a recipient has discretion to use outside entities to conduct investigations; to employ a panel or board of individuals to function as the decisionmaker; to employ more than one investigator for a complaint; and to separate the roles of decisionmaker, investigator, and sanctioning officer. As long as a recipient's grievance procedures comport with the requirements of § 106.45, and if applicable § 106.46, recipients have the discretion to use the model that works best for their educational community.

Changes: The Department has added a new § 106.45(b)(8), requiring a recipient to articulate consistent principles for how it will determine whether certain grievance procedures apply to some, but not all, complaints, if a recipient adopts grievance procedures that apply to the resolution of some, but not all, complaints.

5. Section 106.45(b)(3) Presumption That the Respondent Is Not Responsible for the Alleged Sex Discrimination Until a Determination Is Made at the Conclusion of the Grievance Procedures

Comments: The Department received a range of views from commenters regarding the presumption of non-responsibility in proposed § 106.45(b)(3).

Several commenters supported proposed § 106.45(b)(3). For example, one commenter considered the presumption of non-responsibility essential for securing a just result, and remarked that a Title IX hearing can lead to social and psychological injury, lost educational opportunity, and termination or denial of tenure for employees. Another commenter argued that respondents should not have the burden to ''prove a negative,'' and asserted that the presumption is essential to unbiased, neutral proceedings.

Some commenters referred to court decisions that, commenters stated, ruled for respondents in cases in which recipients had improperly deemed the respondent responsible for alleged sex discrimination before following its procedures and offering the respondent an opportunity to be heard. Other

commenters viewed the proposed regulations as eliminating the presumption. Some commenters stated the Department claims to be preserving the presumption of non-responsibility from the 2020 amendments, but alleged that the presumption would be rendered meaningless by allowing a recipient to institute temporary supportive measures that may burden a respondent and restrict a respondent's access to the education program or activity prior to a determination that sex discrimination occurred. Some commenters viewed the proposed regulations as reverting to the standards from OCR's 2011 Dear Colleague Letter on Sexual Violence, which they characterized as demanding a presumption of guilty until proven innocent. Some commenters stated that the presumption of innocence in criminal proceedings has existed for hundreds of years and is important to due process.

Some commenters offered differing views on how to support or confine the presumption. Some commenters suggested that the presumption of non-responsibility be retained and strengthened, such as by stating that a person's silence shall not be held against them. Some commenters suggested the Department go beyond the existing presumption and require a recipient to explicitly state that the respondent is ''presumed innocent until proven guilty.'' These commenters referred to due process, compared student codes of conduct to the criminal system, and asserted that the lack of a presumption of innocence made the proposed regulations unconstitutional. Another commenter recommended that the final regulations make clear that the presumption is not inconsistent with a recipient's responsibility, such as under § 106.44, to take action to reduce the risk of future harm in its education program or activity when there is a reasonable likelihood of such harm and the remedy does not unreasonably or disproportionately aggrieve either party.

In contrast, other commenters recommended the removal of the presumption of non-responsibility and opposed its extension to all forms of sex discrimination in proposed § 106.45(b)(3). In general, these commenters argued that mandating a presumption of non-responsibility makes it less likely that recipients will effectively create and maintain school environments free from sex discrimination and ensure that all persons have equal access to educational opportunities in accordance with Title IX's nondiscrimination mandate. In particular, commenters raised concerns that the presumption of non-responsibility required by the 2020 amendments causes confusion for recipients and interferes with the effective implementation of a recipient's grievance procedures. These and other commenters asserted that a formal presumption of non-responsibility is superfluous given that the proposed regulations would require a recipient to conduct impartial, unbiased investigations.

Some commenters asserted that the presumption of non-responsibility should be eliminated because it could be confused with the presumption of innocence in the criminal law context. They argued that the presumption in the regulations might give the impression that the ''beyond a reasonable doubt'' standard applies in Title IX proceedings, when in fact it is prohibited under the regulations. Some commenters stated that criminal procedure has no place in the educational system. Other commenters believed that presuming non-responsibility inappropriately tilts the scales in favor of the respondent. Some commenters argued that a presumption in favor of the respondent can be misconstrued as a presumption that the complainant is lying or imply that a recipient should discount the credibility of survivors. Similarly, some commenters noted that a presumption of non-responsibility is not required in any other type of school proceeding, perpetuates stereotypes that those who report sex-based harassment and sexual violence are not trustworthy, and is confusing for recipients and difficult to administer.

Some commenters asserted that the presumption of non-responsibility has a chilling effect on reporting, adding to the problem that sexual violence tends to be underreported. Other commenters asserted that the presumption would be an obstacle to informal or alternative resolution processes, one example being the restorative justice process, a key part of which involves respondents who caused harm taking responsibility for their actions. Some commenters stated that the presumption of non-responsibility may discourage respondents who wish to be accountable from participating in such a process, while also sending a message to complainants that their allegations are presumed insufficient, which deters aggrieved students from exploring options including alternative or informal resolution.

In addition, some commenters asserted that removing the presumption of non-responsibility would improve consistency with other regulatory requirements the Department has adopted. For example, some commenters asserted that the presumption would conflict with proposed § 106.8(d)(2)(iii), which would require that recipients train Title IX Coordinators and investigators on how to avoid prejudgment of the facts at issue, as well as the requirement in proposed § 106.45(b)(6) that credibility determinations not be based on a person's status as a complainant, respondent, or witness. These commenters argued that, to presume non-responsibility at the outset of the grievance procedures, a recipient would have to assume that the respondent is credible and the complainant is not. Additionally, some commenters stated that a presumption of non-responsibility conflicts with the proposed requirements in § 106.45(a)(1) and (b)(1) that a recipient treat the parties equitably and provide equitable resolution of complaints, because a presumption in favor of any one party is not equitable.

Commenters suggested a variety of amendments to the regulations, such as requiring the grievance procedures to state, more neutrally, that a determination about responsibility will not be made until the end of a fair and equitable investigation or to state both that a determination about responsibility will not be made until the end of an investigation and from the outset neither party is presumed to be telling the truth or lying. Some commenters suggested retaining the presumption of non-responsibility and adding a presumption that the complainant made their allegations in good faith; some commenters reported that their institution's policy includes such a statement.

Discussion: The Department appreciates the variety of views shared by commenters and has carefully considered the support for and objections to the presumption of non-responsibility. The Department understands that some commenters view the presumption as critical to ensuring a fair process for the respondent. The Department also understands the importance of ensuring, at the beginning and throughout the proceedings, that the decisionmaker is not biased in favor of or against any party. The Department agrees with commenters that giving complete effect to Title IX requires ensuring equitable treatment for all parties in, and throughout, Title IX proceedings.

After careful consideration of the comments, the Department has decided to maintain in the final regulations the presumption that the respondent is not responsible for the alleged sex

discrimination until a determination is made at the conclusion of the grievance procedures. The regulations are meant to support a neutral, bias-free grievance process in which the burden of proof is on the recipient and responsibility determinations are only made after the conclusion of the recipient's grievance procedures. The presumption of non-responsibility is one component of that process.

The Department is concerned that commenters may have misunderstood the presumption of non-responsibility to require credibility determinations based on a person's status as a complainant, respondent, or witness. That was not the Department's intention in the 2020 amendments, nor is it the Department's intention now. To be clear, the Department emphasizes that the retention of the presumption of non-responsibility is not a presumption that the complainant is lying or that the allegations are not made in good faith. Likewise, given the Title IX requirement that parties be treated equitably, the presumption cannot reasonably be understood as a signal that a complainant's allegations will be presumed non-credible or are inherently suspect. The Department does not intend to send any such signal, and such an approach would be inequitable and inconsistent with Title IX.

Instead, as the Department noted in the 2020 amendments, the presumption is meant to reinforce that the burden of proof is on the recipient, not on either party, and to reinforce careful application of the standard of evidence selected by the recipient. 85 FR 30263. Because the burden of proof is on the recipient only, and not the complainant or respondent, the presumption that the respondent is not responsible until the relevant and not otherwise impermissible evidence has been considered and a determination has been made does not disadvantage the complainant. Rather, under a recipient's Title IX grievance procedures, each party may present their own view of the relevant and not otherwise impermissible evidence, but the burden of gathering evidence and the burden of proof is on the recipient.

The final regulations include many provisions that aim to ensure that Title IX proceedings operate free from bias, that investigators and decisionmakers equitably collect and review evidence, and that decisionmakers draw conclusions following investigations that comport with these regulations. For example, final § 106.45(b)(2) requires that any person designated as a Title IX Coordinator, investigator, or decisionmaker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent; the same is required of any person designated by a recipient to facilitate an informal resolution process in final § 106.44(k)(4). In addition, final § 106.8(d)(2)(iii) and (d)(3) require that Title IX Coordinators and their designees, as well as any employees involved in the implementation of the recipient's grievance procedures, informal resolution process, or the provision of supportive measures, receive training on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. These measures to ensure fairness, together with the presumption of non-responsibility, will increase the confidence of the parties and public in the outcome of Title IX proceedings, which should help to improve compliance with these regulations.

That confidence, in turn, will counteract any chilling effect that the presumption of non-responsibility might otherwise have, as will other provisions that support complainants and encourage them to report sex discrimination. For example, under the revised definition of ''complaint'' in § 106.2, complaints may be oral or written. Even in the absence of a complaint, under § 106.44 a recipient that has knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively, including by offering and coordinating supportive measures as appropriate, offering the option of an informal resolution process if available and appropriate, and by taking other steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity. The presumption of non-responsibility must not be used by recipients to discourage complainants from reporting misconduct, accessing supportive measures, or exploring resolution options, including alternative or informal resolution. The Department disagrees that these final regulations perpetuate stereotypes about the trustworthiness of those who report sex-based harassment and as discussed above, the final regulations include many provisions that support bias-free grievance procedures. In response to the assertion that the presumption of non-responsibility is not required in any other type of school proceeding, the Department notes that its authority to issue these regulations is derived from Title IX and that grievance procedures that are not related to sex discrimination are beyond the scope of this rulemaking. As explained in the 2020 amendments, the APA does not require the Department to adopt identical or even similar rules to address discrimination based on sex, race, or any other basis. *See* 85 FR 30528–29.

The Department declines to implement commenters' suggestion to add to the presumption that a respondent's silence must not be held against them. The presumption that the respondent is not responsible until a determination is made at the conclusion of the grievance procedures prevents the decisionmaker from inferring responsibility for the alleged sex discrimination, including based on a respondent's silence, before the conclusion of the grievance procedures. In addition, § 106.46(f)(4) separately states that, in sex-based harassment proceedings at postsecondary institutions involving a student complainant or student respondent, a decisionmaker must not draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond to questions deemed relevant and not impermissible. And the Department declines to require recipients to import criminal law concepts, such as the Fifth Amendment right against self-incrimination, into school disciplinary proceedings.

For the same reason, the Department disagrees with commenters who asserted that there must be a specific presumption that the respondent is ''innocent until proven guilty'' in order for a respondent to be afforded due process. That phrasing applies in the criminal system, in which innocence and guilt for purposes of imposing criminal penalties are at issue and is not used in civil or administrative proceedings. The second sentence of final § 106.45(h)(1) regarding the standard of proof makes the point that if responsibility is not established by the evidence in accordance with the applicable standard of proof, the recipient must find that the respondent is not responsible. This is consistent with the allocation of the burden of proof in civil and administrative proceedings and further reminds recipients that the burden of proof is on the recipient and that a respondent may only be found responsible after a full and fair process. For more explanation of the recipient's burden of proof, see the discussions of § 106.45(f)(1) and (h)(1).

In addition, the Department does not agree that requiring a presumption of non-responsibility will be confused

with allowing the application of a ''beyond a reasonable doubt'' standard of proof. As the Department explained in the July 2022 NPRM and explains further in the discussion of § 106.45(h)(1), the ''beyond a reasonable doubt'' standard of proof is limited to the criminal context and is never appropriate in a recipient's Title IX proceedings. 87 FR 41486.

The Department does not agree with commenters that a presumption of non-responsibility will deter respondents who are otherwise motivated to participate in informal or alternative resolution processes from doing so. Commenters explained, for example, that in the restorative justice process respondents who caused harm are typically required to take responsibility for their actions, which can lead to more appropriate interventions and better ensure that the needs of parties are met. Respondents who wish to take responsibility for their actions and recognize the benefits of informal resolution are not likely to be deterred from participating in such a process just because the recipient's grievance procedures include a presumption that the respondent is not responsible until a determination is made at the conclusion of the grievance procedures.

The Department's changes to final § 106.44(g) render moot some commenters' argument that the presumption of non-responsibility is undermined by allowing a recipient to institute temporary supportive measures that may burden a respondent. The Department has removed the reference to temporary measures that burden a respondent from the definition of ''supportive measures'' to avoid any suggestion that respondents and complainants are subject to different treatment in the implementation of supportive measures. Final § 106.44(g)(2) clarifies that recipients are permitted to provide supportive measures to a complainant or a respondent as long as such supportive measures are not unreasonably burdensome, are not provided for punitive or disciplinary reasons, and are designed to protect the safety of the parties or the recipient's educational environment or to provide support during the recipient's grievance procedures under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(k). Additionally, under § 106.44(g)(4), the recipient must provide the parties a timely opportunity to challenge the provision of supportive measures. The neutrality and lack of bias required by the final regulations, and the presumption that the respondent is not responsible for the alleged sex discrimination, are not rendered meaningless by provisions allowing a recipient to take non-punitive and reasonable steps necessary to protect the safety of the parties or the recipient's educational environment. For more information regarding the limitations on recipients and their ability to take actions to prevent the risk of future harm in their education programs or activities, see the discussions of §§ 106.44(g), (h), and (i).

The Department also notes, as it did in the July 2022 NPRM, that § 106.45(b)(3) would not apply to a sex discrimination complaint that does not allege that a person violated the recipient's prohibition on sex discrimination, but instead alleges the recipient violated Title IX. *See* 87 FR 41468. Consistent with final § 106.45(a)(1), ''[w]hen a sex discrimination complaint alleges that a recipient's policy or practice discriminates on the basis of sex, the recipient is not considered a respondent.'' Accordingly, the Department recognizes that some provisions in § 106.45, like § 106.45(b)(3), will not apply. *See* discussion of § 106.45(a)(1). In those instances, the Department will still not presume that a recipient accused of sex discrimination through its policy or practice operated its education program or activity in a discriminatory manner until a determination is made at the conclusion of the recipient's grievance procedures under § 106.45.

The Department made minor clarifying edits to this provision, replacing the word ''conduct'' with ''sex discrimination'' for precision. Additionally, the Department removed the phrase ''whether sex discrimination occurred'' from the regulatory text because it is clear from the context and reduces repetitiveness of the sentence.

Changes: The Department changed the word ''conduct'' to ''sex discrimination'' for accuracy and removed the phrase ''whether sex discrimination occurred'' to streamline the provision.

6. Sections 106.45(b)(4) and 106.46(e)(5) Timeframes

Comments: Some commenters supported proposed § 106.45(b)(4) because it would require a recipient to establish grievance procedures that are prompt and equitable and would allow a recipient to respond quickly to Title IX complaints to restore access to a safe educational and work environment, facilitate faster and less traumatic grievance procedures, avoid undue delay, reduce administrative burden, ensure fairness, and keep individuals accountable for discriminatory conduct. Further, some commenters supported the removal of strict timeframes under the 2020 amendments and providing recipients greater flexibility. Commenters observed that this flexibility would allow a recipient to delay grievance procedures due to concurrent law enforcement activities, assess good cause on a case-by-case basis, and would benefit elementary school and secondary school recipients.

Other commenters opposed the timeframes in the proposed regulations. One commenter stated that, even with the requirement for prompt timeframes, the proposed regulations have too many steps that would take at least 60 days to follow. One commenter opposed changes to the language on timeframes at § 106.45(b)(1)(v) in the 2020 amendments because, the commenter stated, this provision was upheld in *Victim Rights Law Center,* 552 F. Supp. 3d 104, and it accounts for the neurobiology of trauma.

Other commenters opposed the proposed regulations' removal of specific timeframes because they thought the lack of specific maximum timeframes for completing grievance procedures would or might lead to, for example, excessive delay; lack of transparency or accountability; chilled reporting or participation; and feelings of betrayal or anxiety. Some commenters offered examples of individuals who reported that they had experienced lengthy grievance procedures that impacted their educational experience. One commenter argued that the Department failed to offer data in its previous rulemaking to support its assertion in the 2020 amendments that the prior 60-day guideline sacrificed accuracy for speed.

Some commenters requested clear timeframes and benchmarks within the grievance procedures. Several commenters requested the reinstatement of the 60-day guideline provided in the 2011 Dear Colleague Letter on Sexual Violence. These commenters raised concerns that recipients would deliberately delay proceedings, and requested that the final regulations state that deliberate delays by a recipient in responding to complaints of sex-based harassment could constitute a form of institutional retaliation. One commenter suggested the Department issue guidance encouraging recipients to finish their investigations and make a determination within 60 calendar days. Another commenter suggested that the Department define ''reasonably prompt'' timeframes as approximately 60 calendar days but permit a recipient to

extend the investigation period in certain situations. Other commenters suggested that the final regulations establish specific timeframes for certain stages of the process or require recipients to set timeframes for stages and keep the parties updated.

In contrast, some commenters requested that the Department define ''prompt,'' but did not specify a recommended timeframe. One commenter suggested that the final regulations state that a reasonably prompt timeframe is less than one full academic year and ideally one semester. Some commenters requested clarity as to whether the regulations require recipients to include timeframes for each major stage or for the overall process. One commenter requested that the final regulations give clearer guidance on the length of the grievance procedures and under what conditions an extension should be granted. Several commenters suggested modifications to the examples of the major stages of a grievance procedure in proposed § 106.45(b)(4).

Other commenters requested that the Department define ''good cause'' and retain the examples of good cause from the 2020 amendments, state that good cause exists only in specific cases, or clarify what constitutes a reasonable delay. One commenter requested the Department issue separate guidance on what constitutes ''good cause.'' One commenter requested that the Department clarify that recipients should use good cause rather than a rigid application of timeframe procedures to achieve reasonable fairness. In addition, some commenters requested that proposed § 106.45(b)(4) be modified to require ''written'' notice to the parties that includes the reason for the delay on the premise that this requirement would facilitate Clery Act compliance. And some commenters asked the Department to require that advisors' schedules be considered in determining timeframes and scheduling. One commenter requested the Department remove the requirement to set a timeframe for the evaluation stage, asserting that pressuring complainants on evaluation deadlines would lead to a stressful process for complainants and could produce a chilling effect.

In addition, other commenters recommended various modifications to proposed § 106.45(b)(4) and § 106.46(e)(5) related to law enforcement proceedings. One commenter suggested that if law enforcement proceedings occur concurrent with Title IX grievance procedures, recipients should not be allowed to draw adverse inferences from a respondent's silence during grievance procedures.

Finally, other commenters proposed a statute of limitations for filing a complaint—for example, a one-year statute of limitations that could be tolled if the parties elect to proceed with an informal resolution process. Some commenters argued that a limitations period would ensure fairness and due process, especially when the respondent is no longer participating as a student in the recipient's education program or activity.

Discussion: The Department acknowledges commenters' support for §§ 106.45(b)(4) and 106.46(e)(5) and notes that the final regulations will continue to require that a recipient establish grievance procedures that are prompt and equitable. The Department shares the goals of ensuring that recipients promptly respond to complaints of sex discrimination and restore access to a safe educational and work environment, that the timing of grievance procedures be fair and transparent, and that students feel safe in their school environments. The Department also acknowledges commenters' support for the flexibility provided in § 106.45(b)(4) and agrees that allowing recipients the ability to set reasonably prompt timeframes, as well as allowing reasonable extensions of such timeframes for good cause, will allow recipients to better meet the needs of their educational communities.

The Department disagrees that the requirement for prompt timeframes will result in grievance procedures that are too lengthy. The Department maintains that the grievance procedures in the final regulations appropriately balance the need for the prompt resolution of complaints; thorough and accurate investigations; and a fair process for all parties. The Department also notes that, to the extent that some commenters preferred the language in the current regulations because it has been upheld by a Federal court, these final regulations do not significantly change the requirements for timeframes set forth in the 2020 amendments. As the Department stated in the July 2022 NPRM, the Department continues to adhere to the rationale of § 106.45(b)(1)(v) in the 2020 amendments and has adopted only minor revisions to simplify the regulatory language and better align it with other sections of the final regulations. *See* 87 FR 41468.

The Department disagrees with commenters' suggestions that these regulations allow a recipient to conduct grievance procedures without specific timeframes, allow for indefinite delays by a recipient, and provide no guarantee of transparency or accountability. Section 106.45(b)(4) requires a recipient to establish reasonably prompt timeframes for the major stages of the grievance procedures, including, for example, evaluation, investigation, determination, and appeal. Any extensions of these established timeframes must be reasonable and for good cause, and the recipient must notify the parties of the reason for the extension. Section 106.46(e)(5) likewise requires recipients to provide ''reasonable extension[s] of timeframes on a case-by-case basis for good cause with written notice to the parties that includes the reason for the delay.'' The requirements of §§ 106.45(b)(4) and 106.46(e)(5) thus allow for neither indefinite grievance procedures nor for a recipient to hide the nature of its required timeframes or reasons for an extension.

The Department agrees with commenters' assertions that timeframes are important for setting parties' expectations about the grievance procedures and facilitating participation, but maintains that recipients should have the flexibility to establish specific reasonably prompt timeframes for the major stages of their grievance procedures. The Department also agrees with commenters that excessive or lengthy delays in grievance procedures can have a negative impact on parties and their educational experience. To address this concern, the Department's regulations require a recipient to set, and abide by, reasonably prompt timeframes and only allow for reasonable extensions for good cause. The Department maintains that conclusion of the grievance procedures must be reasonably prompt because parties should not have to wait longer than necessary to know the resolution of a sex discrimination complaint, and prompt resolution of such complaints is necessary to further Title IX's nondiscrimination mandate. The Department notes that supportive measures designed to protect safety are available during the pendency of the grievance procedures, and, under § 106.44(h), recipients may remove a respondent on an emergency basis, when appropriate, without awaiting the conclusion of a grievance procedure.

The Department acknowledges that withdrawn Department guidance referred to a 60-day timeframe for sexual harassment complaints. Each recipient is in the best position to balance promptness with equity, including fairness and accuracy, based on the recipient's unique environment and experience, and the Department

therefore declines to set a specific minimum or maximum timeframe for recipients or to require that recipients use business or calendar days. Recipients that determine 60 days represents a reasonable timeframe to conclude grievance procedures have discretion to include that timeframe in their Title IX grievance procedures under the final regulations, while other recipients may determine they can conclude a grievance procedure in a shorter or longer period of time. With respect to the commenter's assertion that the Department did not provide data in its previous rulemaking to show that the 60-day timeframe compromised accuracy and fairness, the Department refers to the preamble to the 2020 amendments which addresses this concern and identifies comments made on behalf of complainants and respondents about grievance procedures often taking too long, and comments made on behalf of recipients expressing concern that fair grievance procedures could take more than 60 days in many cases. *See* 85 FR 30270.

The Department declines to adopt a statute of limitations for the filing of a sex discrimination complaint. Applying a statute of limitations would be unfair to complainants because, as many commenters have noted, for a variety of reasons complainants sometimes wait before pursuing a grievance procedure in the aftermath of sex discrimination. The final regulations safeguard the fundamental fairness and reliability of Title IX grievance procedures without the need to impose a statute of limitations. Additionally, as the Department discussed in the 2020 amendments, Title IX obligates recipients to operate education programs and activities free from sex discrimination; imposing a time limit on a complainant's decision to file a complaint would not support Title IX's nondiscrimination mandate. 85 FR 30127.

The Department appreciates commenters' suggestions for modifications to the examples of the major stages of a grievance procedure identified in § 106.45(b)(4), but declines to make such modifications. Beyond the stages identified by the Department—evaluation, investigation, determination, and appeal—recipients have the flexibility to identify additional stages for which they would like to provide timeframes for resolution if they believe this would help parties understand the approximate length of each stage of the grievance procedures. While the Department appreciates commenters' concern about setting a timeframe for the evaluation process, the Department maintains that the recipient's initial evaluation of whether to dismiss or investigate a complaint of sex discrimination constitutes a major stage of a recipient's grievance procedure, and that for promptness and transparency the parties should be aware of the timeframe governing when such an evaluation will be completed. To further clarify the examples of major stages it has provided in § 106.45(b)(4), the Department has slightly modified the description of the evaluation stage, from ''the recipient's determination of whether to dismiss or investigate a complaint of sex discrimination'' to ''the recipient's *decision* whether to dismiss or investigate a complaint of sex discrimination,'' to avoid multiple uses of the term ''determination'' and prevent confusion.

The Department acknowledges commenters' requests that the regulations require a delay of Title IX grievance procedures for concurrent law enforcement proceedings or, alternatively, prohibit more than a temporary delay due to a concurrent law enforcement proceeding. The Department acknowledges that the criminal justice system and Title IX grievance procedures serve distinct purposes but may sometimes overlap with respect to allegations of conduct that constitutes sex discrimination under Title IX and criminal offenses under State or other laws. The Department declines to require a recipient to delay its grievance procedures when there is an ongoing concurrent law enforcement proceeding and likewise declines to specifically prohibit a recipient from delaying a grievance proceeding due to a concurrent law enforcement proceeding. A variety of situations may necessitate the reasonable extension of timeframes on a case-by-case basis for good cause, including the possibility of a concurrent law enforcement proceeding. On the other hand, a concurrent law enforcement proceeding will not always constitute good cause for a delay, and the Department encourages recipients whenever possible to apply their grievance procedures in a manner that avoids the need for an extension.

The Department notes that, to the extent a reasonable extension of timeframes is implemented for good cause, a recipient must not delay the provision of supportive measures because of a concurrent law enforcement proceeding; a recipient must continue to offer and provide supportive measures, as appropriate, to restore or preserve a party's access to the recipient's education program or activity, or to provide support during the recipient's grievance procedures or during the informal resolution process. *See* §§ 106.44(f)(1)(ii), (g). A recipient is likewise required to operate its education program or activity free from discrimination at all times and may therefore need to take action as permitted by these final regulations during the pendency of law enforcement proceedings to ensure students' access to education is not limited or denied based on sex. Concerning the commenter's request regarding adverse inferences based on a respondent's silence when a request for extension due to concurrent law enforcement proceedings is denied, the Department notes that § 106.46(f)(4) prohibits a decisionmaker from drawing an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond to questions deemed relevant and not impermissible. For further discussion of this provision and its impact, see the discussion of § 106.46(f)(4). The Department appreciates commenters' request that the Department explicitly identify deliberate delays in grievance procedures as a form of institutional retaliation. While the Department acknowledges that an intentional delay could constitute retaliation if it meets the standard in the definition of ''retaliation'' in § 106.2, including that the delay was imposed for a retaliatory motive, the Department declines to specifically identify additional types of retaliation in § 106.71 for the reasons discussed in that section.

While the Department appreciates that commenters would like the Department to define terms such as ''prompt,'' ''good cause,'' and ''reasonable'' delays, the Department declines to do so because the meaning of these terms depends on specific contexts. The Department declines to assign a particular timeframe to the terms because recipients should retain flexibility to designate appropriate timeframes, and what is ''prompt'' or ''reasonable'' is a decision that must be made in the context of a recipient's obligation to provide an education program or activity free from sex discrimination. As discussed in the July 2022 NPRM, the Department maintains that good cause for an extension of a timeframe may include, for example, reasonable extensions of time to accommodate the absence of a party, a party's advisor, or a witness; however, the Department intends to grant flexibility, based on recipients' experience and familiarity with their cases, to determine whether particular circumstances constitute good cause

that could justify extending a timeframe. 87 FR 41468. When evaluating extensions for good cause, the Department reiterates that recipient considerations include whether there may be ways to address such circumstances that avoid the need for an extension, such as allowing a witness to participate via videoconference or requiring a party to choose an advisor who has sufficient availability under the recipient's existing timeframes. The Department notes that recipients should be able to provide reasonable modifications for those with disabilities and language assistance for those with limited proficiency in English within the established timeframes and without need for extension. Anyone who believes that a recipient has failed to comply with reasonably prompt timeframes set forth in its grievance procedures may file a complaint with OCR.

As the Department explained in the July 2022 NPRM, the Department has removed specific examples of good cause because the Department is concerned that their inclusion may have inadvertently suggested to recipients that extensions were mandatory in each of those situations, which may have slowed down overall investigation and resolution of complaints. 87 FR 41468. The Department maintains that good cause may include considerations such as the absence of a party but declines to include specific examples of good cause in order to clarify that good cause should be considered on a case-by-case basis. 87 FR 41468. The Department appreciates commenters' concerns about aligning § 106.45(b)(4) with the Clery Act by requiring written notice of the reason for any delay. The Department declines to require written notice in § 106.45(b)(4) because this provision also applies to recipients that are not subject to the Clery Act, including elementary schools and secondary schools, but notes that § 106.46(e)(5), which applies to postsecondary institutions subject to the Clery Act, requires written notice of a reasonable extension of timeframes for good cause.

Changes: The Department has revised ''the recipient's determination of whether to dismiss or investigate a complaint of sex discrimination'' in § 106.45(b)(4) to ''the recipient's decision whether to dismiss or investigate a complaint of sex discrimination.''

7. Section 106.45(b)(5) Reasonable Limitations on Sharing of Information

Privacy Protections Generally

Comments: Commenters expressed support for proposed § 106.45(b)(5) for a variety of reasons, including because it promotes fairness and consistency for all parties, addresses privacy concerns and chilling effects raised by the 2020 amendments, prevents unnecessary disclosure of personal information, balances privacy interests (especially of young students) with the parties' need to represent themselves, acknowledges that investigations must be conducted in a sensitive and confidential way, and provides protection for parties against retaliation. Some commenters shared that the 2020 amendments' prohibition on restricting the parties' ability to discuss the allegations exposes students to retaliation and harassment, leads to a chilling effect, can exacerbate a hostile environment on campus, and negatively affects the reliability of witness testimony.

Some commenters expressed support for § 106.45(b)(5), citing the importance for certain parties, such as students with disabilities or young students, of being able to access additional support to participate in a recipient's grievance procedures. Some commenters asked the Department to allow elementary schools and secondary schools to decide what constitutes reasonable steps to protect privacy in a particular case. Some commenters questioned whether recipients could restrict the parties' ability to engage in the speech described in § 106.45(b)(5) for reasons other than protecting privacy. The commenters urged the Department to modify § 106.45(b)(5) to prohibit recipients from interfering with these types of speech, regardless of whether the recipient is taking steps to protect privacy or for another reason.

Some commenters recommended changes to the limitation in proposed § 106.45(b)(5) that the recipient's reasonable steps to protect privacy must not restrict the parties' ability to consult with a family member, confidential resource, or advisor, such as using ''discuss'' rather than ''consult with'' and being less prescriptive in listing the individuals with whom parties can consult.

Some commenters asked for clarification regarding who constitutes a ''confidential resource'' or ''advisor'' for purposes of proposed § 106.45(b)(5). Some commenters urged defining these terms as broadly as possible, or to permit consultation with a broader range of sources, such as police, prosecutors, and judges. Some commenters urged restrictions on a recipient's ability to volunteer information to law enforcement. One commenter suggested clarifying that a party does not have a right to communicate with a family member, confidential resource, or advisor during a hearing or meeting.

Some commenters asked the Department to replace the phrases ''prepare for a hearing, if one is offered'' and ''otherwise defend their interests'' with the phrase ''otherwise prepare for or participate in the grievance process'' based on a concern that defending their interest is a broad phrase that parties could use to justify widespread disclosures. Another commenter asked whether ''defend their interests'' means that a party would need to be challenged by someone else or whether they could proactively speak about the allegations.

Some commenters also asked the Department to clarify whether there are any differences between the privacy requirements in §§ 106.45(b)(5) and 106.46(e)(6)(iii). Other commenters asked whether § 106.45(b)(5) conflicts with the retaliation provision in proposed § 106.71.

Discussion: The Department acknowledges commenters' support of § 106.45(b)(5). The Department continues to believe that § 106.45(b)(5) appropriately addresses concerns about chilling effects on participation in the grievance procedures, peer retaliation, and the integrity of the grievance procedures associated with widespread disclosures.

Section 106.45(b)(5) requires a recipient to take reasonable steps to protect the parties' and witnesses' privacy during the pendency of a recipient's grievance procedures, provided that these steps do not restrict the parties' ability to: obtain and present evidence, including by speaking to witnesses, subject to § 106.71; consult with family members, confidential resources, or advisors; or otherwise prepare for or participate in the grievance procedures. The steps that are reasonable to protect privacy may vary depending on the circumstances, and thus a recipient must consider the circumstances of a particular complaint when determining what steps the recipient must take to protect privacy, which includes consideration of whether a particular step is reasonable and whether it impermissibly restricts a party's ability to gather evidence, consult with certain individuals, or prepare for or participate in the grievance procedures. Nevertheless, the Department emphasizes that any steps that infringe on constitutional rights or

otherwise undermine due process are inherently unreasonable, and such steps do not qualify as ''reasonable steps'' under § 106.45(b)(5). *Cf.* 34 CFR 106.6(d).

In response to commenters' concern that § 106.45(b)(5) permits a recipient to restrict the parties' ability to gather evidence, consult with certain individuals, or prepare for or participate in the grievance procedures as long as the recipient did not impose these restrictions as part of its reasonable steps to protect privacy, the Department clarifies that § 106.45(b)(5) prohibits a recipient from taking reasonable steps for the purpose of protecting privacy that restrict the parties' ability to gather evidence, consult with certain individuals, or prepare for or participate in the grievance procedures. Although § 106.45(b)(5) does not apply to steps that a recipient takes for purposes other than privacy protection, the Department notes that other provisions in these final regulations provide additional protection for the parties—*e.g.,* § 106.45(f)(2) addresses the opportunity to present witnesses and evidence, § 106.46(e)(2) addresses the opportunity to be accompanied by a party's advisor in cases of sex-based harassment involving a student party at postsecondary institutions, and § 106.6(g) addresses participation by parents, guardians, and authorized legal representatives.

The Department declines the commenter's request to change ''consult with'' to ''discuss'' in § 106.45(b)(5) to prevent parties from communicating with family members, confidential resources, or advisors during a hearing or meeting. The Department notes that other provisions in these final regulations, such as §§ 106.6(g) and 106.46(e)(2) and (3), may affect when and how a party may communicate with these individuals in certain proceedings.

The Department also declines the suggestions to broadly define or be less prescriptive as to the individuals listed in § 106.45(b)(5). The Department maintains that this list sufficiently protects the parties' ability to confide in other individuals during the grievance procedures, and nothing in § 106.45(b)(5) prevents a recipient from allowing the parties to consult with individuals beyond those listed in the provision.

Regarding commenters' questions about communications with law enforcement and the judicial system, the Department notes that the Title IX regulations do not impose limitations on the parties' ability to speak with law enforcement or to speak at judicial proceedings. The Department notes a recipient must be mindful of the requirements of § 106.44(j) when considering whether to disclose information to law enforcement or to the judicial system.

The Department wishes to clarify that ''confidential resources,'' as used in this provision, is not synonymous with ''confidential employee,'' as defined in § 106.2, although certain individuals may qualify as both. Unlike a confidential employee, a confidential resource does not need to be an employee of the recipient. The confidential resource must, however, have a confidential status under a Federal, State, or local law, or by virtue of their profession. Thus, a teacher or friend will generally not qualify, whereas a mental health counselor or a community-based rape crisis counselor will generally qualify.

The Department clarifies that ''advisors,'' as used in § 106.45(b)(5), refers to any individual who is acting as an advisor to the party for purposes of the grievance procedures. This includes but is not limited to the advisor of the party's choice referenced throughout § 106.46.

In response to concerns that ''defend their interests'' is an overly broad phrase that could be used to justify widespread disclosures, the Department is modifying § 106.45(b)(5) by replacing the phrases ''prepare for a hearing, if one is offered'' and ''otherwise defend their interests'' with the phrase ''otherwise prepare for or participate in the grievance procedures.'' The Department also notes that this change avoids the concern expressed by one commenter as to whether a party would need to be challenged by someone else to be considered as defense of their interest.

Commenters asked about the differences between §§ 106.45(b)(5) and 106.46(e)(6)(iii). Section 106.45(b)(5) requires a recipient to take reasonable steps to protect the privacy of the parties and witnesses throughout the grievance procedures, whereas § 106.46(e)(6)(iii) and the corresponding provision at § 106.45(f)(4)(iii) require a recipient to prevent and address parties' unauthorized disclosure of material obtained solely through the grievance procedures. When providing the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence under §§ 106.45(f)(4)(i) and 106.46(e)(6)(i), a recipient must take reasonable steps under §§ 106.45(f)(4)(iii) and 106.46(e)(6)(iii) to prevent and address unauthorized disclosures. The Department recognizes that there is some overlap in the three provisions requiring privacy protections (*i.e.,* §§ 106.45(b)(5) and (f)(4)(iii) and 106.46(e)(6)(iii)), and certain steps that a recipient takes to protect privacy may further the requirements of more than one provision. However, the Department does not agree that these provisions conflict, or that their differences would create difficulties for recipients.

The Department appreciates commenters' questions about the interaction between § 106.45(b)(5) and the retaliation provision. Although the factual scenarios posed by the commenters would require an analysis of the specific facts and circumstances, the Department emphasizes that a recipient must comply with the requirements of both §§ 106.45(b)(5) and 106.71. Accordingly, a party's right to speak to witnesses is subject to the requirement in § 106.71 that a recipient prohibit retaliation, which is defined in § 106.2 as ''intimidation, threats, coercion, or discrimination'' against any individual, including witnesses, for the purpose of interfering with any right or privilege under Title IX or the regulations or because that individual participated in any way in the grievance procedures.

Changes: The Department has made a technical edit to § 106.45(b)(5) to change ''[t]ake'' to ''[r]equire the recipient to take'' for clarity. The Department has also changed ''a family member, confidential resource, or advisor'' to ''their family members, confidential resources, or advisors.'' The Department has also replaced the phrases ''prepare for a hearing, if one is offered'' and ''otherwise defend their interests'' with the single phrase ''otherwise prepare for or participate in the grievance procedures.''

More Stringent Privacy Protections

Comments: Some commenters raised concerns that proposed § 106.45(b)(5) does not adequately protect the privacy or identity of the parties or witnesses, which could have a chilling effect and raise concerns of retaliation, especially for members of the LGBTQI+ community. Some commenters asked for clear guidelines to protect the parties' privacy during the early stages of an investigation, during the process of providing remedies or accommodations, and after the conclusion of the grievance procedures.

Some commenters expressed concern that proposed § 106.45(b)(5) allows parties to independently investigate allegations, such as by speaking with witnesses to influence whether the witnesses would participate in a grievance procedure and what they

might say. Commenters also noted that allowing parties to speak to witnesses increases the risk of retaliation.

Commenters also inquired about when a recipient is permitted to redact information, including witness names, when disclosing evidence. Other commenters asked the Department to prohibit the use of nondisclosure agreements in Title IX grievance procedures to dissuade recipients from conditioning supportive measures or the initiation of grievance procedures on parties or their advisors signing nondisclosure agreements.

Some commenters expressed overarching concerns about privacy without explicitly referencing § 106.45(b)(5). One commenter stated that recipients and their employees have an ethical duty of confidentiality and should be trained on privacy laws and how to protect sensitive data. Another commenter seemed to suggest that the regulations should restrict Freedom of Information Act (FOIA) requests for medical information, consistent with the Fourteenth Amendment, FERPA, and HIPAA.

Commenters also asked for clarification about when a recipient may include a statement regarding the privacy rights of the parties and how to ensure privacy while using language assistance services.

Discussion: The Department aims to prevent the harms associated with widespread disclosure by requiring a recipient to take reasonable steps to protect the privacy of the parties and witnesses. The disclosure requirements and the right to present evidence under these final regulations are necessary to ensure the integrity and fairness of the grievance procedures, as explained in greater detail in the discussions of §§ 106.45(f)(2) and (4) and 106.46(e)(6). The Department maintains that these final regulations strike an appropriate balance between ensuring that parties are able to prepare and participate in the grievance procedures, while requiring privacy protections and prohibiting retaliation to address fears related to overly broad disclosures. The Department also notes that these regulations must not infringe on any federally guaranteed constitutional rights.

In response to commenters' concerns about witness intimidation and improper influence of witnesses, the Department reiterates that parties are prohibited under § 106.71 from intimidating a witness because the witness has participated in the grievance procedures. The Department further notes that § 106.45(g), and if applicable § 106.46(f), require a recipient to assess the credibility of parties and witnesses. Nothing in these regulations prohibits a recipient from requiring its investigator to speak to witnesses prior to speaking with the parties in order to minimize the risk that their statements will be improperly influenced.

Commenters inquired about a recipient's ability to redact materials. The Title IX regulations require a recipient to make certain disclosures of personally identifiable information to the parties, including the requirements in §§ 106.45(f)(4) and 106.46(e)(6) to provide the parties with an equal opportunity to access the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible. A recipient may redact information that is not relevant to the allegations but that is contained within documents or evidence that are relevant to the allegations. A recipient must redact (or otherwise refrain from disclosing) information that is impermissible under § 106.45(b)(7)—such as information protected by a legally recognized privilege or provided to a confidential employee; records made by a physician or psychologist in connection with the treatment of a party or witness; or evidence about the complainant's sexual interests or prior sexual conduct, with narrow exceptions—even if the information is contained within documents or evidence that are relevant to the allegations.

Under these final regulations, however, a recipient is not permitted to redact information or evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible because such redaction infringes on the right of the parties (and their advisors, for complaints under § 106.46) to receive access to the relevant and not otherwise impermissible evidence, as well as on the parties' due process rights. The Department has previously recognized situations in which FERPA permits the unredacted disclosure to a parent (or eligible student) of education records related to disciplinary proceedings when the information cannot be segregated and redacted without destroying its meaning.[48] To the extent that FERPA would require the withholding or redaction of personally identifiable information in education records, for purposes of Title IX the Department takes the position that principles of due process and fundamental fairness require the disclosure of unredacted evidence and information to the parties that is relevant to the allegation and not otherwise impermissible. Accordingly, the constitutional override justifies this disclosure, even if the disclosure is not consistent with FERPA. To the extent the constitutional override does not apply, the GEPA override also requires a recipient to fully comply with the requirements of the Title IX regulations, even if those requirements are not consistent with FERPA's protection of education records. *See* the section on § 106.6(e) for discussion of the constitutional, GEPA, and FERPA overrides. For additional discussion of redactions within Title IX grievance procedures, see the discussion of §§ 106.45(f)(4) and 106.46(e)(6).

The final regulations neither require nor prohibit nondisclosure agreements or confidentiality agreements, as nondisclosure agreements fall within the recipient's discretion to determine which reasonable steps to take to protect privacy based on the circumstances. The Department notes that if a recipient requires such an agreement, it must comply with all of the requirements in the final regulations, including § 106.45(b)(5), and any applicable laws.[49] The Department clarifies that although § 106.45(b)(5) requires a recipient to take reasonable steps to protect the privacy of parties and witnesses during the pendency of a recipient's grievance procedures, such steps may not restrict the ability of the parties to obtain and present evidence, to speak with certain individuals, or to participate in the grievance procedures. In addition, depending on the facts and circumstances, a nondisclosure agreement, especially one that is overly broad, may not satisfy § 106.45(b)(5)'s requirement that any steps a recipient takes to protect the privacy of parties and witnesses must be reasonable.

[48] Under FERPA's definition of education records, ''a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning.'' 73 FR 74832–33; *see also* Letter from Michael Hawes, Director of Student Privacy Policy, U.S. Dep't. of Educ., Office of Mgmt., to Timothy S. Wachter, Knox McLaughlin Gornall & Sennett, P.C. (Dec. 7, 2017), *https://studentprivacy.ed.gov/resources/letter-wachter-regarding-surveillance-video-multiple-students* (requiring a school district to provide a video of a hazing incident to the parents of a disciplined student because ''[i]t does not appear to us that the District can segregate or redact the video without destroying its meaning'').

[49] The Department notes that the Speak Out Act, 42 U.S.C. 19403, generally prohibits the judicial enforceability of a nondisclosure clause or non-disparagement clause before a dispute arises involving a sexual assault or sexual harassment alleged to be in in violation of Federal, State, or tribal law.

Sections 106.45(f)(4)(iii) and 106.46(e)(6)(iii) similarly require that any steps a recipient takes to prevent and address the parties' and their advisors' unauthorized disclosure of information obtained solely through the grievance procedures must be reasonable. In response to commenters, the Department also clarifies that § 106.44(g) requires a recipient to offer and coordinate supportive measures as appropriate, and recipients may not condition the offer or coordination of supportive measures or the initiation of grievance procedures on a party signing a nondisclosure or other confidentiality agreement.

Due to the fact-specific nature of these issues, the Department declines to provide more specific guidelines for protecting privacy, including guidelines for sanctioning employees who violate a student's privacy. The Department maintains that a recipient is well positioned to determine reasonable steps to protect privacy based on the particular circumstances, including but not limited to the nature of the allegations and the stage of the grievance procedures, within the parameters set forth by § 106.45(b)(5) and other provisions. The Department revised final § 106.44(j) to prohibit the disclosure of personally identifiable information obtained while carrying out a recipient's Title IX obligations, with some exceptions. The circumstances under which such information may be disclosed are explained more fully in the discussion of § 106.44(j).

The Department also declines to extend the requirement for the recipient to take reasonable steps to protect the privacy of parties and witnesses beyond the conclusion of the grievance procedures. After the grievance procedures have concluded, the disclosure of information presents little or no threat to the fairness and integrity of the investigation and outcome of a particular complaint. Although § 106.45(b)(5) does not apply after the conclusion of the grievance procedures, Title IX continues to prohibit harassment, including harassment of a party or witness after conclusion of grievance procedures, and retaliation under § 106.71. In addition, § 106.44(j) prohibits a recipient from disclosing personally identifiable information obtained while carrying out its Title IX obligations, with some exceptions, and continues to apply after the conclusion of the grievance procedures. Other privacy laws, such as FERPA, may also be applicable.

Regarding the suggestion to require privacy-related training, the Department notes that § 106.8(d)(2)(ii) requires recipients to ensure that employees and individuals who have any role in implementing the Title IX regulations receive training on the recipient's grievance procedures under § 106.45, and if applicable § 106.46, to the extent related to their responsibilities. As noted above, a recipient is obligated to take reasonable steps to protect privacy under §§ 106.45(b)(5) and (f)(4)(iii) and 106.46(e)(6)(iii). Accordingly, the regulations already require privacy-related training. Nothing in the final regulations prevents a recipient from providing training on other privacy laws or methods to protect sensitive data.

Although the Department is not authorized to restrict FOIA requests, as requested by a commenter, the Department notes that FOIA exempts certain information about individuals, including information in medical files, when the disclosure of this information ''would constitute a clearly unwarranted invasion of personal privacy.'' 5 U.S.C. 552(b)(6). The Department notes that under § 106.45(b)(7)(ii), a party's or witness's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional related to the treatment of the party or witness must not be accessed, considered, disclosed, or otherwise used as part of the grievance procedures, unless the recipient obtains that party's or witness's voluntary, written consent for use in the grievance procedures. *See* section on § 106.45(b)(6) and (7).

The Department agrees that it is important to protect the parties' privacy while using language assistance services; however, a recipient is in a better position to identify how to ensure privacy based on the particular circumstances of what services are needed and how they factor into the recipient's grievance procedures.

In response to a commenter's inquiry about when a recipient may include a statement regarding the privacy rights of the parties, the Department notes that various provisions of these final regulations (*e.g.,* §§ 106.44(f)(1)(iii) and 106.45(c)(1)(i)) require a recipient to inform the parties of the grievance procedures, which must include reasonable steps to protect privacy.

Changes: None.

Due Process Concerns

Comments: Commenters raised concerns about the difficulty of balancing privacy concerns with the requirements of due process.

Some commenters appreciated the clarification that a recipient must maintain the privacy of parties and witnesses if possible and that parties may contact witnesses, obtain evidence, and participate in the investigation.

Other commenters emphasized the importance of ensuring impartial investigations and grievance procedures. One commenter referenced the importance of protecting a respondent's confidentiality, while another commenter referenced their experience as a respondent and noted that the recipient's refusal to disclose the identity of the complainant and witnesses to the respondent until after the investigation concluded prevented the respondent from organizing their defense.

Discussion: The Department appreciates commenters' concerns about protecting privacy interests without infringing on due process rights, as well as commenters' views that privacy protections are needed to protect the fairness of the procedures. The Department maintains that § 106.45(b)(5) appropriately balances these considerations by requiring a recipient to take reasonable steps to protect privacy while prohibiting a recipient from taking such steps that restrict the ability of the parties to obtain and present evidence; consult with their family members, confidential resources, or advisors; or otherwise prepare for or participate in the grievance procedures. In response to a commenter's concern about restrictions on their ability to organize a defense, the Department notes that under these final regulations, as discussed above, a recipient is not permitted to withhold information that is relevant to the allegations of sex discrimination and not otherwise impermissible. In addition, under § 106.45(c)(1)(ii), the parties are entitled to a notice of the allegations that includes the identities of the parties involved in the incident.

As the Department noted in the July 2022 NPRM, unrestricted disclosures of sensitive information could threaten the fairness of the grievance procedures by deterring parties or witnesses from participating, negatively affecting the reliability of witness testimony, facilitating retaliatory harassment, and causing other potential harms. 87 FR 41469–70. Overly restrictive measures to protect privacy could also jeopardize the fairness of the grievance procedures and the reliability of the outcome, such as by interfering with the parties' ability to identify relevant witnesses and gather other evidence. Section 106.45(b)(5) therefore identifies certain limitations on the recipient's ability to impose reasonable steps to protect privacy.

Changes: None.

Authority and First Amendment Concerns

Comments: Some commenters expressed concern that proposed § 106.45(b)(5) would exceed the Department's authority, would be arbitrary and capricious (by shielding recipients from accountability), and would be inconsistent with the First Amendment, free speech values, and established law.

Some commenters opposed proposed § 106.45(b)(5) because they believed it would chill speech. Other commenters urged the Department to modify proposed § 106.45(b)(5) to include an exception that allows parties to criticize how recipients handled their complaints to hold recipients accountable. Another commenter criticized the exception in proposed § 106.45(b)(5) that would allow parties to discuss allegations when defending their interests as overly narrow and vague and an inappropriate limitation on free speech. Some commenters inquired about the recipient's ability to act in response to a party revealing information about an investigation in an article or on social media.

Some commenters expressed concern that proposed § 106.45(b)(5) would invite a recipient to impose ''gag orders.'' Some commenters urged the Department to retain the 2020 amendments' prohibition on restricting parties from discussing allegations and gathering evidence and emphasized the importance of permitting parties to seek guidance and criticize the allegations or the handling of the grievance process.

Discussion: The Department emphasizes that students, employees, and third parties retain their First Amendment rights, and § 106.45(b)(5) does not infringe on these rights. Section 106.6(d) of the Title IX regulations explicitly states that nothing in these regulations requires a recipient to restrict rights that would otherwise be protected from government action by the First Amendment. Accordingly, a recipient must be mindful of the rights protected by the First Amendment when taking reasonable steps to protect the privacy of the parties and witnesses under § 106.45(b)(5). For additional discussion of the First Amendment, see the section on First Amendment Considerations in the definition of ''sex-based harassment.''

The Department understands that some commenters wish to retain § 106.45(b)(5)(iii) from the 2020 amendments, which prohibits a recipient from restricting a party's right to discuss the allegations under investigation or gather and present evidence. The Department, however, is persuaded by the concerns expressed by commenters during the June 2021 Title IX Public Hearing, *see* 87 FR 41469, and during the July 2022 NPRM public comment period, as described earlier in this section of the preamble, regarding the many ways in which unrestricted disclosures jeopardize the fairness of the grievance procedures. The Department disagrees with commenters who characterized proposed § 106.45(b)(5) as an invitation for recipients to impose ''gag orders.'' As discussed above, final § 106.45(b)(5) will protect the parties' ability to discuss the allegations by prohibiting a recipient from taking steps to protect privacy that restrict the parties' ability to obtain evidence, consult with certain individuals, or prepare for or participate in the grievance procedures. With respect to commenters' requests to retain § 106.45(b)(5)(iii) from the 2020 amendments to preserve the ability to seek guidance from others, the Department notes that final § 106.45(b)(5) prohibits a recipient from restricting a party's ability to consult with their family members, confidential resources, or advisors.

It is the Department's view that § 106.45(b)(5)'s requirement that a recipient take reasonable steps to protect the privacy of parties and witnesses during the grievance procedures may include restrictions on discussing the allegations or investigation in an article or on social media as long as such restrictions are consistent with the First Amendment. Widespread disclosures of personally identifiable information on social media or in the media can threaten the fairness of the grievance procedures and lead to harassment, including retaliation. Section 106.45(b)(5) also limits the reasonable steps a recipient can take to protect the privacy of the parties or witnesses to those that do not restrict the parties' ability to obtain and present evidence, consult with certain individuals, or otherwise prepare for or participate in the grievance procedures. The Department maintains that a recipient may be able to limit social media or other widespread media disclosures in a manner that does not conflict with § 106.45(b)(5), depending on the circumstances and consistent with the First Amendment.

Contrary to commenters' assertions, § 106.45(b)(5) does not exceed the Department's authority and is not inconsistent with Title IX or established case law. We maintain our position, consistent with the 2020 amendments and as explained in the discussion of § 106.44(j), that measures to protect the privacy of personally identifiable information are necessary to effectuate Title IX and to fully implement Title IX's nondiscrimination mandate. The Department notes that commenters who raised these issues did not explain how § 106.45(b)(5) exceeds the Department's authority or is inconsistent with case law. The Department is acting within the scope of its congressionally delegated authority in requiring recipients to take reasonable steps to protect the privacy of parties and witnesses.

The Department declines to add an exception to § 106.45(b)(5) to allow parties to criticize how recipients handled their complaints; however, the Department reiterates that § 106.45(b)(5) applies only to protect the privacy of parties and witnesses during the pendency of a recipient's grievance procedures. A categorical prohibition on criticizing the recipient's handling of grievance procedures is not a reasonable step to protect privacy, whereas a reasonable step might include prohibiting a party from identifying parties or witnesses while the grievance procedures are ongoing.

Regarding a commenter's criticism of ''defending their interests'' as overly narrow and vague and an inappropriate limitation on free speech, the Department is replacing the phrases ''prepare for a hearing, if one is offered'' and ''otherwise defend their interests'' with the phrase ''otherwise prepare for or participate in the grievance procedures.'' The Department views this revised language as easier for parties to understand and apply. The Department recognizes that some might think this exception is also too narrow; however, the Department maintains that § 106.45(b)(5) appropriately balances the need for parties to be able to make certain disclosures during the pendency of the grievance procedures with the need to protect unrestricted disclosures that could threaten the fairness of the procedures. The Department reiterates that § 106.45(b)(5) does not require a recipient to restrict rights protected by the First Amendment.

Changes: The Department has replaced the phrases ''prepare for a hearing, if one is offered'' and ''otherwise defend their interests'' with the single phrase ''otherwise prepare for or participate in the grievance procedures.''

8. Section 106.45(b)(6) Objective Evaluation of All Relevant Evidence and 106.45(b)(7) Exclusion of Impermissible Evidence

§ 106.45(b)(6): Objective Evaluation of All Relevant Evidence

Comments: Commenters expressed support for § 106.45(b)(6) for multiple reasons, including that it would establish clear guideposts, ensure reliable resolutions, and establish a fair process. Commenters expressed support for § 106.45(b)(6)'s requirement that recipients review all relevant evidence, including inculpatory and exculpatory evidence, because this protects due process, limits litigation risk, and is consistent with case law.

Some commenters sought clarification of the term ''relevant'' or objected to a recipient's exercise of discretion regarding what evidence is ''relevant.'' Commenters also expressed concern about the parties' inability to contest the relevance determination.

Discussion: The Department appreciates the comments regarding the importance of clarity, reliability, fairness, and impartiality. The Department emphasizes that § 106.45(b)(6) retains the same language as § 106.45(b)(1)(ii) in the 2020 amendments.

Both § 106.45(b)(6) in these final regulations and § 106.45(b)(1)(ii) in the 2020 amendments require an objective evaluation of all ''relevant'' evidence. The 2020 amendments did not define the term ''relevant,'' and the Department stated in the preamble to the 2020 amendments that ''the ordinary meaning of the word should be understood and applied.'' 85 FR 30247 n.1018. Section 106.2 defines ''relevant'' as ''related to the allegations of sex discrimination,'' and clarifies that ''evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.'' It is the Department's view that both the final regulations and the 2020 amendments require a similar universe of evidence to be objectively evaluated by the decisionmaker. For a more detailed discussion on the definition of ''relevant,'' please refer to the section on the definition of ''relevant'' in § 106.2.

For clarity, the Department has revised § 106.45(b)(6) to state that the recipient's grievance procedures must require an objective evaluation of all evidence that is relevant, as defined in § 106.2, excluding evidence that is deemed impermissible under § 106.45(b)(7). The Department articulated this interpretation in the July 2022 NPRM, when the Department proposed to consolidate the three categories of impermissible evidence into § 106.45(b)(7) to ''make clear to recipients and others that these types of evidence would be excluded from the general requirement that the recipient conduct an objective evaluation of all relevant evidence.'' 87 FR 41471. As explained in the discussion of § 106.45(b)(7) of these final regulations, a recipient may only consider impermissible evidence for the purpose of determining whether an exception under § 106.45(b)(7)(i) through (iii) applies.

Parties may raise concerns about relevance determinations as part of their reasonable opportunity to respond to the evidence under §§ 106.45(f)(4)(ii) and 106.46(e)(6)(ii). The Department also notes that, under § 106.8(d)(2)(iv), all investigators, decisionmakers, and other persons who are responsible for implementing the grievance procedures receive training on the meaning and application of the term ''relevant.'' In addition, nothing prohibits a recipient from choosing to allow other opportunities for the parties to contest relevance determinations. *See* § 106.45(j). For complaints under § 106.46, the parties may appeal erroneous relevance determinations that affected the outcome under § 106.46(i)(1)(i). *See* 85 FR 30343.

Changes: The Department has revised § 106.45(b)(6) to clarify that a recipient's grievance procedures must require an objective evaluation of all evidence that is relevant and not otherwise impermissible. The Department has added a cross-reference to § 106.2, which defines ''relevant,'' and a cross-reference to § 106.45(b)(7), which describes the types of impermissible evidence and notes certain exceptions.

§ 106.45(b)(7): Exclusion of Impermissible Evidence Regardless of Relevance

Comments: Some commenters supported § 106.45(b)(7) for clarifying when evidence is impermissible even if relevant and for resolving discrepancies with State laws.[50] One commenter expressed concern that § 106.45(b)(7) requires the exclusion of relevant evidence, though the commenter acknowledged that § 106.45(b)(7) generally retains the prohibitions that appear in the 2020 amendments.

Some commenters sought clarification as to whether, under § 106.45(b)(7), a party may consent to the use of part of a record (*e.g.,* a sexual assault nurse examiner's report) while withholding the rest of the record, stating that the other party must be able to view the entire document to assess whether the withheld material is relevant.

Discussion: The Department acknowledges the comments in support of § 106.45(b)(7), which sets forth the types of evidence (and questions seeking that evidence) that must not be accessed, considered, disclosed, or otherwise used, regardless of whether they are relevant. The three categories of evidence that must be excluded under § 106.45(b)(7) are substantially similar to the prohibitions that appear in the 2020 amendments in § 106.45(b)(1)(x), (5)(i), and (6)(i) and (ii). The Department continues to believe that such evidence is particularly sensitive (*e.g.,* medical records, evidence of the complainant's prior sexual conduct) or otherwise inappropriate for use in grievance procedures (*e.g.,* information protected by attorney-client privilege). *See* 85 FR 30303–04, 30317, 30351, 30361.

The Department declines to modify § 106.45(b)(7) to require a party to provide consent to an entire document if the party consents to use of a portion of it. Keeping in mind that the types of evidence listed in § 106.45(b)(7) are presumptively excluded, a decisionmaker may consider a party's reasons for partially withholding consent as part of the decisionmaker's overarching role in assessing credibility and deciding responsibility. The Department recognizes that there may be circumstances in which a partial disclosure is reasonable, such as when portions of the document are privileged or otherwise legally protected, when portions of the document are appropriately redacted or withheld as irrelevant, or when the party only has access to a portion of the document.

The Department recognizes that a recipient may need to access or consider impermissible evidence (and questions seeking that evidence) for the narrow purpose of determining whether an exception in § 106.45(b)(7)(i) through (iii) applies. Accordingly, the Department has revised § 106.45(b)(7) to clarify that impermissible evidence (and questions seeking that evidence) must not be accessed or considered except by a recipient for the purpose of determining whether an exception applies that would permit the use of such evidence.

Changes: The Department has revised § 106.45(b)(7) to make it clear that impermissible evidence must not be accessed, considered, disclosed, or otherwise used; however, there is a narrow exception for the recipient to access and consider evidence to determine whether an exception in § 106.45(b)(7)(i) through (iii) applies.

[50] One commenter cited N.Y. Educ. Law § 6444(5)(c)(vi).

§ 106.45(b)(7)(i): Exclusion of Privileged Evidence or Evidence Provided to a Confidential Employee

Comments: Some commenters praised the Department for clarifying the prohibitions on using privileged information, including that this prohibition encompasses Federal and State privileges. Some commenters urged the Department to modify § 106.45(b)(7)(i) to exclude records provided to confidential employees who do not fall under a preexisting legally recognized privilege. Some commenters urged the Department to require written voluntary consent before information provided to a confidential employee could be used in the investigation. Some commenters encouraged the Department to require recipients to notify parties of the possibility of privilege and to encourage parties to consult counsel to prevent parties from inadvertently turning over privileged information.

Discussion: The Department acknowledges commenters' support for § 106.45(b)(7)(i) as excluding evidence protected under a privilege recognized by Federal or State law.

The Department declines to include additional requirements about what recipients must advise parties regarding privileged information because this is already covered by the final regulations. Under § 106.44(f)(1)(iii) and (iv), the Title IX Coordinator is obligated to notify the complainant, upon notification of conduct that reasonably may constitute sex discrimination, and the respondent, if a complaint is made, of the grievance procedures under § 106.45, which includes information regarding what types of evidence and questions seeking evidence are impermissible under § 106.45(b)(7). The recipient is also required to notify the parties of the grievance procedures, as part of the notice of allegations under § 106.45(c)(1)(i), and the grievance procedures include information regarding what types of evidence and questions seeking evidence are impermissible under § 106.45(b)(7). The Department declines to require recipients to encourage parties to consult attorneys regarding privileged information because nothing in the final regulations requires parties to have an attorney. Parties may choose to consult an attorney, and the Department does not intend to imply otherwise.

The Department agrees with the concerns expressed by commenters about the need to protect information shared with confidential employees and the expectation that such information would be excluded from the grievance procedures. Accordingly, the Department has revised § 106.45(b)(7)(i) to state that evidence provided to a confidential employee is impermissible unless the person who confided in the confidential employee has waived that confidentiality. If, however, the evidence provided to a confidential employee is also available from other non-confidential sources, the evidence may be accessed from those non-confidential sources and used as part of the grievance procedures.

Section 106.45(b)(7)(i) continues to require any waiver to be voluntary; however, the Department has removed the specification from proposed § 106.45(b)(7)(i) that the waiver be made in a manner permitted in the recipient's jurisdiction. The Department notes that jurisdictions may not have an established waiver standard for evidence shared with confidential employees. For situations in which there is an existing legal standard for waiving a particular privilege (*e.g.,* specified by a State law), that legal standard governs. The Department does not intend for § 106.45(b)(7)(i) to supplant established waiver standards but rather to provide flexibility for situations in which no waiver standard exists. The Department has determined that it is not necessary to specify the manner for waiving a privilege and maintains that it is appropriate to give recipients the discretion to specify the manner for waiving a privilege (unless there is an existing waiver standard that applies), which may include requiring that it be in writing if the recipient so chooses. The Department also notes that § 106.45(b)(1)(x) of the 2020 amendments permitted a waiver of privilege without specifying the manner.

Changes: The Department has revised § 106.47(b)(7)(i) to state that a recipient must exclude evidence that is protected under a privilege as recognized by Federal or State law and evidence provided to a confidential employee, unless the person to whom the privilege or confidentiality is owed has voluntarily waived the privilege or confidentiality.

§ 106.45(b)(7)(ii): Exclusion of Records Maintained in Connection With Treatment

Comments: Commenters expressed support for § 106.45(b)(7)(ii) for multiple reasons. Some noted that nonconsensual disclosure of medical and counseling records can result in distrust, and others recommended extending the protection to a witness's records, in addition to a party's records.

Some commenters supported § 106.45(b)(7)(ii) but proposed alterations. Some commenters recommended including a narrow exception to allow a recipient to access, consider, or disclose a party's records in connection with treatment in cases in which physical injury is relevant and the records are probative of that issue. Some commenters urged revisions to state that postsecondary students have a right to access their on-campus treatment records prior to deciding whether to consent to their use in the Title IX grievance procedures. Some commenters opposed § 106.45(b)(7)(ii) as unduly broad and instead recommended that these records be subject to the ordinary test of relevance, except as protected by privilege. One commenter stated that materials related to a student-party's special education services (or eligibility for such services) should not be used as evidence.

One commenter asked the Department to extend the ban on the nonconsensual use of records to recipients who are sued for Title IX violations. Another commenter expressed concern that allowing parties to consent to the use of medical and treatment records might open the door to their use in related litigation, and that individuals are unable to comprehend the meaning or consequences of waiving their privilege.

Some commenters sought clarification regarding the application of § 106.45(b)(7)(ii) to allegations of sexual misconduct involving clinicians employed by universities who work in academic medical centers (AMCs). Commenters sought clarification about the interaction between HIPAA and § 106.45(b)(7)(ii); some recommended that this provision not apply to medical records that are subject to HIPAA, and some recommended that this provision align with HIPAA because school records include medical information.

Some commenters objected to the removal of the reference to FERPA in § 106.45(b)(5)(i) of the 2020 amendments as removing a reminder of the rights of parents, or sought clarification of the approach to records related to treatment under Title IX and FERPA.

Discussion: The Department acknowledges the commenters' support for § 106.45(b)(7)(ii). The Department agrees with commenters regarding the importance of extending the exclusion of records in connection with treatment to witnesses, and the Department has revised § 106.45(b)(7)(ii) accordingly. The Department recognized the particular sensitivity of these records in the preamble to the 2020 amendments, *see* 85 FR 30303, and the Department maintains that this sensitivity justifies a prohibition on the nonconsensual use of

these records as related to both parties and witnesses.

The Department clarifies that, consistent with the preamble to the 2020 amendments, § 106.45(b)(7)(ii)'s prohibition on the use of records related to treatment includes a student's IEP or Section 504 plan. *See* 85 FR 30427. Thus, the recipient must obtain voluntary, written consent for the use of such materials in the recipient's grievance procedures before such materials can be used as evidence.

In response to a request to extend § 106.45(b)(7)(ii) to recipients who are sued in court for Title IX violations, the Department notes that § 106.45 sets forth the requirements for a recipient's Title IX grievance procedures for administrative proceedings. Whether a court may require disclosure of a party's records in connection with treatment as part of litigation is beyond the scope of this rulemaking. While the Department is sympathetic to the concern that individuals may not understand the meaning of waiving their privilege, the Department maintains that § 106.45(b)(7)(ii)'s heightened protection of records related to treatment sufficiently cautions parties and witnesses to consider whether to voluntarily consent to the use of their records in the grievance procedures.

The Department declines to create an exception to § 106.45(b)(7)(ii) to allow a recipient to use a party's records in connection with treatment in cases in which physical injury is relevant to the proceedings. The 2020 amendments do not allow a recipient to use, or require a party to submit, treatment records in light of the sensitivity of such records (§ 106.45(b)(5)(i)), and the Department maintains this position in the final regulations. The Department continues to maintain that these records constitute ''some of the most sensitive documents about a party,'' 85 FR 30525, which warrants giving the parties the right to control access to their own records even in cases in which the absence of consent to use crucial records may affect the recipient's ability to determine whether sex discrimination occurred by the preponderance of the evidence.

The Department acknowledges that treatment records are carved out of the definition of education records in FERPA. *See* 20 U.S.C. 1232g(a)(4)(B)(iv); 34 CFR 99.3. Title IX does not require a recipient to provide postsecondary students or students who are eighteen years of age or older with access to their treatment records prior to their decision whether to consent to use of their records in the Title IX grievance procedures, though a recipient may choose to provide this access [51] and those students may be able to access them through State laws prior to deciding whether to give consent. The disclosure of treatment records is governed by these other laws and therefore is outside the scope of this rulemaking. Recipients should be mindful of any applicable requirements under FERPA or State laws regarding such disclosure.

The Department disagrees with the suggestion to apply the general relevance standard to a party's (or witness's) records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party absent voluntary, written consent. The Department continues to maintain that medical, psychological, and similar records made in connection with treatment are particularly sensitive and warrant heightened privacy protections.

The Department appreciates the comments regarding HIPAA, which protects the privacy and security of certain health information; however, the Department does not enforce HIPAA and lacks authority under Title IX to require recipients to comply with HIPAA through these Title IX regulations. The Department also notes that HIPAA specifically excludes from its coverage records that are protected by FERPA, including education records and treatment records. *See* U.S. Dep't of Health & Hum. Servs. & U.S. Dep't of Educ., Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to Student Health Records, at 7 (Dec. 2019 update), *https://studentprivacy.ed.gov/resources/joint-guidance-application-ferpa-and-hipaa-student-health-records.* A recipient must comply with all applicable laws, and the recipient is in the best position to determine whether and how HIPAA may apply to it. *See* 85 FR 30434. These Title IX regulations apply to records involved in a Title IX grievance proceeding, regardless of whether HIPAA also applies to the records. Section 106.45(b)(7)(ii) also applies to grievance procedures involving allegations of sexual misconduct involving clinicians who are employed by recipients and work at AMCs.

The Department maintains that it is not necessary to reference FERPA's definitions of ''eligible student'' and ''parent'' in a provision describing which records may be used as part of the Title IX grievance procedures. These final Title IX regulations make clear, in § 106.6(g), that nothing in these regulations limits the rights of a parent, guardian, or authorized legal representative to act on behalf of a complainant, respondent, or other person, which would include their child, subject to FERPA. When considering evidence that is relevant but may be impermissible, the Department expects recipients to be mindful of the rights of parents, guardians, and other authorized legal representatives, including any authority they may have to consent on behalf of a student to the use of records maintained in connection with treatment. For additional information regarding the interaction between FERPA and Title IX, see the section on § 106.6(e).

Changes: The Department has extended § 106.45(b)(7)(ii) to apply to a witness's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the witness, unless the recipient obtains the witness's voluntary, written consent for use in the recipient's grievance procedures.

§ 106.45(b)(7)(iii): Exclusion of Evidence Related to the Complainant's Sexual Interests or Prior Sexual Conduct

Comments: Some commenters expressed support for § 106.45(b)(7)(iii)'s exclusion of evidence and questions regarding prior sexual conduct and the requirement that prior sexual conduct between the parties does not prove or imply consent. For example, some commenters said it would be consistent with many States' rape shield laws. Another commenter expressed appreciation for the Department's efforts to protect parties from invasions of privacy, character attacks, and stereotyping.

Other commenters expressed concern about aligning proposed § 106.45(b)(7)(iii) with State rape shield laws. Some commenters opposed proposed § 106.45(b)(7)(iii) as unduly broad. For example, some commenters recommended that evidence of prior sexual conduct be subject to the ordinary test of relevance unless privileged or recommended requiring a particularized showing of relevance.

[51] *See* U.S. Dep't of Educ., Dear Colleague Letter to School Officials at Institutions of Higher Education, at 3 (Aug. 2016), *https://studentprivacy.ed.gov/resources/dear-colleague-letter-school-officials-institutions-higher-education* (noting that a recipient may choose to disclose a treatment record for a postsecondary student or a student who is eighteen years of age or older to that student, and that the treatment record would then become an ''education record'' under FERPA).

Some commenters recommended that proposed § 106.45(b)(7) align more closely with Federal Rule of Evidence 412(b)(1)(C). Some commenters recommended that the limitations on disclosure of prior sexual conduct or sexual interests apply equally to both parties, and another commenter asked for clarification that proposed § 106.45(b)(7) does not prohibit respondents from presenting exculpatory contextual information. One commenter asserted that proposed § 106.45(b)(7)(iii) is unworkable in the elementary school and secondary school contexts and appeared to suggest removing the exceptions that would allow evidence of prior sexual conduct.

One commenter expressed concern that proposed § 106.45(b)(7)(iii) would improperly put the investigator in control of whether to include certain evidence based on the investigator's view of how the parties might use the evidence in the proceeding.

Some commenters asked the Department to expressly permit evidence of a respondent's prior sex-based conduct as pattern evidence and to weigh such evidence based on its strength. As support for their recommendation to permit evidence of a respondent's prior sex-based conduct, the commenters referenced alignment with Federal or State evidentiary rules, Title VII, the Clery Act, research findings that students who commit sex-based harm are frequently repeat perpetrators, and the small likelihood that all survivors of a repeat perpetrator will report the misconduct due to the underreporting of sexual assault.

Some commenters asked the Department to address the interests of ''pattern witnesses,'' which a commenter noted would be consistent with Rule 412 of the Federal Rules of Evidence.

One commenter urged the Department to revise proposed § 106.45(b)(7)(iii) to state that the complainant can always provide evidence of their own sexual history, interests, or predisposition.

Discussion: The Department acknowledges commenters' support for § 106.45(b)(7)(iii). Section 106.45(b)(7)(iii) applies to the entirety of a recipient's Title IX grievance procedures for complaints of sex discrimination, including sex-based harassment, and is substantially similar to the corresponding evidentiary exclusions in the 2020 amendments at § 106.45(b)(6)(i) and (ii). The Department does not agree with commenters who viewed the general prohibition in § 106.45(b)(7)(iii) or the two exceptions to the general prohibition as overly broad. As noted in the preamble to the 2020 amendments, these prohibitions align with rape shield protections used in Federal litigation and serve the critically important purpose of protecting complainants in Title IX grievance procedures from being questioned about or having evidence considered regarding their sexual interests or prior sexual conduct, with two limited exceptions. *See* 85 FR 30103. The Department is not aware of any rape shield laws that conflict with § 106.45(b)(7)(iii), nor did commenters identify any. Given the particularly sensitive nature of this type of evidence, as well as the potential for prejudice and chilling effects associated with the use of this evidence, it is inappropriate to apply a standard of relevance or particularized relevance to this evidence.

The Department disagrees that § 106.45(b)(7)(iii) is unworkable in elementary schools and secondary schools, and the Department notes that a similar provision exists in the 2020 amendments at § 106.45(b)(6)(ii). It is important to limit access to this particularly sensitive information except in two narrow circumstances across all types of recipients. The Department also notes that § 106.8(d)(2) requires investigators, decisionmakers, and other persons responsible for implementing the recipient's grievance procedures to be trained on the types of evidence that are impermissible regardless of relevance; this required training will help elementary schools and secondary schools with the application of this provision.

The Department declines to add an exception to allow evidence of sexual history when its exclusion would allegedly violate the respondent's constitutional rights (based on Rule 412(b)(1)(C) of the Federal Rules of Evidence) or when the evidence is exculpatory. As the Department noted in the preamble to the 2020 amendments, the exception in Rule 412(b)(1)(C) of the Federal Rules of Evidence is explicitly limited to criminal defendants, whose rights differ from respondents in Title IX grievance procedures, because, among other things, criminal defendants face the possibility of incarceration. *See* 85 FR 30351–52. Thus, prohibiting the introduction into a Title IX grievance procedure of evidence that may have been permitted in a criminal trial does not present the same constitutional concerns. In addition, these final regulations permit a wide universe of relevant and not otherwise impermissible evidence. Consistent with the 2020 amendments, the Department maintains that the grievance procedures outlined in § 106.45, and if applicable § 106.46, provide robust procedural protections of respondents' due process rights. *See id.* Additionally, the Department maintains its reasoning from 2020 that importing a complex set of evidentiary rules from the criminal setting makes it less likely that non-lawyers would feel competent to serve as a recipient's decisionmaker. *See id.*

The Department disagrees that § 106.45(b)(7)(iii) puts the investigator in control of whether to include certain evidence based on the investigator's view of how the parties might use the evidence in the proceeding because the parties may articulate why the evidence should not be excluded under § 106.45(b)(7)(iii). Parties may assert that certain evidence should not be excluded as part of their reasonable opportunity to respond to the evidence that is relevant to the allegations and not otherwise impermissible under §§ 106.45(f)(4)(ii) and 106.46(e)(6)(ii). In addition, nothing prohibits a recipient from allowing parties to explain why evidence should not be excluded during other parts of the grievance procedures. *See* § 106.45(j).

The Department declines to opine on specific evidentiary scenarios because such determinations related to the applicability of § 106.45(b)(7)(iii) are inherently fact-specific.

The Department declines to extend § 106.45(b)(7)(iii)'s protections to respondents. Consistent with the Department's position expressed in the preamble to the 2020 amendments, the Department does not wish to exclude more evidence and information than is necessary to further the goals of the Title IX grievance procedures. *See* 85 FR 30352. The Department has determined that respondents' prior sexual conduct does not require a special provision to adequately protect them, whereas the Department maintains—consistent with case law [52] and rape shield protections in many States—that rape shield protections for complainants are needed to counteract historical and societal misperceptions that a complainant's sexual history is always relevant to sex-based harassment allegations. The Department continues to caution recipients that some situations will involve counterclaims between parties, such that a respondent is also a complainant. *See* 85 FR 30352. In such situations, the recipient must take care to properly apply the rape shield protections to any party designated as a ''complainant,'' even if the same party is

[52] *See, e.g., Michigan* v. *Lucas,* 500 U.S. 145, 146 (1991).

also a ''respondent'' in a consolidated grievance process.

The Department also declines to modify these final regulations to expressly permit evidence of a respondent's prior sex-based conduct as pattern evidence. Such evidence is governed by the relevance standard, as defined in § 106.2 of these final regulations, and must be assessed on a case-by-case basis. The Department appreciates the commenter's point that pattern evidence may be admissible in other proceedings, such as court proceedings governed by the Federal Rules of Evidence. The Department notes that pattern evidence may be permissible for use in Title IX grievance procedures, as the recipient must objectively evaluate pattern evidence to the extent it is relevant, *i.e.,* related to the allegations of sex discrimination under investigation and may aid a decisionmaker in determining whether the alleged sex discrimination occurred. *See* § 106.2.

The Department appreciates the concerns raised regarding pattern witnesses, *i.e.,* witnesses who were allegedly sexually harassed or assaulted by the same respondent; however, the Department declines to extend the protections of § 106.45(b)(7)(iii) to pattern witnesses. To ensure fair proceedings based on a broad universe of admissible evidence, the Department is not expanding § 106.45(b)(7)(iii) beyond evidence that relates to the sexual interests or prior sexual conduct of complainants. The Department notes that a witness may decline to answer particular questions as part of the grievance procedures.

The Department also declines to revise § 106.45(b)(7)(iii) to generally permit the complainant to provide evidence of their own sexual history, interests, or predisposition. Allowing complainants to broadly introduce the evidence prohibited by § 106.45(b)(7)(iii) threatens to deprive respondents of due process (*e.g.,* allowing a complainant to introduce evidence of prior sexual conduct but not permitting the respondent to rebut) and might result in misuse by the parties. Complainants, like respondents, are only permitted to use such information under the exceptions to § 106.45(b)(7)(iii) when evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is offered to prove consent with evidence concerning specific incidents of the complainant's prior sexual conduct with the respondent.

The Department appreciates concerns that State laws may differ from the grievance procedures outlined here. A recipient may continue to comply with State law to the extent that it does not conflict with the requirements in these final regulations. In the event of an actual conflict between § 106.45(b)(7)(iii) and State or local law, § 106.45(b)(7)(iii) has preemptive effect over the conflicting State or local law. For a more detailed discussion of preemption in these final regulations, see the discussion of § 106.6(b).

Changes: None.

§ 106.45(b)(7)(iii): Evidence Offered To Prove Consent

Comments: Some commenters opposed proposed § 106.45(b)(7)(iii) based on their view that evidence of sexual interests or prior sexual conduct could prove or imply consent. Some commenters urged the Department to remove the second sentence of proposed § 106.45(b)(7)(iii) or to replace it with language stating that the prior sexual conduct does not ''necessarily'' demonstrate or imply consent. One commenter viewed the first and second sentences of proposed § 106.45(b)(7)(iii) as contradicting each other. Another commenter expressed concern that proposed § 106.45(b)(7)(iii) will encourage recipients to draw improper inferences about implied consent and urged the Department to narrow the exception to apply to evidence about how the parties communicated consent rather than to prove consent itself or to clarify that similarities in the types of communications related to consent do not imply consent.

One commenter suggested that the Department revise proposed § 106.45(b)(7)(iii) to clarify that consent is not implied based on a variety of factors, including but not limited to a social or romantic relationship between the parties, and that prior conduct includes conduct occurring after the alleged incident. Another commenter urged the Department to change the references to ''sex-based harassment'' in the second sentence of proposed § 106.45(b)(7)(iii) to ''sexual discrimination.''

Discussion: The Department appreciates the concerns and questions from commenters regarding evidence of the complainant's prior sexual conduct and whether such evidence can demonstrate or imply the complainant's consent to the alleged sex-based harassment. After considering the comments seeking clarification about how evidence of prior sexual conduct can be used, the Department has revised § 106.45(b)(7)(iii) to clarify that the fact of prior consensual sexual conduct does not ''by itself'' demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude a determination that sex-based harassment occurred. Even if there are similarities in the types of consent-related communication, such similarities do not on their own demonstrate or imply the complainant's consent to the alleged conduct or preclude a determination that sex-based harassment occurred. The addition of ''by itself'' helps resolve any perceived inconsistency between the first and second sentences of § 106.45(b)(7)(iii).

The Department clarifies that ''prior'' sexual conduct refers to any conduct prior to the conclusion of the grievance procedures and is not limited to the conduct that occurred prior to the alleged incident of sex-based harassment. This aligns with the Department's position expressed in the preamble to the 2020 amendments that the admission of evidence offered to prove a complainant engaged in other sexual behavior should be prohibited. *See* 85 FR 30354 n.1355 (explaining the Department's use of ''prior'' rather than ''other'' as a more widely understood reference to evidence unrelated to the alleged conduct at issue). The Department also wishes to clarify that § 106.45(b)(7)(iii) does not apply to evidence about a relationship between the parties that is not related to the complainant's sexual interests or prior sexual conduct. Evidence, however, that is directly linked to prior sexual conduct (*e.g.,* evidence of a pregnancy, use of birth control, or a medical history of a sexually transmitted infection) is prohibited under § 106.45(b)(7)(iii) and is only permissible if it falls within an exception.

The Department declines to revise the second sentence of § 106.45(b)(7)(iii) to refer to consent to alleged sex discrimination, rather than consent to alleged sex-based harassment, because evidence of prior consensual sexual conduct generally will not relate to complaints alleging sex discrimination other than sex-based harassment.

Changes: For consistency with the phrase in the second sentence, the Department has revised the first sentence to refer to ''consent to the alleged sex-based harassment.'' The Department has revised the second sentence of § 106.45(b)(7)(iii) to state that prior consensual sexual conduct between the parties does not ''by itself'' demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude a determination that sex-based harassment occurred. The Department has also made non-

substantive revisions for clarity to move the language ''offered to prove consent'' to the end of the sentence, to add ''to the alleged sex-based harassment'' for clarity, and to replace the word ''concerning'' with the word ''about.''

§ 106.45(b)(7)(iii): Sexual Interests

Comments: Some commenters objected to the use of the phrase ''sexual interests or prior sexual conduct,'' and suggested alternatives, including ''sexual interests, history, and/or predisposition,'' or some combination of those terms. One commenter cited Rule 412(a)(2) of the Federal Rules of Evidence, which uses the term ''sexual predisposition.'' One commenter expressed concern about the absence of a definition of sexual interests.

Discussion: For the reasons expressed in the July 2022 NPRM, the Department continues to maintain that the phrase ''sexual interests or prior sexual conduct'' best describes the sensitive information that the Department seeks to protect under § 106.45(b)(7)(iii). 87 FR 41472. The Department maintains its position from the July 2022 NPRM that the best approach is to reference the complainant's ''prior sexual conduct'' instead of ''prior sexual behavior'' or ''prior sexual history'' because these Title IX regulations repeatedly use the term ''conduct.'' In addition, the Department continues to maintain that the term ''sexual interests'' is more appropriate than the term ''sexual predisposition,'' which the Department views as an outdated phrase that may conjure the type of assumptions that the Department seeks to prohibit. *See* 87 FR 41472 (citing 85 FR 30351). Although the Department has updated the terminology, evidence related to sexual predisposition that the 2020 amendments prohibited continues to be prohibited as evidence related to sexual interests under these final regulations. The Department notes that evidence related to sexual interests includes, but is not limited to, evidence like mode of dress, speech, and lifestyle. This position is not inconsistent with the Federal Rules of Evidence. *See* Fed. R. Evid. 412 advisory committee's note to the 1994 amendment (explaining ''sexual predisposition'').

Changes: None.

9. Section 106.45(b)(8) Procedures That Apply to Some, But Not All, Complaints

Comments: Some commenters asked whether a recipient has discretion to use certain procedures for some, but not all, complaints of sex discrimination, provided that those procedures are all consistent with the regulations.

Discussion: As explained elsewhere in the preamble, the final regulations provide a recipient with reasonable options for how to structure grievance procedures to ensure they are equitable for the parties while accommodating each recipient's administrative structure, education community, and applicable Federal, State, or local law. In light of this goal, it is appropriate to provide a recipient with discretion to use certain procedures for some, but not all, complaints of sex discrimination, provided that it informs its education community in advance of when certain procedures apply. The Department has added a new § 106.45(b)(8) requiring a recipient that chooses to adopt grievance procedures that apply to some, but not all, complaints, to articulate consistent principles in its written grievance procedures for how the recipient will determine which procedures apply. This means that a recipient must provide information regarding what factors, if any, the recipient will consider when determining under what circumstances or to which types of sex discrimination complaints certain procedures apply (*e.g.,* complaints involving certain forms of sex-based harassment, student-to-student sex-based harassment complaints, complaints with certain types of evidence, complaints involving students of certain ages or education levels). The Department also notes that a recipient's determination regarding whether to apply certain procedures to some, but not all, complaints must be made in a manner that treats complainants and respondents equitably, consistent with § 106.45(b)(1). In addition, although this provision permits a recipient to use different procedures for some, but not all, complaints of sex discrimination, a recipient is not permitted to use different procedures for different parties within a specific complaint investigation (*e.g.,* use a live hearing with questioning by an advisor for assessing the credibility of one party and use live questioning during individual meetings to assess the credibility of the other party) absent a party's need for a disability-related accommodation or language access services.

Changes: The Department has added new § 106.45(b)(8) requiring a recipient's grievance procedures to articulate consistent principles for how the recipient will determine which procedures apply if a recipient chooses to adopt certain aspects of the grievance procedures for the resolution of some, but not all, complaints.

10. Section 106.45(c) Notice of Allegations

Comments: Some commenters urged the Department to maintain the 2020 amendments' requirements for providing a notice of allegations for multiple reasons, including that such a notice ensures respondents receive due process protections and are able to adequately respond to allegations. Commenters noted that courts have recognized the importance of providing adequate notice to respondents.

Some commenters requested more clarity regarding what constitutes ''sufficient information'' in § 106.45(c)(1)(ii) to allow the parties to respond to the allegations, including whether it should specify specific forms of discrimination or identify specific policies alleged to have been violated.

Other commenters suggested further simplifying or eliminating the notice of allegations requirement in proposed § 106.45(c).

Some commenters expressed support for the proposed requirement that recipients provide written notice of sex-based harassment allegations at the postsecondary level and allow oral notice of sex discrimination allegations in elementary schools and secondary schools, noting that different procedures are appropriate due to differences in the ages and needs of different students. Conversely, some commenters expressed concern and confusion that the ''sufficient information'' identified in § 106.45(c)(1)(ii) is not the same as the written notices required by § 106.46(c). Some commenters urged the Department to extend the requirement for a written notice of allegations in proposed § 106.46(c) to the contexts covered by § 106.45(c), arguing that written notice promotes predictability, transparency, and consistency, enhances the legitimacy of the process, and ensures recipients have a written documentation of having provided notice.

Some commenters urged the Department to add other elements to the notice, including, for example, information regarding grievance procedures, the parties' rights, access to an advisor, evidentiary standards, and the retaliation reporting process.

Some commenters sought clarifications or changes regarding the timing of the notice. For example, some commenters asked the Department to clarify how a recipient can ensure simultaneous communication with the parties when notice is provided orally. Some commenters suggested that recipients should be required to provide a notice of allegations only when a

recipient is bringing a misconduct charge under Title IX, not upon the receipt of a complaint. One commenter asked the Department to clarify whether a recipient needs to provide notice of allegations to parties prior to informal resolution, noting that proposed § 106.45(c)(ii) seems to conflict with the nondisclosure protections in proposed § 106.44(j).

One commenter urged the Department to examine how certain notifications to a student's parents could adversely impact an LGBTQI+ or pregnant student in some cases, such as leaving them homeless or vulnerable to abuse.

Discussion: The Department acknowledges comments supporting a notice of allegations that ensures fairness and transparency and aligns with due process protections recognized by Federal courts. As explained in the July 2022 NPRM, § 106.45(c) maintains many components of the notice of allegations in the 2020 amendments, meets and surpasses the due process requirements set by the Supreme Court in *Goss,* 419 U.S. at 581, allows flexibility in recognition of differences in the elementary and secondary and postsecondary contexts, and aligns with other revisions to the grievance procedure requirements. 87 FR 41473–74.

The Department proposed the changes in the July 2022 NPRM in light of factors including public input OCR received in listening sessions and during the June 2021 Title IX Public Hearing. 87 FR 41473. The principal changes were to broaden the requirement for a notice of allegations to apply to any form of sex discrimination rather than applying only to allegations of sex-based harassment, add a requirement that the notice remind parties that retaliation is prohibited to address concerns raised by some stakeholders, and give recipients more flexibility to provide a simplified and oral notice in appropriate contexts to address stakeholder concerns about challenges in applying this requirement in elementary schools and secondary schools. The Department maintains that these changes make the notice of allegations more consistent with the scope of Title IX and give recipients appropriate flexibility to apply the requirement in ways that are better designed to timely and effectively inform parties of its investigation.

The Department declines to adopt commenters' suggestions to further simplify or eliminate the notice of allegations requirement. As explained in more detail in the July 2022 NPRM and below, the Department has determined each element of the notice of allegations serves an important function to ensure adequate, reliable, and impartial investigations of sex discrimination complaints. 87 FR 41472–74.

Further, the Department agrees with commenters that a written notice of allegations can promote predictability, transparency, consistency, and legitimacy in a recipient's implementation of its grievance procedures. A recipient may choose to reduce notices of allegations to writing, particularly in cases involving more serious conduct and more serious consequences, and in which the recipient determines written notice is required by due process, State or local law, or a recipient policy. Section 106.8(f) requires recipients to maintain records documenting their response to complaints of sex discrimination, which would include providing the notice of allegations. However, as explained in the July 2022 NPRM, a requirement that the notice be in writing may limit a recipient's ability to respond promptly and in a developmentally and age-appropriate way when a student complains of sex discrimination. 87 FR 41473. For example, in the elementary school or secondary school context, a prompt oral response can be a valuable teaching moment, particularly with younger students. To allow for this important flexibility, we decline to require written notice of the allegations for an elementary school or secondary school in these final regulations, but note that the requirements in § 106.8(f) require a recipient to keep records documenting the grievance procedures, including a notice of allegations provided orally. In addition, in complaints outside the harassment context, there may be no respondent and therefore the notice would only need to be provided to the complainant, who presumably will already have information about the alleged sex discrimination. In such a situation, oral notice may be appropriate.

With respect to comments on differences between what constitutes ''sufficient information'' for purposes of §§ 106.45(c)(1)(ii) and 106.46(c), the Department has determined that providing detailed information about the grievance procedures in § 106.46(c)(2) would not always be suitable in the context of providing oral notice or notice to a young student under § 106.45(c). However, as noted above, nothing in the final regulations prevents a recipient from providing additional information in its oral notice of allegations or from reducing its notice to writing.

The Department appreciates the commenter's question about how a recipient can ensure simultaneous communication with the parties when notice of the allegations is provided orally. The final regulations require that a recipient provide the notice of allegations to the parties who are known, but simultaneous notice is not required. The Department notes that § 106.45(b)(1) requires a recipient to treat complainants and respondents equitably throughout the grievance procedures, but equitable treatment does not necessarily require simultaneous notice, particularly when it would be inappropriate or impractical to do so.

The Department appreciates the opportunity to clarify the timing of the notice of allegations. Section 106.45(c) requires a recipient to provide the notice ''[u]pon initiation of the recipient's grievance procedures,'' which is different from the 2020 amendments, which required notice ''[u]pon receipt of a formal complaint.'' 34 CFR 106.45(b)(2)(i). This change ensures a recipient has time to review a complaint, determine whether the complaint is appropriate for dismissal under § 106.45(d)(1), confirm the accuracy of information to be included in the notice, and address any safety concerns, if appropriate. However, a recipient will need to provide the notice as soon as these threshold issues have been resolved and the grievance procedures have been initiated, to ensure that any delay does not undermine a recipient's obligation to resolve a sex discrimination complaint promptly and equitably.

In response to questions about what constitutes ''[s]ufficient information available at the time to allow the parties to respond to the allegations,'' the Department notes that § 106.45(c) specifies that the recipient must include the identities of the parties involved in the incident, the conduct alleged to constitute sex discrimination under Title IX or this part, and the date and location of the alleged incident, if available to the recipient. A recipient may, but is not required to, provide additional information at that time, as long as sharing the information does not violate other obligations. The Department declines the commenters' suggestions to narrow or broaden the requirement to specify the ''conduct alleged to constitute sex discrimination under Title IX,'' as the appropriate information may vary depending on the facts of a particular complaint, how a recipient defines prohibited conduct in its policies, and other factors. In all cases, however, the information included must be sufficient to allow the parties to respond to the allegations.

Including additional information and reducing the notice to writing may be particularly helpful in cases involving more serious conduct and more serious consequences. As a baseline, however, a streamlined notice will be easier for a recipient to implement consistently and easier for parties to understand. In addition, as noted in the July 2022 NPRM, requiring a recipient to include detailed information in its notice of allegations is not necessary in all cases and may prevent a recipient from responding promptly and appropriately to all forms of sex discrimination in the educational environment, particularly at the elementary school and secondary school level. 87 FR 41473.

With respect to informal resolution, the Department appreciates the opportunity to clarify that a recipient must provide the notice of allegations upon initiation of the recipient's grievance procedures, which necessarily precedes offering the parties any opportunity for informal resolution. Providing the parties notice of the allegations is essential even when resolving a case informally, to ensure the parties can make an informed decision as to whether to agree to participate in an informal resolution process. The Department disagrees with the commenter's suggestion that a conflict may arise between the notice provision in §§ 106.45(c)(ii) and 106.44(j). The disclosure restrictions described in § 106.44(j) specify exceptions in which personally identifiable information may be disclosed, and they include disclosures made to carry out this part, which includes disclosures made in accordance with §§ 106.44, 106.45, and 106.46.

The Department appreciates the commenter's concern as to how sending a notice of allegations to a student's parents could adversely impact a student who feels unsafe at home. The Department recognizes that some students feel unsafe at home or could have fears about their safety if disclosures were made to a parent or guardian. Concerns about abuse or threats to a student's safety should be addressed in a manner consistent with applicable State and local laws, which may provide protection in those circumstances. As a general matter, it is important for parents to be involved in decision-making about a minor child, and the Department declines to make a change to § 106.45(c) in response to the commenter's concern. We also note that nothing in Title IX or the final regulations can derogate any legal right of a parent, guardian, or other authorized legal representative to act on behalf of a student. *See* the discussion regarding § 106.6(g).

To ensure clarity and consistency with § 106.45(f)(4) and ensure that parties are notified of their rights regarding access to the evidence, the Department has revised proposed § 106.45(c)(1) to require the notice to include a statement that the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence or an accurate description of this evidence and if a recipient provides a description of the evidence, the parties may also request—and then must receive—access to the relevant and not impermissible evidence under § 106.45(f)(4)(i).

The Department also observed that the reference to additional allegations ''about the respondent's conduct toward the complainant'' in § 106.45(c)(2) did not limit these allegations to those involving sex discrimination. The Department therefore revised this paragraph to clarify that it applies to additional allegations ''of sex discrimination by the respondent.''

Changes: The Department has added ''(s)'' to the end of the words ''incident,'' ''date,'' and ''location,'' to account for alleged conduct that includes more than one incident or that occurred on more than one date or at more than one location. The Department has added § 106.45(c)(1)(iv) stating that the notice of allegations must include a statement that the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence or an accurate description of this evidence and if a recipient provides a description of the evidence, the parties may request and then must receive access to the relevant and not otherwise impermissible evidence. The Department revised § 106.45(c)(2) to clarify its application to additional allegations ''of sex discrimination by the respondent'' and to change a reference to paragraph (c)(1) to paragraph (c).

11. Section 106.45(d) Dismissal of a Complaint

General Support and Opposition

Comments: Some commenters supported proposed § 106.45(d), arguing that it would increase flexibility, reduce burden on a recipient, and alleviate confusion for parties. For example, some commenters included specific anecdotes of barriers that parties faced to resolve complaints under the prior approach to dismissal.

Some commenters requested clarifications on § 106.45(d), including whether a recipient could dismiss a complaint because the alleged conduct did not occur under the recipient's education program or activity, or whether the recipient must use the term ''dismissal,'' which could be distressing and confusing to complainants.

Discussion: The Department agrees that § 106.45(d) will provide a recipient increased flexibility to address sex discrimination in its education program or activity and will lead to more effective Title IX enforcement. The Department also agrees that § 106.45(d) will streamline and clarify grievance procedures for students and recipients.

The Department appreciates the opportunity to clarify that, consistent with § 106.45(d)(1)(iii) and (iv), a recipient may dismiss a complaint because the alleged conduct did not occur under the recipient's education program or activity. As explained in more detail in the discussion of § 106.11, a recipient has an obligation to address all sex discrimination occurring under a recipient's education program or activity. Conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution and conduct that is subject to the recipient's disciplinary authority. *See* § 106.11. Further, a recipient has an obligation to address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to that hostile environment occurred outside of the recipient's education program or activity or outside the United States. *See id.* However, if alleged conduct did not occur under the recipient's education program or activity, neither Title IX nor this part apply. *See id.; see also* discussion of § 106.11. Accordingly, a complaint that alleges such conduct would not constitute sex discrimination ''under Title IX or this part'' and may be dismissed. *See* § 106.45(d)(1)(iii), (iv).

The Department declines to opine on whether a recipient's grievance procedures should replicate terminology such as ''dismissal.'' As a general matter, using the same terminology from final regulations could facilitate comparisons between a recipient's published grievance procedures and Title IX regulations, which could aid in enforcement efforts by the Department. Nonetheless, the Department acknowledges that different terminology may be more appropriate and understandable depending, for example, on the age, maturity, and educational level of a recipient's student population. Accordingly, a recipient has discretion in how it communicates its obligations

under § 106.45(d) to students, as long as it effectively conveys the circumstances in which a recipient may decline to initiate or continue a Title IX investigation or grievance procedures and otherwise complies with § 106.45(d).

Changes: None.

Section 106.45(d)(1) Permissive Dismissals

Comments: Commenters supported the permissive dismissals approach codified in proposed § 106.45(d)(1) and commended the removal of the mandatory dismissal provision from the 2020 amendments for numerous reasons. For example, some commenters emphasized that the 2020 amendments' mandatory dismissal requirements resulted in premature and improper dismissal of complaints that may have uncovered actionable sex discrimination with more investigation or inappropriately required dismissals of complaints in which the respondent was a student, but the complainant was no longer a student or employee.

In contrast, some commenters believed a recipient should not have authority to dismiss a complaint under proposed § 106.45(d), arguing that it creates burdens and confusion for complainants, is contrary to the purposes of Title IX, and could lead recipients to eliminate alternative resolution options. Other commenters opposed permissive dismissals under proposed § 106.45(d)(1) because, they asserted, they would threaten the First Amendment rights of students if a recipient declined to dismiss a complaint and proceeded with grievance procedures that punish or chill student speech. For example, some commenters urged the Department to maintain the dismissal requirements in the 2020 amendments that are similar to legal standards used by courts when evaluating a motion to dismiss.

Commenters suggested modifying proposed § 106.45(d)(1) to expand or clarify the appropriate grounds for dismissal. For example, some commenters suggested that § 106.45(d) should permit the dismissal of a complaint when there are no supporting alleged facts or behaviors, the allegations are outside the recipient's jurisdiction, there is not a sufficient nexus between the alleged conduct and the recipient, the complainant is no longer participating in the recipient's education program or activity, or the complaint is based on false allegations or wrongful behavior by the complainant. Some commenters sought clarification on whether the named grounds for permissive dismissal are exhaustive and on how a recipient should proceed in cases in which the complainant is no longer a student or employee.

Discussion: The Department agrees that the removal of mandatory dismissals better fulfills Title IX's nondiscrimination mandate by supporting access to a recipient's grievance procedures. The Department agrees that final § 106.45(d)(1) will allow a recipient to investigate and resolve complaints that are within the scope of Title IX more effectively.

The Department understands that the mandatory dismissal provision in the 2020 amendments may have limited the effectiveness of Title IX enforcement, including by requiring dismissal of complaints when recipients may not have been in a position to know whether further investigation and resolution of potential sex discrimination would be warranted. The Department received extensive feedback objecting to mandatory dismissals, including from recipients, through the June 2021 Title IX Public Hearing, numerous listening sessions with stakeholders, 2022 meetings held under Executive Order 12866, and in response to the July 2022 NPRM. After considering that feedback, the Department determined that requiring the dismissal of complaints without the completion of an investigation may not fully afford students the protections of Title IX's nondiscrimination mandate. Accordingly, the Department maintains that a recipient should not be required to dismiss a complaint based on a determination whether the conduct alleged meets the definition of sex discrimination at the outset of grievance procedures. Based on the feedback described, the Department recognizes that in many cases, it will not be clear at the beginning of an investigation whether alleged conduct could constitute sex discrimination and, therefore, a recipient would be required to take additional steps to comply with its obligation under Title IX to ensure its education program or activity is free from sex discrimination. In these cases, a recipient's grievance procedures consistent with § 106.45, and as applicable § 106.46, would guide the recipient's investigation and determination to ensure that both are thorough, prompt, and equitable. The Department recognizes, however, that a dismissal determination may be appropriate in a limited set of circumstances, which are articulated in § 106.45(d)(1). In those cases, the Department's view is that a recipient should have the discretion to dismiss the complaint and avoid conducting an unnecessary investigation.

For these reasons, the Department disagrees with the assertion that a recipient should not have authority to dismiss a complaint or that dismissals of complaints are contrary to the purpose of Title IX. Specifically, in instances in which it would be impracticable to address alleged sex discrimination because the recipient is unable to identify or exert control over the respondent, *see* § 106.45(d)(1)(i) and (ii), or the alleged conduct would not constitute sex discrimination, *see* § 106.45(d)(1)(iii) and (iv), dismissal is proper and consistent with the purpose of Title IX. Further, because there are circumstances in which it would be unclear whether a complaint satisfies these categories at the outset of an investigation, § 106.45(d) allows a recipient to comply with its obligation to address sex discrimination by either initiating or continuing grievance procedures to make a determination whether sex discrimination occurred, or alternatively, allowing a recipient to address such conduct in the manner it deems fit, such as by offering supportive measures or informal resolution options, as appropriate, to the parties. *See* § 106.45(d)(4)(iii).

Regarding the assertion that permissive dismissals will incentivize recipients to eliminate informal resolution options, the Department notes that § 106.45(d) does not preclude a recipient from offering informal resolution prior to dismissal of a complaint.

The Department also disagrees that any part of § 106.45(d) exceeds the Department's authority. Congress has authorized the Department to issue regulations to effectuate Title IX's prohibition on sex discrimination, 20 U.S.C. 1682, and the Supreme Court has specifically recognized the Department's authority to adopt regulations governing the procedures recipients use to resolve complaints of sex discrimination. *Gebser,* 524 U.S. at 292. Section 106.45(d) is an important element of a recipient's compliance with Title IX because it helps ensure a recipient's efforts focus on the harms Title IX prohibits and that are within a recipient's power to address.

Regarding concerns that § 106.45(d) will confuse complainants, the Department notes that a recipient is required to put its grievance procedures in writing under § 106.45(a)(1) and include information on how to locate its grievance procedures in the notice of nondiscrimination that is disseminated to students under § 106.8(c)(1)(i)(D). Additionally, the Title IX Coordinator

serves as a resource to complainants and respondents who can explain grievance procedures to parties and answer questions related to a recipient's procedures.

We disagree that § 106.45(d)(1) would undermine an individual's free speech rights. Title IX requires a recipient to address sex-based harassment in its education program or activity, and the final regulations do not and cannot restrict rights protected by the First Amendment. Additional discussion regarding the definition of sex-based harassment and the First Amendment is provided in the discussion of Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2) (Section I.C).

The Department declines to incorporate the commenters' suggested additional bases for dismissal because they are either already captured in the final regulations or would be contrary to the purpose of dismissal. For example, some bases, such as lack of nexus or jurisdiction may, depending on the facts, be covered by the bases listed in § 106.45(d)(1) or other provisions such as §§ 106.45(a)(2) or 106.11. The Department also declines to add bases that depend on evaluation of credibility or factual determinations because a recipient would not be able to determine the veracity of a statement or testimony without an investigation or other factfinding associated with grievance procedures. For instance, the proper response to alleged retaliation from any party is to initiate an investigation under a recipient's grievance procedures, not to dismiss an underlying complaint for which the recipient has not determined whether sex discrimination occurred.

The Department appreciates the opportunity to clarify that the categories for which a recipient may dismiss a complaint in § 106.45(d)(1) are exhaustive. As such, unless one of the four reasons under § 106.45(d)(1) is satisfied, a recipient must implement grievance procedures under § 106.45, and as applicable § 106.46, or an informal resolution process under § 106.44(k), if available and appropriate. We note that dismissals under § 106.45(d)(1) are permissive, rather than mandatory, and that a recipient could either decline, initiate, or continue grievance procedures if any of the four reasons is satisfied. As such, the Department disagrees that final § 106.45(d) would encourage dismissals in a manner that disfavors complainants or discourage dismissals in a manner that disfavors respondents. In addition, a recipient exercising its permissive dismissal of a complaint under Title IX may still be obligated by other requirements, such as Title VII, to investigate and address the complaint. Further, as explained in more detail in the discussion of § 106.45(d)(4), the final regulations require a recipient that dismisses a complaint to offer supportive measures to the complainant and respondent, as appropriate, as well as take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity, which will further mitigate the risk of depriving any party of an educational opportunity.

The Department declines to offer more specific guidance at this time on how a recipient should investigate a complaint made by a person who is no longer participating in its education program or activity. How a recipient investigates and conducts grievance procedures for such a complaint could depend on a variety of factors, including the conduct alleged; the identity of the respondent, if known; and whether the respondent is participating in the recipient's education program or activity. The Department understands that supporting recipients in the implementation of these regulations and ensuring that members of the recipient's community know their rights is important. The Department will offer technical assistance, as appropriate, to promote compliance with these final regulations, the scope of which will be determined in the future.

Changes: None.

Section 106.45(d)(1)(i) Recipient Is Unable To Identify the Respondent

Comments: One commenter said that it would be inappropriate or impossible to initiate grievance procedures or notice to the respondent in any circumstance under § 106.45(d)(1)(i), in part because the respondent would be unknown.

Discussion: The Department disagrees that it would be inappropriate or impossible for a recipient to ultimately initiate grievance procedures or provide notice to a respondent who was unknown to the complainant. Under § 106.45(d)(1)(i), a recipient must take reasonable steps to identify the respondent. These steps may include, but are not limited to, interviewing the complainant, interviewing potential witnesses, and reviewing contemporaneous records such as video footage and visitor logs if relevant.

If a respondent's identity cannot be ascertained, a recipient should consider, in deciding whether dismissal may be appropriate, if there are good reasons to proceed with grievance procedures without a respondent, such as providing closure to the complainant or addressing circumstances independent of the identity of the respondent that may have contributed to an incident (*e.g.,* unsafe conditions, lack of monitoring, inadequate policies). If the specific steps set out in § 106.45 will not be effective without a respondent, dismissal under § 106.45(d)(1)(i) would be permitted and may be proper. For example, in *Feminist Majority Foundation* v. *Hurley,* the Fourth Circuit held that a recipient's failure to identify or adequately address sex-based harassment directed at students on an anonymous social media platform may violate Title IX. 911 F.3d 674, 692–93 (4th Cir. 2018). In its holding, the court identified several steps that the university could have taken to address the anonymous harassment, including more vigorously denouncing the harassing conduct, mandating a student body assembly to discourage such harassment on social media platforms, seeking external advice to develop policies to address and prevent harassment, or offering counseling to the complainants. *Id.*

Additionally, although § 106.45(d)(1)(i) allows a recipient to dismiss a complaint if it is unable to identify the respondent after taking reasonable steps to do so, this provision does not permit a recipient to dismiss a sex discrimination complaint alleging that a recipient's policy or practice discriminates based on sex simply because no individual respondent was named in the complaint.

Changes: None.

Section 106.45(d)(1)(ii) Respondent Is Not Participating in the Recipient's Education Program or Activity and Is Not Employed by the Recipient

Comments: Some commenters supported § 106.45(d)(1)(ii), which permits dismissal of a complaint if the respondent is not participating in or employed by the recipient's education program or activity. Commenters appreciated the change from current § 106.45(b)(3)(ii), which permits dismissal of a complaint if the respondent is no longer enrolled, because § 106.45(d)(1)(ii) permits the recipient to address an allegation even if the respondent is disenrolled or is on recipient-approved leave.

Some commenters argued § 106.45(d)(1)(ii) would exceed the Department's authority by allowing a recipient to take action against a third party.

In contrast, some commenters were concerned that § 106.45(d)(1)(ii) may require a recipient to dismiss a

complaint against a respondent who is not an employee or participating in the education program or activity, contrary to the Department's previous recognition that a third party could create a hostile environment on campus.

One commenter asserted that § 106.45(d)(1)(ii) would encourage a respondent to leave a recipient's education program or activity so they would not be subject to that recipient's grievance procedures and would permit the respondent to become a student or employee at another recipient where they could engage in sex discrimination.

Commenters suggested language changes to proposed § 106.45(d)(1)(ii), including that the Department replace ''participating'' with ''accessing,'' reference ''educational benefits'' in addition to the recipient's ''education program or activity,'' and replace ''and'' with ''or'' to clarify the breadth of the provision.

Some commenters requested clarification as to whether a recipient could restrict a respondent from attending a recipient's event if a complaint against that respondent was dismissed under § 106.45(d)(1)(ii).

Discussion: The Department agrees that allowing a dismissal only when a respondent is no longer participating in, rather than merely disenrolled from, a recipient's education program or activity could require a recipient to investigate a broader range of complaints of sex discrimination. Contrary to some commenters' assertions, a recipient has an obligation to address allegations of sex discrimination that limit or deny a person's participation in its education program or activity, including when the discrimination is perpetuated by a non-student or non-employee if it otherwise falls within the scope of Title IX. *See, e.g., Hall,* 22 F.4th at 403, 405–07 (3d Cir. 2022); *Simpson* v. *Univ. of Colo. Boulder,* 500 F.3d 1170, 1180–85 (10th Cir. 2007) (holding that a university could be liable under Title IX for sexual harassment by nonstudent football recruits). Final § 106.45(d)(1)(ii) therefore requires a recipient to implement grievance procedures under § 106.45, and if applicable § 106.46, or an informal resolution process under § 106.44(k), if available and appropriate, if a non-student or non-employee who is participating in the recipient's education program or activity engages in sex discrimination.

It appears that some commenters misunderstood § 106.45(d)(1)(ii) as requiring dismissal. In fact, under § 106.45(d)(1)(ii), dismissal of a complaint is permitted, but not required. Because dismissal under this category is at the discretion of the recipient, the Department disagrees that § 106.45(d)(1)(ii) encourages respondents to disenroll and engage in sex discrimination in another recipient's education program or activity. In addition, if a respondent is disenrolled but otherwise participating in a recipient's education program or activity, dismissal of the complaint on that basis would be improper. As noted in the July 2022 NPRM, participation in a recipient's education program or activity could include serving in an alumni organization or as a volunteer or attending school-related events. 87 FR 41476.

A recipient has an obligation to address sex discrimination in its own education program or activity, but a recipient may have limited control over a respondent who is no longer employed by the recipient or participating in its education program or activity. Under § 106.45(d)(1)(ii), a recipient may elect to implement grievance procedures for a complaint in which a respondent is not employed by or participating in its education program or activity, though it would not be required to do so. As noted in the 2020 amendments, by granting recipients the discretion to dismiss in situations in which the respondent is no longer a student or employee of the recipient, § 106.45(d)(1)(ii) appropriately permits a recipient to consider, for example, whether a respondent poses an ongoing risk to the recipient's community or whether a determination could provide a benefit to the complainant or assist the recipient in complying with its obligations under other laws related to addressing sexual misconduct involving minor students. *See, e.g.,* U.S. Dep't of Educ., Office of Elementary and Secondary Education, Dear Colleague Letter on ESEA Section 8546 Requirements (June 27, 2018), *https://www2.ed.gov/policy/elsec/leg/essa/section8546dearcolleagueletter.pdf* (referencing the obligation of an elementary school or secondary school to determine if there is probable cause to believe that an employee engaged in sexual misconduct under the Every Student Succeeds Act, 20 U.S.C. 7926); 85 FR 30290. Additionally, continuing grievance procedures under § 106.45(d)(1)(ii) may assist another recipient in meeting its obligations under Title IX, particularly if a respondent becomes an employee or student at another recipient. *Cf. Williams,* 477 F.3d at 1296 (holding that a university that recruited a student who engaged in sexual harassment at a previous university without properly supervising the recruit or informing him of the recipient's sexual harassment policy may be found deliberately indifferent to sexual harassment committed by the recruit under Title IX); 34 CFR 99.31(a)(2) (permitting an educational agency or institution to disclose education records to another school, school system, or postsecondary institution in which the student seeks to enroll or is already enrolled) and 99.34 (setting forth requirements for such disclosures). In the event that the recipient elects to dismiss such a complaint, under § 106.45(d)(4)(i) and (iii) of the final regulations, it must offer supportive measures to the complainant, as appropriate, and take other steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.

The Department declines the suggestion to modify § 106.45(d)(1)(ii) to allow dismissal if the respondent is no longer ''accessing education benefits'' because doing so could create inconsistencies with the terminology used in the statute and current and final regulations, which consistently refer to ''participation'' in a recipient's education program or activity. *See, e.g.,* 20 U.S.C. 1681(a); 34 CFR 106.34(a), 106.40(b). Similarly, unlike ''an education program or activity,'' which is used throughout the statute and regulations, the meaning of ''education benefits'' is not readily understood by reference to Title IX, the Department's Title IX regulations, or other State and Federal laws. The Department also declines a commenter's suggestion to change ''and'' to ''or'' in § 106.45(d)(1)(ii) because ''and'' more clearly communicates that this dismissal option is available only when the respondent is not participating in the education program or activity and not employed by the recipient.

The Department appreciates the opportunity to respond to questions about whether a recipient should restrict a respondent from attending a recipient event if a complaint was dismissed under § 106.45(d)(1)(ii) before the recipient learned that the respondent was participating in the recipient's event. As explained in the July 2022 NPRM, if a Title IX Coordinator is notified that a third party who is not a student or an employee of the recipient is attending events organized by the recipient and engaging in harassing or discriminatory behavior at such events, the Title IX Coordinator would need to take prompt and effective action consistent with § 106.44(f)(1)(vii) to end such discrimination and prevent its recurrence even in the absence of a

complaint. 87 FR 41447. In this example, the Title IX Coordinator may choose to bar the third party from the recipient's events or campus in general, or otherwise take appropriate prompt and effective steps to ensure sex discrimination does not continue or recur in the recipient's education program or activity. *Id.* Alternatively, the recipient may reopen the complaint to initiate or resume grievance procedures.

The Department also emphasizes that unless one of the other permissive bases for dismissal exists, a recipient must not dismiss a complaint when a respondent is participating in a recipient's education program or activity, such as by attending recipient events. Further, consistent with § 106.44(g)(2), a recipient may provide supportive measures, as appropriate, that do not unreasonably burden either party, are designed to protect the safety of the parties or the recipient's educational environment or to provide support during the recipient's grievance procedures or during the informal resolution process, and are not imposed for punitive or disciplinary reasons. *See* discussion of § 106.44(g).

Changes: None.

Section 106.45(d)(1)(iii) Complainant Voluntarily Withdraws Any or All of the Allegations in the Complaint

Comments: One commenter urged the Department to consider whether a recipient would have an obligation to proceed with a Title IX investigation when a complainant withdraws a complaint because a private settlement was reached with the respondent, but the settlement does not resolve a broader, ongoing safety issue on campus. The commenter also suggested that § 106.45(d)(1)(iii) be narrowed to read: ''The complainant voluntarily withdraws all of the allegations in the complaint.''

Discussion: The Department emphasizes that whether the conditions for dismissal of a complaint under § 106.45(d)(1)(iii) would be met is a fact-specific inquiry. The Department acknowledges that in some cases, a complainant's withdrawal of allegations would leave no remaining allegations for a recipient to address through its grievance procedures. Dismissal would then be permitted under § 106.45(d)(1)(iii). In other cases, there may be remaining allegations that would independently constitute sex discrimination under Title IX. This might occur, for example, in a complaint that involves multiple complainants, allegations against several respondents, alleged discrimination that occurred on more than one occasion, or as one commenter intimated, when there is an ongoing safety issue. Final § 106.45(d)(1)(iii) would leave to the recipient's discretion the determination whether any alleged conduct that remains could, if proven, constitute sex discrimination under Title IX. Because dismissal could be appropriate if ''any'' of the allegations are withdrawn, or if ''all'' of the allegations have been withdrawn, the Department declines to narrow § 106.45(d)(1)(iii). The Department also notes that even when a recipient dismisses a withdrawn complaint under § 106.45(d)(1)(iii), under § 106.44(f)(1)(v), the recipient also has an obligation to consider whether other factors warrant initiating grievance procedures to investigate alleged conduct that either presents an imminent and serious threat to the health or safety of a complainant or other person or prevents the recipient from ensuring equal access based on sex to its education program or activity. *See* discussion of § 106.44(f)(1)(v).

Finally, upon its own review, for clarity and consistency with other parts of the regulations, the Department has included a reference to Title IX ''or this part.''

Changes: The Department has revised § 106.45(d)(1)(iii) to include a cross-reference to § 106.44(f)(1)(v) to make clear that if a complainant withdraws any or all of the allegations of the complaint, the Title IX Coordinator still has an obligation to determine whether other factors warrant initiating grievance procedures. Additionally, to maintain consistency with other parts of the regulations, final § 106.45(d)(1)(iii) states that dismissal is permissive if the alleged conduct, even if proven, would not constitute sex discrimination under Title IX ''or this part.''

Section 106.45(d)(1)(iv) Conduct Alleged Would Not Constitute Sex Discrimination Under Title IX

Comments: Some commenters argued that a recipient should be required, rather than merely allowed, to dismiss any complaint that does not on its face meet the Title IX definition of ''sexual harassment.''

Some commenters specifically expressed concern about the last sentence of § 106.45(d)(1)(iv), which requires that a recipient, prior to dismissing the complaint, make reasonable efforts to clarify the allegations with the complainant. For example, commenters expressed concern that this could allow an investigator to inappropriately revise the complaint or have inappropriate *ex parte* communications with the complainant.

Conversely, some commenters suggested that the Department further strengthen the recipients' obligations under § 106.45(d)(1)(iv) to prevent dismissal solely because a complaint is not clearly articulated, which might happen for many reasons, including because a complainant misunderstands the legal standard, has limited English proficiency, or has a disability.

Discussion: The Department declines commenters' suggestion to require dismissals under § 106.45(d)(1)(iv) rather than granting a recipient discretion as to whether to dismiss such a complaint. As discussed in the July 2022 NPRM, the procedures in § 106.45 are designed to elicit information sufficient for a recipient to make an informed decision as to whether sex discrimination occurred and requiring, rather than permitting, dismissal would cause a recipient to forgo these procedures in many cases or possibly make hasty judgment calls at the outset of a complaint. 87 FR 41477–78. In the early stages of the complaint process, gathering more information, including from the complainant, may help to confirm whether the allegations, if true, would amount to sex discrimination. For instance, in cases of sex-based harassment in which one or more of the parties may have been incapacitated during the alleged incident, a recipient may gain additional information to establish what occurred through witness interviews conducted as part of its investigation under its grievance procedures. 87 FR 41478. In other cases, a complainant may report an allegation of sex-based harassment but lack information about severity or pervasiveness that, for example, a recipient might receive through evidence gathering under its grievance procedures. *Id.* Requiring dismissal of all such complaints would prevent a recipient from using its grievance procedures to address possible sex-based harassment in its education program or activity. *Id.* The Department recognized this in the preamble to the 2020 amendments when, in response to comments, the Department declined to permit dismissal of ''frivolous complaints'' because ''the point of the § 106.45 grievance process is to require the recipient to gather and objectively evaluate relevant evidence before reaching conclusions about the merits of the allegations.'' 85 FR 30290.

For similar reasons, the Department maintains that it is necessary and appropriate for recipients to make reasonable efforts to clarify allegations with the complainant before dismissing

a complaint under § 106.45(d)(1)(iv) and disagrees that such efforts would be improper or biased against a respondent. The requirement to clarify allegations with the complainant also would help avoid mistaken dismissal of a complaint based on a complainant's limited English proficiency, disability, or general misunderstanding of what facts are relevant. The Department also disagrees that § 106.45(d)(1)(iv) would permit a Title IX Coordinator or decisionmaker to act in a biased or improper manner. The Department has appropriately considered and addressed potential bias in § 106.45(b)(2), which requires that any person designated as a Title IX Coordinator, investigator, or decisionmaker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent, as well as in § 106.8(d)(2)(iii), which requires that these persons be trained on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Because § 106.45(d)(1)(iv) makes clear that a recipient must make an effort to clarify the allegations with the complainant before dismissing a complaint under this provision, the Department does not find it necessary to amend the provision to prevent dismissal solely because a complaint is not clearly articulated.

Finally, upon its own review, for clarity and consistency with other parts of the regulations, the Department has revised § 106.45(d)(1)(iv) to include a reference to Title IX ''or this part.''

Changes: For consistency with other parts of these regulations, the Department has revised § 106.45(d)(1)(iv) to clarify that a recipient may dismiss a complaint if the alleged conduct, even if proven, would not constitute sex discrimination under Title IX ''or this part.''

Section 106.45(d)(2) Notification of a Dismissal

Comments: Some commenters supported § 106.45(d)(2) because it requires notice to a respondent only if the respondent has been notified of the allegations, and because it requires simultaneous notice of dismissal to the parties, when appropriate.

Some commenters suggested that a recipient should not be allowed to dismiss a complaint without providing the parties a reason for that dismissal.

Discussion: The Department acknowledges commenters' support of § 106.45(d)(2). The Department agrees that a recipient needs to notify a respondent of a dismissal only if the respondent has been notified of the allegations. Notifying a respondent of the dismissal of a complaint for which they had no prior notice would likely cause confusion and could put a complainant at risk of retaliation or sex discrimination, particularly in circumstances in which a complainant withdrew a complaint due to safety concerns. Further, the Department appreciates the opportunity to clarify that § 106.45(d)(2) requires the recipient to notify the complainant and, as applicable, the respondent of the basis for the dismissal.

Changes: None.

Section 106.45(d)(3) Appeal From a Dismissal

General

Comments: Some commenters opposed proposed § 106.45(d)(3). For example, some commenters asserted that § 106.45(d)(3), combined with the absence of the right to appeal a recipient's final determination under proposed § 106.45, would favor complainants over respondents (contrary to § 106.45(b)(1)), would violate the principles of equitable treatment and due process, and would cause the burden on recipients to outweigh any benefits. Some commenters expressed concern that the proposed regulations would not require a recipient to provide a written appeal decision to the parties simultaneously. Conversely, some commenters opposed § 106.45(d)(3) as burdensome on recipients and lacking necessary limitations on a party's opportunity to appeal a dismissal, such as the bases for which a recipient must offer an appeal.

Some commenters opposed § 106.45(d)(3) to the extent that it would allow a Title IX Coordinator, rather than a different adjudicator, to decide an appeal. Some commenters supported provisions that require an individual other than the initial decisionmaker to decide the appeal.

Some commenters requested that the Department modify the proposed dismissal requirements to replicate or align with the Clery Act, including, for example, by requiring a recipient to include its reasoning in its notification of the appeal's outcome.

Some commenters opposed the application of § 106.45(d)(3)(i)–(iv) and (vi) in the elementary school and secondary school context, especially because proposed § 106.45 does not otherwise require a recipient to offer an appeal from the final determination of the grievance procedures.

Discussion: The Department wishes to clarify that the 2020 amendments require a recipient to offer both parties an appeal from a dismissal. 34 CFR 106.45(b)(8)(i). As discussed further below, the only difference in these final regulations is to condition the availability of respondent appeals from a dismissal on whether the respondent has been notified of the complaint, and once a dismissal is appealed, the regulations apply equally to both parties under § 106.45(d)(3)(ii). As such, any burdens associated with § 106.45(d)(3) are largely the same as those in parallel requirements in the 2020 amendments and the benefits of providing an avenue to review a recipient's decision to dismiss a complaint justify the asserted burden on recipients.

In response to concerns about what limitations the final regulations would place on a party's opportunity to appeal a dismissal, the Department clarifies that, as indicated in the July 2022 NPRM, final § 106.45(d)(3) requires a recipient to offer an appeal from a dismissed complaint on the same bases as required under the 2020 amendments, 87 FR 41478–79, which are specifically procedural irregularity; new evidence that was not reasonably available at the time of the dismissal; or Title IX Coordinator, investigator, or decisionmaker bias or conflict of interest. *See* 34 CFR 106.45(b)(8)(i). Accordingly, the Department has revised § 106.45(d)(3) in the final regulations to cross-reference these bases, which are incorporated at § 106.46(i)(1).

The Department declines to require a recipient to notify the parties in writing of the outcome of an appeal, which is consistent with extensive stakeholder feedback that requiring written notice in grievance procedures often prevents elementary schools and secondary schools from handling incidents when they arise, delays their ability to respond to sex discrimination when it occurs, and may be a more appropriate requirement for postsecondary institutions. *See* 87 FR 41458; *see also* discussion of § 106.45(c) and (f)(4). However, nothing in these regulations prohibits a recipient from complying with the requirements of § 106.45(d)(3)(vi) in writing.

With respect to commenters who objected to requiring an elementary school or secondary school to offer an appeal from a dismissal—particularly because the proposed regulations did not require a recipient to offer an appeal from a determination whether sex discrimination occurred—the Department notes that new § 106.45(i) requires a recipient to offer an appeal process that, at a minimum, is the same as it offers in all other comparable

proceedings, if any, including proceedings relating to other discrimination complaints. Although a recipient may not be required to offer an appeal under § 106.45(i), the Department maintains that providing a mechanism to review a recipient's decision to dismiss a complaint promotes Title IX's goal of addressing sex discrimination and preventing its recurrence in federally funded education programs and activities. As explained in more detail in the discussion of § 106.45(i), because § 106.45 provides substantially more procedural requirements than were previously required under Title IX regulations (*see generally* § 106.45(b)(1) and (2) and (f)(1)–(4)), requiring a recipient to offer an appeal from the final determination in all sex discrimination complaints regardless of whether a recipient offers an appeal in comparable proceedings is unnecessary to ensure an equitable and reliable process; and doing so may impair a recipient's ability to resolve sex discrimination complaints in a prompt and equitable manner. However, in the case of a complaint that has been dismissed, it is the Department's view that an appeal is necessary because dismissal occurs before a determination is reached and before an investigation may have been initiated or completed. Moreover, the procedural requirements that precede dismissal are necessarily more limited than those required at the completion of grievance procedures. As noted in the preamble to the 2020 amendments, providing a party the opportunity to appeal a dismissal will make it more likely that a recipient reaches sound determinations regarding dismissal of complaints, which will give complainants and respondents greater confidence in grievance procedures. 85 FR 30396.

The Department is not persuaded that § 106.45(d)(3) of these final regulations violates due process and equitable treatment principles, including § 106.45(b)(1). The appeal process outlined in the final regulations ensures that parties have an equal opportunity to appeal dismissals and other determinations. Final § 106.45(d)(3) similarly provides both parties a right to appeal a dismissal of allegations, except when the dismissal occurs before the respondent has been notified of the allegations. As discussed in more detail below, when the recipient dismisses allegations before issuing a notice of allegations, offering the respondent an opportunity to appeal would not be efficient or effective because the dismissal reflects the recipient's determination that it need not determine whether the respondent is responsible for sex discrimination on the basis of those allegations. To the extent a recipient issues a notice of allegations and thus requires the respondent to take some action in response, the respondent would have an equal right to appeal a dismissal of those allegations. Section 106.45(d)(3) is designed to fulfill Title IX's mandate to eliminate sex discrimination in a recipient's education program or activity, and the final regulations' framework for prompt and equitable grievance procedures ensure transparent and reliable outcomes for recipients, students, employees, and others participating or attempting to participate in a recipient's education program or activity.

The Department also clarifies that, contrary to the commenters' concerns, § 106.45(d)(3)(iii) requires a recipient to ensure that the decisionmaker for the appeal did not take part in an investigation of the allegations or dismissal of the complaint. Consequently, a Title IX Coordinator would be prohibited from deciding the appeal if they took part in the investigation or dismissal of the complaint. The Department declines to further restrict who may decide an appeal of a dismissal under § 106.45(d)(3)(iii) for the same reasons explained in more detail in the discussion of § 106.45(b)(2). Further, as previously noted, §§ 106.45(b)(2) and 106.8(d)(2)(iii) protect against bias and conflict of interest, and this includes decisionmakers on appeal.

The Department declines to modify § 106.45(d)(3) to align with the Clery Act because many recipients covered by Title IX, including all elementary schools and secondary schools, have no obligations under, and may be unfamiliar with, the Clery Act. The Department notes that nothing in the final regulations prevents a recipient from notifying the parties of the result of the appeal and the rationale for the result in a manner that is also consistent with the Clery Act.

The Department disagrees with assertions that requiring a recipient to implement appeal procedures equally, rather than equitably, for the parties would allow one party to appeal a dismissal without allowing the other party to be notified or challenge the appeal. Section 106.45(d)(3) requires a recipient to notify the complainant and respondent, as applicable, that a dismissal may be appealed; paragraph (d)(3)(i) requires a recipient to notify the parties when the appeal is filed, including the respondent if the respondent has not previously been notified; paragraph (d)(3)(v) requires a recipient to provide the parties a reasonable and equal opportunity to make a statement in support of, or challenging, the outcome; and paragraph (d)(3)(vi) requires a recipient to notify the parties of the result of the appeal and the rationale for the result. While the application of this provision is fact-specific, the Department observes that it would not be appropriate for a recipient to reverse a decision related to dismissal without providing both the complainant and respondent a reasonable and equal opportunity to support or challenge the decision.

The Department notes that ''equal'' and ''equitable'' have different implications and, consistent with the 2020 amendments, the final regulations use both terms with that distinction in mind. *See* 85 FR 30186; *see also* discussion of the explanation of equitable treatment in § 106.45(b)(1). In the context of § 106.45(d), the Department uses the words ''equal'' and ''equally'' intentionally because once a dismissal is appealed, a recipient must implement the same appeal procedures for all parties. However, the final regulations at § 106.45(b)(1) require a recipient's grievance procedures to treat complainants and respondents equitably, recognizing that there are certain aspects of the grievance procedure requirements under which equitable, but not equal, treatment is appropriate. *See* discussion of § 106.45(b)(1).

Changes: The Department has revised § 106.45(d)(3) to cross-reference § 106.46(i)(1) and to clarify the notice of appeal, which is described in further detail below.

Notice of the Opportunity To Appeal a Dismissal When the Respondent Has Not Been Notified of the Complaint

Comments: Some commenters expressed confusion about whether proposed § 106.45(d) would require notifying a respondent of a right to appeal a dismissal when the respondent has not been notified of the complaint. For example, some commenters asserted that proposed § 106.45(d)(2) and (3) are inconsistent for this reason, and some commenters suggested that proposed § 106.45(d)(3) be altered so that a respondent need only be notified of the opportunity to appeal if the respondent has been notified of the complaint.

Some commenters asked the Department to consider possible unintended consequences of notification requirements related to a student's right to appeal a dismissal, including whether a recipient might

unwittingly disclose sensitive information to an unsupportive parent, which could harm the student.

Discussion: The Department is persuaded by commenters' recommendation that the Department modify § 106.45(d)(3) so that whether a respondent is notified of the opportunity to appeal a dismissal depends on whether the respondent has been notified of the complaint and dismissal. The Department agrees that notifying a respondent of the opportunity to appeal the dismissal of a complaint for which they had no prior notice would likely cause confusion. The Department also notes that once a dismissal is appealed, equal treatment principles require a recipient to provide the respondent a reasonable opportunity to argue that the complaint was properly dismissed, which would be difficult if the respondent had not yet been notified of the allegations. For these reasons, the Department has revised § 106.45(d)(3) to clarify that a recipient must notify the respondent that the dismissal may be appealed only if the dismissal occurs after the respondent has been notified of the allegations. If any party appeals the dismissal, a recipient must notify all parties, including notice of the allegations consistent with § 106.45(c) if notice was not previously provided to the respondent. The Department declines commenters' suggestion to remove requirements related to the respondent in § 106.45(d)(3)(v)–(vi) because doing so would not provide the respondent an equal opportunity to make a statement and understand the result of the appeal.

The Department acknowledges commenters' concern about the disclosure of sensitive information related to Title IX compliance. The Department revised final § 106.44(j) to prohibit the disclosure of personally identifiable information obtained while carrying out a recipient's Title IX obligations, with some exceptions, which is explained more fully in the discussion of § 106.44(j).

Finally, for consistency and clarity, the Department has replaced ''its'' with ''the'' in final § 106.45(d)(3), ''when the appeal is filed'' with ''of any appeal'' in final § 106.45(d)(3)(i), and ''all parties'' with ''the parties'' in final § 106.45(d)(3)(vi).

Changes: Proposed § 106.45(d)(3)(i) through (v) has been revised and redesignated as § 106.45(d)(3)(i) through (vi) to separate into two paragraphs the requirements regarding notice and equal implementation of appeal procedures. Final § 106.45(d)(3) now clarifies that the recipient must notify the complainant that a dismissal may be appealed and provide the complainant with an opportunity to appeal the dismissal of a complaint on the bases set out in § 106.46(i)(1); that if the dismissal occurs after the respondent has been notified of the allegations, then the recipient must also notify the respondent that the dismissal may be appealed on the bases set out in § 106.46(i)(1). The Department has also revised § 106.45(d)(3)(i) to make clear that if a dismissal is appealed, the recipient must notify the parties of any appeal, including notice of the allegations consistent with § 106.45(c) if notice was not previously provided to the respondent. Finally, for consistency and clarity, the Department has replaced ''its'' with ''the'' in final § 106.45(d)(3), ''when the appeal is filed'' with ''of any appeal'' in final § 106.45(d)(3)(i), and ''all parties'' with ''the parties'' in final § 106.45(d)(3)(vi).

Section 106.45(d)(4) Prompt and Effective Steps To Address Sex Discrimination After Dismissal

Comments: Some commenters expressed strong support for § 106.45(d)(4)(i) because it would ensure that a complaint is handled fairly, promptly, and effectively. Other commenters recommended that § 106.45(d)(4) be amended to provide the respondent with supportive measures on the same basis as the complainant.

Some commenters supported proposed § 106.45(d)(4)(iii) because it would help ensure students' safe access to education. In contrast, other commenters opposed § 106.45(d)(4)(iii) because it would be burdensome, or not necessary when a complaint is dismissed because the recipient determined that sex discrimination did not occur. One commenter asserted that, depending on a recipient's administrative structure, the Title IX Coordinator might not be best positioned to take the steps required by § 106.45(d)(4)(iii). One commenter asserted that § 106.45(d)(4)(iii) would be illogical as applied to dismissals made under paragraph (d)(1)(iv) on the grounds that a Title IX Coordinator would be required to ensure sex discrimination does not continue or recur after already dismissing based on a determination that the conduct would not constitute sex discrimination.

Discussion: The Department agrees that § 106.45(d)(4) promotes fairness by ensuring that if a recipient dismisses a complaint, it must, as appropriate, offer supportive measures to the complainant and, as applicable, the respondent, as well as take prompt and effective steps to ensure that sex discrimination does not continue or recur within its education program or activity. The Department disagrees that § 106.45(d)(4) is illogical because dismissal under § 106.45(d)(1)(iv) occurs before the conclusion of grievance procedures and a recipient's determination whether sex discrimination occurred. Consequently, when a recipient dismisses a complaint under these provisions, it has not conclusively determined that no sex discrimination occurred; rather, at the time of dismissal prior to a final determination whether sex discrimination occurred, there is insufficient evidence to support a claim of sex discrimination. Because dismissal is not mandatory, the final regulations allow a recipient to either implement grievance procedures to reach a determination whether sex discrimination occurred or dismiss the complaint. Discretionary dismissal is accompanied by a recipient's legal duty to operate its education program or activity free from sex discrimination. *See, e.g.,* 87 FR 41405 (citing 20 U.S.C. 1681(a), 1682, 1221e–3, 3474; *N. Haven Bd. of Educ.,* 456 U.S. at 521; *Cannon,* 441 U.S. at 704). Accordingly, § 106.45(d)(4) allows a recipient to avoid an unnecessary investigation if it concludes that the conditions for permissive dismissal have been met, while requiring steps, as appropriate, to ensure that sex discrimination does not continue or recur within its education program or activity. For example, if an allegation of a sex-based hostile environment is based solely on a complainant's statement that on multiple occasions, they heard strange voices while using the dormitory showers, a recipient may decide to investigate under its grievance procedures to determine whether an individual is inappropriately surveilling private facilities, such as by interviewing witnesses or reviewing contemporaneous video footage outside the facilities. Alternatively, a recipient may dismiss the complaint, either because it is unable to identify the respondent after taking reasonable steps to do so or because the facts alleged (*i.e.,* the presence of another person indicated by the strange voice) would not constitute sex discrimination under Title IX. If the recipient dismisses the complaint on those bases, it must, as appropriate, offer the complainant supportive measures, and take other appropriate prompt and effective steps to ensure that possible sex discrimination does not continue or recur, such as convening a floor meeting to discuss the allegations in a manner that retains the complainant's

anonymity or encouraging potential witnesses or other complainants to come forward. *See* § 106.45(d)(4). Consistent with § 106.44(f)(1)(vii), the Department notes that a recipient has discretion to determine what prompt and effective steps would be appropriate to meet its obligation to operate its education program or activity free from sex discrimination, which may include actions suggested by commenters such as investigating whether other persons have been subjected to sex discrimination or following up with the parties individually to determine the effectiveness of offered supportive measures.

The Department agrees that either a complainant or respondent may require supportive measures, as appropriate, to restore or preserve access to the recipient's education program or activity even if a complaint is dismissed. *See* discussion of § 106.44(g). Further, § 106.45(d)(4)(ii) already requires a recipient to provide supportive measures to a respondent on an equitable basis with a complainant because it only excepts from this obligation instances in which it would be impracticable to offer supportive measures to a respondent (*i.e.,* when the recipient is unable to identify the respondent after taking reasonable steps to do so, when the respondent is not participating in the recipient's education program or activity and is not employed by the recipient, or when the respondent has not been notified of the allegations).

The Department appreciates the opportunity to clarify that a recipient, not the Title IX Coordinator, has an obligation to ensure that it complies with grievance procedures under § 106.45, and if applicable § 106.46, including taking other appropriate prompt and effective steps consistent with § 106.45(d)(4). As explained in more detail in the discussion of § 106.8(a), the final regulations expressly permit a recipient or a Title IX Coordinator to delegate specific duties to one or more designees, provided the Title IX Coordinator retains ultimate oversight over the recipient's efforts to comply with its responsibilities under Title IX and this part and ensure the recipient's consistent compliance under Title IX and this part.

Changes: The Department has revised § 106.45(d)(4)(ii) and (iii) to update and clarify internal cross-references.

12. Section 106.45(e) Consolidation of Complaints

Consolidation Generally

Comments: Some commenters expressed support for proposed § 106.45(e) for various reasons, including because consolidation often accords with the recipients' and parties' wishes, and because consolidation can yield increased efficiency and reduced burden for recipients, parties, and witnesses. Other commenters noted that complainants in cases involving multiple respondents tend to be particularly vulnerable and experience heightened fear, harassment, barriers to reporting, and case management challenges.

Some commenters stated that consolidation, when combined with the single-investigator model, may impact the integrity of the investigation by increasing the probability of witness collusion and the inclusion of unsupported or weak allegations.

Other commenters asked the Department to clarify the considerations for consolidating complaints. One commenter asked the Department to permit recipients to consolidate cases in which pattern conduct arises from similar, but not the same, facts or circumstances.

Discussion: The Department appreciates the range of opinions expressed by commenters regarding consolidation. The Department agrees that cases involving multiple parties can pose unique concerns, such as heightened vulnerabilities and case management challenges. The Department also agrees with commenters who asserted that consolidation enables a recipient to coordinate cases involving multiple parties and minimize unnecessary burdens that could interfere with a party's ability to access their education. The Department also acknowledges commenters' concerns about the potential impact of consolidation on the integrity of the grievance procedures, but the Department disagrees that the consolidation provision will cause these results.

These final regulations contain sufficient procedural protections to safeguard against the concerns that commenters have raised. With respect to commenters' concerns about bias and unsupported allegations, the final regulations require that a recipient treat complainants and respondents equitably (§ 106.45(b)(1)) and that any person designated as an investigator or decisionmaker ''not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent'' (§ 106.45(b)(2)). The final regulations also require, at § 106.8(d)(2)(iii), that investigators and decisionmakers receive training on ''[h]ow to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.'' Although § 106.8(d)(2)(iii) does not expressly require bias training that addresses complaints involving multiple respondents, the Department notes that nothing in these final regulations prevents a recipient from providing such training. As explained in the discussion of § 106.8(d), the Department has determined that § 106.8(d) strikes the appropriate balance between requiring training topics necessary to promote a recipient's compliance with these final regulations, while leaving maximum flexibility to recipients to choose the content and substance of training topics beyond the topics mandated by § 106.8(d).

The Department declines to categorically require or prohibit consolidation of complaints of sex discrimination against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party. The Department continues to support a discretionary approach, which enables a recipient to consider the facts and circumstances of the particular complaints when deciding whether to consolidate, including the toll of separate proceedings on the parties and any risks to the fairness of the investigation or outcome.

Regarding commenters' concerns about harassment of complainants or collusion by witnesses, these final regulations prohibit harassment that amounts to retaliation, including peer retaliation, as set forth in § 106.2 (definitions of ''retaliation'' and ''peer retaliation'') and § 106.71. The final regulations require a recipient to conduct an ''adequate, reliable, and impartial investigation of complaints'' (§ 106.45(f)) and to assess witnesses' credibility to the extent that credibility is in dispute and relevant (§ 106.45(g)). Discretion to consolidate cases does not relieve a recipient of its obligations to comply with the requirements of Title IX and these final regulations.

Some commenters asked the Department to clarify the considerations for consolidating complaints. Although the Department recognizes that recipients and parties may desire more detailed guidelines for when and how to consolidate, the Department declines to specify guidelines for consolidation, aside from those listed in § 106.45(e),

because of the necessarily fact-specific nature of the consolidation decision. The Department wishes to clarify, however, that § 106.45(e) must be interpreted to be consistent with a recipient's obligations under FERPA, as explained more fully in the ''Consolidation and FERPA'' subsection below. In all other respects, the final regulations give recipients the flexibility to determine whether to consolidate in a manner that best addresses the parties, the complaints, and the recipient's unique structure and resources.

A commenter inquired whether recipients may consolidate complaints in circumstances other than those outlined in § 106.45(e), though the commenter did not offer any examples for consideration. Another commenter inquired about consolidating complaints involving pattern conduct and similar facts or circumstances. The Department declines to broaden § 106.45(e) to expressly permit consolidation in other circumstances, such as those involving facts or circumstances that are similar but not the same. The Department views the guidelines set forth in § 106.45(e) as covering the complaints in which consolidation is most likely to be fair to all parties, to create efficiencies in the grievance procedures, and to comply with FERPA. Nothing in these final regulations expressly prohibits recipients from consolidating in circumstances other than those outlined in § 106.45(e), and § 106.45(j) expressly permits a recipient to adopt additional provisions as long as they apply equally to the parties. Recipients, however, must be mindful of their obligations under these final regulations (*e.g.,* the obligation to conduct adequate, reliable, and impartial investigations) and their obligations under other laws (*e.g.,* FERPA).

The Department wishes to make clear that a recipient must comply with the requirements set out in § 106.45, and if applicable § 106.46, regardless of whether the recipient chooses to consolidate complaints or to handle them separately, including but not limited to the requirements to ensure that any person designated as an investigator or decisionmaker not have a conflict of interest or bias (§ 106.45(b)(2)); to establish reasonably prompt timeframes (§ 106.45(b)(4)); to provide for the adequate, reliable, and impartial investigation of complaints (§§ 106.45(f) and 106.46(e)); and to provide a process for the decisionmaker to assess a party's or witness's credibility (§§ 106.45(g) and 106.46(f)). The Department also notes that, under § 106.44(k), a recipient has discretion to decide whether it is appropriate to offer an informal resolution process; however, a recipient should be mindful that an informal resolution agreement is binding only on the parties to that process. In addition, as provided by § 106.44(k)(1)(ii), a recipient may decide not to offer informal resolution if the conduct alleged presents a future risk of harm to others. Recipients are in the best position to make decisions about processing consolidated complaints since they may have a better understanding of how to balance the interests of promptness, fairness to the parties, and accuracy of adjudications in each case.

Changes: For clarity, the Department has made a non-substantive revision to require that the consolidated complaint comply with the requirements of ''§ 106.46 in addition to the requirements of this section'' rather than comply with the requirements of ''this section and § 106.46.''

Consolidation and Complaints by One Party Against Another

Comments: Some commenters asked the Department to clarify that a respondent may make cross-complaints against the complainant. The commenters stated that, although false cross-complaints could be used strategically by the respondent, the veracity of these cross-complaints should be determined during the investigation. Other commenters asked the Department to modify the regulations to allow for cross-complaints for slander.

Discussion: The Department confirms that a recipient has the discretion to consolidate the initial complaint and a subsequent complaint or complaints, regardless of filer, under § 106.45(e) (as a type of complaint ''by one party against another party'').[53] As noted in the preamble to the July 2022 NPRM, if a complainant alleges that the subsequent complaint was made in retaliation for their original complaint, the recipient must determine whether the subsequent complaint constitutes prohibited retaliation under § 106.71. 87 FR 41543. In addition, a recipient has discretion under § 106.45(d)(1) to determine whether to dismiss the subsequent complaint, including based on a determination that the conduct alleged, even if proven, would not constitute sex discrimination under Title IX.

A party may file a complaint under the Title IX grievance procedures, including a counter-complaint or a cross-complaint, to pursue any allegations of sex discrimination as defined in these regulations, including sex-based harassment and retaliation. The Department declines to revise § 106.45(e) to expressly address complaints of slander, but nothing in these final regulations precludes a recipient from addressing slander or other misconduct outside the scope of Title IX under the recipient's conduct codes.

Changes: None.

Consolidation and Constitutional Concerns

Comments: Some commenters raised concerns that consolidation could limit respondents' due process or free speech rights by, for example, punishing individuals for ''guilt by association'' rather than for their own conduct or by aggregating the speech or conduct of multiple people to meet an actionable threshold. Some commenters further stated that a recipient should not be allowed to consolidate complaints over the objection of a respondent unless the recipient has documented and implemented efforts to remove bias or group guilt.

Discussion: Section 106.45(e) provides that when multiple complainants or respondents are involved, the references within §§ 106.45 and 106.46 to a party, complainant, or respondent ''include the plural, as applicable.'' This language is unchanged from the 2020 amendments and, as explained in the preamble to the 2020 amendments, *see* 85 FR 30096 n.454, ensures that when a recipient consolidates complaints involving multiple complainants or multiple respondents into a single set of grievance procedures, each individual party has each right granted to a party under § 106.45, and if applicable § 106.46. The Department confirms that when a recipient consolidates complaints, each party retains their status as an individual, as opposed to a group or organization. A recipient must comply with the requirements under § 106.45, and if applicable § 106.46, regardless of whether the recipient chooses to consolidate complaints under § 106.45(e) or handle them separately. Nothing in these final regulations permits a recipient to curtail a party's rights or weigh the evidence differently due to a consolidation of the complaints.

In response to concerns related to group-related bias, the final regulations require that any person designated as an investigator or decisionmaker must ''not have a conflict of interest or bias for or

[53] Commenters referred to this as a cross-complaint, though the Department notes that this type of complaint is sometimes referred to as a counter-complaint.

against complainants or respondents generally or an individual complainant or respondent'' (§ 106.45(b)(2)), that investigators and decisionmakers receive training on ''[h]ow to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias'' (§ 106.8(d)(2)(iii)), and that a recipient maintain records documenting the grievance procedures and the materials used to provide training (§ 106.8(f)(1) and (3)). Such requirements to eliminate bias include any potential bias towards a group in a consolidated case. These regulations require a recipient to respond to complaints of sex discrimination in specific ways, including by investigating the allegations, assessing credibility, and determining whether sex discrimination occurred, *see* § 106.45(f)–(h). Like the 2020 amendments, *see* 85 FR 30274–75, these final regulations only contemplate adjudication of allegations as to an individual respondent. The regulations, at § 106.2, define a ''respondent'' as a *person*—not a group—alleged to have violated the recipient's prohibition on sex discrimination.

Changes: None.

Consolidation and FERPA

Comments: Some commenters raised privacy and FERPA concerns in connection with proposed § 106.45(e). Other commenters sought clarification regarding recipients disclosing evidence about all students involved in a consolidated complaint to all parties and their advisors, given FERPA's general prohibition on non-consensual disclosure of information from a student's education record.

Discussion: The Department appreciates the opportunity to clarify that § 106.45(e) must be interpreted consistent with a recipient's obligations under FERPA. A recipient must comply with its obligations under both Title IX and FERPA unless there is a direct conflict that precludes compliance with both laws.[54] These final Title IX regulations provide a recipient with the *option* to consolidate complaints, but the regulations do not *require* a recipient to consolidate. Accordingly, there is no direct conflict between any § 106.45(e) requirement and FERPA. If consolidation of certain complaints means that a recipient is unable to comply with FERPA, the recipient is not permitted to exercise its discretion to consolidate those complaints.

Regarding commenters' questions related to sharing evidence and the responsibility determination with all parties to a consolidated complaint, the Department reiterates that a recipient cannot choose to consolidate complaints when such consolidation would give rise to FERPA violations. The Department notes that consolidation would not violate FERPA when a recipient obtains prior written consent from the parents or eligible students to the disclosure of their education records.

A recipient may redact information that is not relevant to the allegations of sex discrimination; however, a recipient must, when redacting information, ensure that the recipient is fully complying with its obligations under § 106.45, and if applicable § 106.46. For additional discussion of a recipient's ability to redact information as part of the grievance procedures, see the discussions of §§ 106.6(e), 106.45(b)(5) and (f)(4), and 106.46(e)(6). The Department notes that the regulations require a recipient to take reasonable steps to protect the privacy of the parties (§ 106.45(b)(5)) and to prevent and address the unauthorized disclosure of information (§§ 106.45(f)(4)(iii) and 106.46(e)(6)(iii)).

The Department acknowledges that FERPA permits a recipient to disclose personally identifiable information from a student's education record without prior written consent if the disclosure is to a school official who has been determined to have a legitimate educational interest (applying the criteria set forth in the educational agency's or institution's annual notification of FERPA rights) in such information. *See* 20 U.S.C. 1232g(b)(1)(A); 34 CFR 99.7(a)(3)(iii), 99.31(a)(1)(i)(A).

Changes: None.

13. Section 106.45(f) Complaint Investigations

Comments: Commenters generally supported the requirement in § 106.45(f) for adequate, reliable, and impartial investigation of complaints because this provision lays the foundation for equitable adjudications and requires equitable treatment of complainants and respondents. Some commenters shared personal stories of traumatic or difficult experiences with grievance procedures. One commenter suggested that a recipient send detailed information from investigations to local school boards for oversight.

One commenter expressed concern regarding a return to the 2011–2017 requirement for adequate, reliable, and impartial investigations based on the commenter's view that this standard yielded biased outcomes and the railroading of respondents. Another commenter asked the Department to add a new paragraph to proposed § 106.45(f) to require the recipient to conduct grievance procedures in an impartial manner and to ensure that the recipient makes an impartial determination regarding responsibility. Some commenters requested clarity on what assistance the Department will provide to a recipient for investigating Title IX complaints.

Discussion: The Department acknowledges the commenters' support for § 106.45(f), which requires recipients to provide for adequate, reliable, and impartial investigation of complaints. In response to concerns that this requirement may not be sufficient, the Department emphasizes that these final regulations contain numerous procedural requirements for the various stages of the investigation and resolution process to support recipients in reaching adequate, reliable, and fair outcomes.

The Department declines a commenter's suggestion to add a new paragraph regarding impartiality because § 106.45(f) already states that a recipient must provide for an impartial investigation. In addition, § 106.45(b)(1) requires grievance procedures to treat complainants and respondents equitably, and § 106.45(b)(2) requires that any person designated as a Title IX Coordinator, investigator, or decisionmaker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

The Department disagrees with a commenter's suggestion to require recipients to share detailed information from investigations with school boards for oversight. Disclosures of sensitive and personally identifiable information with school boards may raise privacy concerns. Privacy protections within these final regulations and FERPA may limit a recipient's ability to disclose information from the investigation. The Department also notes that the Office for Civil Rights has the authority to investigate and enforce recipients' compliance with Title IX.

The Department acknowledges the request for technical assistance. The Department will offer technical assistance and guidance, as appropriate, to promote compliance with the final regulations.

[54] When there is a direct conflict between the requirements of Title IX and FERPA, the GEPA override, as incorporated into § 106.6(e), applies such that a recipient must comply with Title IX. When there is a direct conflict between constitutional due process rights and FERPA, a constitutional override applies. The interaction between FERPA and Title IX is explained in greater detail in the discussion of § 106.6(e) in this preamble.

Changes: None.

14. Section 106.45(f)(1) Investigative Burden on Recipients

Comments: Some commenters expressed concern that § 106.45(f)(1) is not sufficient to ensure that the burden to conduct an investigation that gathers sufficient evidence to determine whether sex discrimination occurred remains on the recipient and not on the parties or especially on the respondent. Another commenter asked the Department to preserve § 106.45(b)(5)(i) in the 2020 amendments to prevent a recipient from improperly placing the burden of proof on respondents. The commenter noted that some recipients inappropriately shift the burden to students, such as in cases involving an affirmative consent policy that requires a student prove that a sexual interaction was not a sexual assault. One commenter asked the Department to clarify the meaning of ''sufficient evidence,'' in light of FERPA considerations.

Discussion: Section 106.45(f)(1) retains similar language to § 106.45(b)(5)(i) in the 2020 amendments that requires the recipient, and not the parties, to bear the burden of gathering sufficient evidence to reach a determination. The Department has substituted the legalistic phrases ''burden of proof'' and ''burden of gathering evidence'' in the 2020 amendments with the more accessible phrase ''burden . . . to conduct an investigation,'' but the meaning is the same: the recipient bears the burden of conducting an investigation that gathers sufficient evidence to make a determination whether sex discrimination occurred.

Regarding a commenter's concern that affirmative consent policies effectively shift the burden of proof from recipients onto students, the Department clarifies that these final regulations, consistent with the 2020 amendments, do not permit a recipient to shift the burden to a respondent to prove consent, nor do they permit the recipient to shift the burden to a complainant to prove absence of consent. *See* 85 FR 30125. To the extent that a recipient improperly uses a consent requirement to instruct a respondent to prove the existence of consent, this practice would violate § 106.45(f)(1). *See* 85 FR 30125, 30125 n.554. Consistent with the 2020 amendments, these regulations do not adopt a particular definition of consent in connection with sexual assault. For additional discussion of the Department's approach to consent policies, see the discussion of the definition of ''sex-based harassment'' in § 106.2. Regardless of whether and how a recipient defines consent in the context of sexual assault, the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding whether sex discrimination occurred is always on the recipient.

Regarding a commenter's request to clarify any FERPA implications on the requirement to gather sufficient evidence, the Department emphasizes that FERPA does not relieve a recipient of its obligation to gather sufficient evidence to determine whether sex discrimination occurred. For additional information regarding the interaction between FERPA and Title IX's evidentiary provisions, see the discussions of §§ 106.6(e), 106.45(e), (f)(4), and 106.46(e)(6).

Changes: None.

15. Section 106.45(f)(2) Opportunity To Present Witnesses and Other Evidence That Are Relevant and Not Otherwise Impermissible

Comments: Some commenters supported § 106.45(f)(2) for providing elementary schools and secondary schools with more flexible and less formal approaches to present evidence and witnesses.

Some commenters suggested additional modifications or clarifications. For example, one commenter urged the Department to clarify that expert witnesses are permissible. Other commenters recommended expanding § 106.45(f)(2)'s applicability to any relevant witnesses, or to all evidence and witnesses regardless of relevance. One commenter noted that the Department should not restrict the right to present evidence and witnesses based on a premature evaluation of relevance. Other commenters urged that all evidence should be presented and weighed according to corroborating evidence.

Some commenters opposed proposed § 106.45(f)(2) as limiting due process rights. One commenter urged the Department to preserve current § 106.45(b)(5)(ii), arguing that numerous courts have affirmed the importance of parties having an equal opportunity to present evidence. Some commenters requested clarification on whether a recipient could exclude character witnesses, and one commenter urged the Department to expressly prohibit them.

Discussion: The Department acknowledges commenters' support for § 106.45(f)(2), which requires a recipient to provide an equal opportunity for the parties to present fact witnesses and other inculpatory and exculpatory evidence that are relevant and not otherwise impermissible. Although § 106.45(f)(2) differs from § 106.45(b)(5)(ii) of the 2020 amendments in some respects, it retains the important principle that the parties have an equal opportunity to present evidence. Section 106.45(f)(2) retains the requirement from the 2020 amendments that a recipient provide an equal opportunity for the parties to present fact witnesses and other inculpatory and exculpatory evidence, and § 106.45(f)(2) clarifies that the witnesses and other evidence must be relevant and not otherwise impermissible. This relevance threshold is consistent with the numerous provisions in the 2020 amendments and in these final regulations that limit the evidence in the grievance procedures to evidence that is ''relevant,'' as defined in § 106.2. *See* 87 FR 41480. The Department has revised § 106.45(f)(2) to clarify that parties do not have the right to present impermissible evidence, as described by § 106.45(b)(7), regardless of relevance. In the July 2022 NPRM, the Department stated that § 106.45(b)(7)'s prohibition on the use of impermissible evidence applies to the grievance procedures under § 106.45, and if applicable § 106.46. 87 FR 41470. The Department has added ''and not otherwise impermissible'' to the regulatory text of § 106.45(f)(2) to avoid any confusion.

The Department disagrees that § 106.45(f)(2) limits the due process rights of respondents, as constitutional due process does not demand that respondents have the opportunity to present irrelevant evidence. *Cf. Crane* v. *Kentucky,* 476 U.S. 683, 689 (1986) (''[T]he Constitution leaves to the judges who must make these decisions 'wide latitude' to exclude evidence that is . . . 'only marginally relevant.' '' (quoting *Delaware* v. *Van Arsdall,* 475 U.S. 673, 679 (1986))). In the preamble to the 2020 amendments, the Department described the provision as referring to relevant witnesses and evidence, and the Department now makes this explicit in the final regulations. *See* 85 FR 30283. Because the relevance limitation addresses the potential harm and unnecessary use of resources caused by the introduction of irrelevant testimony and evidence, it is important to retain the relevance limitation on the right to present fact witnesses and evidence in these final regulations. *See* 87 FR 41481. Regarding commenters' suggestion to require evidence to be presented and weighed based on corroborating evidence, the Department maintains that relevance provides a more accessible and workable standard. Evidence may

be determined to be accurate and valid even if there is no other evidence to corroborate it. *See* 85 FR 30085–86. Further, at the time that a party seeks to present a particular witness or piece of evidence, it may not yet be known whether corroborating evidence exists. These final regulations, like the 2020 amendments (*see* 85 FR 30381), do not require corroborative evidence to reach a determination; however, a decisionmaker may consider corroborative evidence as part of their evaluation of the allegations.

Section 106.45(f)(2) does not govern the use of expert witnesses. The Department has moved the provision regarding expert witnesses from § 106.45(b)(5)(ii) of the 2020 amendments to § 106.46(e)(4) of these final regulations, which applies to complaints of sex-based harassment involving a student complainant or a student respondent at a postsecondary institution. The Department is not requiring recipients to allow expert witnesses because the use of expert witnesses may introduce delays without adding a meaningful benefit to the recipient's investigation and resolution of the case, particularly in the types of cases governed by § 106.45. The Department discusses expert witnesses in the discussion of § 106.46(e)(4). Nevertheless, a recipient has the discretion to allow the parties to present expert witnesses as part of investigating and resolving complaints under § 106.45, provided that the recipient applies this decision equally to the parties. *See* § 106.45(j); 87 FR 41481.

The Department declines to categorically allow or disallow character evidence, which aligns with the approach taken in the preamble to the 2020 amendments. *See* 85 FR 30247–48. These final regulations require that parties have the opportunity to present relevant and not otherwise impermissible evidence (§ 106.45(f)(2)) and require recipients to objectively evaluate relevant and not otherwise impermissible evidence (§ 106.45(b)(6)). The requirement that character evidence be ''relevant,'' as defined by § 106.2, will exclude character evidence that will not aid the decisionmaker in determining whether sex discrimination occurred.

The Department declines to impose further requirements on the presentation of evidence in § 106.45(f)(2) because the circumstances vary greatly for different types of complaints. Section 106.45(g) requires recipients to provide a process for questioning parties and witnesses to assess a party's or witness's credibility, to the extent credibility is in dispute and relevant, and § 106.45(h)(1) requires a decisionmaker to evaluate relevant and not otherwise impermissible evidence for its persuasiveness. Consistent with the approach taken by the 2020 amendments, the Department maintains that the final regulations reach the appropriate balance between prescribing detailed procedures and deferring to recipients to tailor their grievance procedures to their unique circumstances, within the bounds of the regulatory requirements. *See* 85 FR 30247. Here, recipients have discretion as long as they provide an equal opportunity for the parties to present fact witnesses and other inculpatory and exculpatory evidence that are relevant and not otherwise impermissible.

Changes: The Department has revised § 106.45(f)(2) to clarify that fact witnesses and other evidence must be ''relevant and not otherwise impermissible.''

16. Section 106.45(f)(3) Review and Determination of Relevant Evidence

Comments: Some commenters expressed general support for this provision. Other commenters expressed opposition to proposed § 106.45(f)(3), including on the ground that an investigator might not be able to determine which evidence is relevant until all evidence has been gathered.

Discussion: Section 106.45(f)(3) requires a recipient to review all evidence gathered throughout the investigation and to assess that evidence for relevance and impermissibility. The Department recognizes that a recipient may make relevance determinations throughout the course of an investigation; however, the Department emphasizes that a recipient remains responsible for assessing relevance in light of all evidence gathered. To avoid inadvertently excluding relevant evidence, a recipient may need to revisit an earlier relevance determination and reconsider a witness or a piece of evidence that the recipient had previously excluded.

Changes: None.

17. Section 106.45(f)(4) Access to the Relevant and Not Otherwise Impermissible Evidence

§ 106.45(f)(4)(i): Equal Opportunity To Access the Evidence or an Accurate Description of the Evidence

Comments: Commenters supported proposed § 106.45(f)(4) for a variety of reasons. For example, multiple commenters expressed support for sharing a summary of relevant evidence rather than the evidence itself, which they stated would safeguard sensitive evidence and would reduce the chilling effect on complainants who fear that disclosure of their evidence could lead to retaliation, further harassment, or other harms. One commenter supported not giving parties at the elementary school and secondary school level access to all investigative materials. Other commenters expressed support for streamlined procedures and increased flexibility for recipients under proposed § 106.45(f)(4), noting that different approaches are appropriate for different educational settings.

Some commenters expressed concern that proposed § 106.45(f)(4) entitles parties to a description of the relevant evidence, but not access to the evidence itself. Commenters noted that a recipient might intentionally or inadvertently exclude important evidence from the description, which could harm respondents, in particular, who need to understand the evidence against them. Commenters also raised concerns that a description would make it challenging for parties to determine how to respond or what additional evidence to present. Some commenters encouraged the Department to require that at least the respondent be able to access the evidence. Some commenters expressed concern that the parties' lack of access to the evidence could potentially violate a party's due process rights, citing court cases related to access to evidence. Some commenters criticized the July 2022 NPRM for referencing a study by Foundation for Individual Rights and Expression (FIRE), which the commenters described as stating that respondents should be able to view the evidence against them, without enacting that requirement.[55] Some commenters expressed confusion as to whether proposed § 106.45(f)(4) affects due process rights, which the 2020 amendments recognized as important. Commenters also noted that recipients' and parties' experiences before the 2020 amendments demonstrate that a summary of the evidence is insufficient. Some commenters cited *Goss,* 419 U.S. at 581, 584, as holding that elementary school students are entitled to an explanation of the evidence against them, especially in proceedings that could have severe consequences.

Some commenters sought clarification of what information must be included in the description of the evidence, including whether information could be redacted.

[55] The referenced study is FIRE, *Spotlight on Due Process 2020–2021, https://www.thefire.org/research-learn/spotlight-due-process-2021-2022* (last visited Mar. 12, 2024).

Some commenters expressed concern that the summary of the evidence could be oral, rather than written. Other commenters noted that providing a verbal summary of the evidence does not noticeably lessen the burden on recipients. Some commenters noted that the parties should be able to make copies of the evidence or at least be able to access a written investigative report, while other commenters expressed that the investigative report requirement in the 2020 amendments is inappropriate in the context of elementary schools and secondary schools.

Some commenters supported the use of the ''relevant'' standard rather than the ''directly related'' standard because ''relevant'' is used throughout the proposed regulations and therefore avoids confusion, and because the ''relevant'' standard will help ensure that recipients are appropriately safeguarding sensitive or privileged information from disclosure and not relying on it. Other commenters expressed concern about the investigator deciding which evidence is relevant, which some commenters argued would inject subjectivity into the grievance procedures. Other commenters argued that because schools are not courts and do not apply rules of evidence, schools should provide a description of the evidence that is not limited to relevant evidence. Others expressed concern that allowing the initial relevance determination to be made by the same person who is the ultimate decisionmaker would impair the decisionmaker's ability to be neutral and fair.

Some commenters noted that providing only a description of the relevant evidence, rather than the evidence itself, could violate a collective bargaining agreement.

Discussion: The Department appreciates the range of opinions expressed by commenters regarding proposed § 106.45(f)(4), which would have required recipients to provide each party with a description of the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible. As discussed in the July 2022 NPRM, the Department held the tentative view that proposed § 106.45(f)(4) would streamline the investigation process while ensuring the parties receive a description of the relevant evidence so that they could have a meaningful opportunity to respond. 87 FR 41482. The Department also noted that a recipient that was not required by § 106.46(e)(6) to provide access to the underlying relevant evidence would nevertheless have the discretion to do so. *Id.*

After careful consideration of the comments in response to the July 2022 NPRM, the Department has decided to modify § 106.45(f)(4) to make these two options for providing access to the evidence more explicit and to give parties the right to receive access to the underlying evidence upon the request of any party. Under final § 106.45(f)(4), a recipient must provide each party with an equal opportunity to access the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible, consistent with § 106.2 and with § 106.45(b)(7), by providing an equal opportunity to access the relevant and not otherwise impermissible evidence (''evidence option'') or an accurate description of such evidence (''description option''). If the recipient initially chooses the description option and then a party requests access to the evidence, the recipient is required to provide all parties with an equal opportunity to access the underlying relevant and not otherwise impermissible evidence. The Department has also modified final § 106.45(f)(4) to include paragraphs that follow the general framework of § 106.46(e)(6), which are discussed later in this preamble.

Final § 106.45(f)(4) addresses commenters' due process concerns. The Department maintains that due process does not require access to the underlying evidence in all instances in order for the party to have a meaningful opportunity to respond, and also acknowledges that the Supreme Court has not held that due process requires access to the underlying evidence in all cases governed by § 106.45. However, providing recipients with the option to provide either an accurate description or the underlying evidence provides sufficient flexibility for recipients to structure their grievance procedures to comply with due process. In addition, the parties have the right to access the underlying evidence by requesting such access.

The Supreme Court and other Federal courts have recognized that procedural due process requirements depend on the circumstances of each particular case, and that due process is a flexible standard. *See Morrissey,* 408 U.S. at 481; 87 FR 41456. In *Goss,* the Supreme Court held that when a short suspension from a public elementary school or secondary school is at issue, procedural due process requires, at a minimum, notice and a meaningful opportunity to be heard. 419 U.S. at 579. In that context, *Goss* explained that due process entitles the student to ''oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.'' *Id.* at 581. The Court also observed that due process may require additional procedures for more severe sanctions. *Id.* at 584. Final § 106.45(f)(4) gives a recipient the flexibility to provide access to the evidence in a manner that would satisfy *Goss,* while also giving all parties the right to access the underlying evidence upon request by any party. Section 106.45(f)(4) provides recipients the flexibility and discretion, consistent with due process, to adapt the manner of providing access to the evidence to the circumstances at hand.

Although a recipient has flexibility in determining the manner of providing the description or the underlying evidence, subject to the equal opportunity requirement, § 106.45(b)(8) requires the recipient to articulate consistent principles in its grievance procedures for determining when the recipient will initially provide a description of the evidence or access to the underlying evidence. The Department notes that the description option may be more appropriate for complaints involving younger students and individuals facing less severe consequences, allowing the recipient to streamline the investigation process while ensuring that the parties have a meaningful opportunity to be heard. Complaints involving high school or postsecondary students or students facing possible expulsion are more likely to warrant a recipient providing the parties with access to the underlying evidence.

Regarding a commenter's request for parties to receive copies of the evidence, the Department notes that a recipient has the discretion to determine how to provide access to the evidence but must be mindful of the privacy protections required by § 106.45(f)(4)(iii). Section 106.45(f)(4) does not require a recipient to give the parties a physical or electronic copy of the description or the underlying evidence. Recipients may tailor the manner in which they present the relevant and not otherwise impermissible evidence in light of various factors, such as the ages of the parties, the severity of the alleged conduct, the volume of evidence, and other case-specific or recipient-specific factors. *See* 87 FR 41482. Under § 106.45(f)(4), a recipient may provide a description of the evidence orally or in writing. Regardless of how the recipient provides the parties with access to the evidence, a recipient must maintain records documenting the grievance procedures for each complaint under § 106.8(f)(1). The Department wishes to

clarify that § 106.8(f)(1) does not specify that a recipient must maintain written records, but an oral description must be documented in some manner to comply with § 106.8(f)(1) (*e.g.,* audio recording).

Section 106.45(f)(4) requires a recipient to provide access to a description of the evidence or access to the underlying evidence. Unlike § 106.46(e)(6), which requires access to a written investigative report or access to the underlying evidence, § 106.45(f)(4) reflects the Department's view that a written investigative report may not be necessary or appropriate for complaints that do not relate to sex-based harassment involving a student at a postsecondary institution. Recipients that choose the description option under § 106.45(f)(4) have discretion to determine the form of a description of the evidence, considering the nature of the complaint, the type and volume of evidence, including witness interviews, and the age of the parties. A recipient may, but is not required to, provide the description of the evidence in the form of a written investigative report.

The Department disagrees with a commenter's suggestion that a recipient could provide only the respondent with access to the evidence. To ensure that the grievance procedures are fair and provide all parties with a meaningful opportunity to respond to the evidence, recipients are not permitted to provide greater access to evidence to respondents or complainants. An equal opportunity to access the evidence requires a recipient to provide all parties with the same description of the evidence or to provide them with the same access to the underlying evidence. A recipient cannot choose to provide access to the underlying evidence to one party and to provide a description of the evidence to the other party or parties. The requirement to provide an equal opportunity to access the evidence also extends to the mode of delivery, such as whether a physical or electronic copy is provided. The requirement to provide an equal opportunity to access the evidence, however, does not mean that a recipient must treat the parties in an identical manner. A recipient may need to provide a particular mode of access through auxiliary aids and services to a party with a disability to ensure effective communication, which would not be applicable to the other party. Similarly, for persons with limited English proficiency, a recipient may need to provide language assistance services to only one party.

To address commenters' concerns that the description of the evidence could exclude important exculpatory or inculpatory evidence or not fully describe the evidence, the Department has revised the final regulations to require § 106.45(f)(4)(i)'s description of the evidence to be ''accurate.'' By requiring that the description of the evidence be ''accurate,'' the Department means it must fairly summarize the relevant and not otherwise impermissible evidence and be sufficient to provide the parties with a reasonable opportunity to respond, including a meaningful opportunity to prepare arguments, contest the relevance of evidence, and present additional evidence for consideration. The Department declines to specify what must be included in the description of evidence, other than that it must be accurate and sufficient to provide a reasonable opportunity to respond. The Department also reminds recipients that § 106.45(f) requires an investigation to be adequate, reliable, and impartial, and § 106.45(b)(2) further requires that any person designated as an investigator not have a conflict of interest or bias, including as reflected in a description of the evidence. In addition, under final § 106.45(f)(4)(i), a party has the right to receive access to the underlying evidence, and thus a party does not need to rely solely on a description of the evidence that the party believes to be incomplete.

In response to commenters' concerns that providing a description of the evidence could expose recipients to liability, the Department notes that a recipient is free to decide in all cases to provide the underlying evidence, rather than a description of the evidence, under final § 106.45(f)(4). Regarding commenters' criticism that the Department referenced a FIRE study in the July 2022 NPRM regarding access to the evidence without implementing such a requirement, the Department notes that the July 2022 NPRM cited this study only as recent research regarding the standard of proof used by postsecondary institutions. *See* 87 FR 41485. The Department acknowledges that in FIRE's study, which reviewed and scored ''procedural safeguards'' in disciplinary proceedings at postsecondary institutions, institutions did not earn any points in FIRE's scoring scheme for providing parties with access solely to a summary of the evidence.[56] However, § 106.45(f)(4)(i) requires a recipient to do more than merely provide a summary: if a recipient chooses to provide a description of the evidence, that description must be ''accurate,'' meaning it must fairly summarize the relevant and not otherwise impermissible evidence and be sufficient to provide the parties with a reasonable opportunity to respond, including a meaningful opportunity to prepare arguments, contest the relevance of evidence, and present additional evidence for consideration. Further, under § 106.45(f)(4)(i), if a recipient chooses to provide a description, the parties have the right to request—and then must receive—access to the underlying evidence. Not only do the final regulations require several features that FIRE's study recommended, even FIRE's study recognizes that access to evidence is only one kind of procedural safeguard. The final regulations require several procedural safeguards that promote fair and reliable grievance procedures.

The Department appreciates commenters' support for use of the ''relevant'' standard in § 106.45(f)(4) and also acknowledges commenters' concerns. The 2020 amendments distinguish between evidence that is directly related to the allegations, to which the recipient must provide the parties with access (§ 106.45(b)(5)(vi)), and relevant evidence, which the recipient must evaluate (§ 106.45(b)(1)(ii)), include in the investigative report (§ 106.45(b)(5)(vii)), and permit questions about (§ 106.45(b)(6)). The preamble to the 2020 amendments clarifies that a recipient must disclose to the parties any evidence related to a complainant's sexual predisposition or prior sexual behavior that is directly related to the allegations, *see* 85 FR 30428, even though the 2020 amendments required such evidence to generally be excluded from an investigative report and from questioning as irrelevant, *see* 34 CFR 106.45(b)(6)(i), (ii); 85 FR 30304. OCR received feedback during the June 2021 Title IX Public Hearing that the distinction between ''directly related'' and ''relevant'' is confusing and not well-delineated. In the July 2022 NPRM, the Department proposed merging these standards by defining ''relevant'' in § 106.2 to mean evidence ''related to the allegations of sex discrimination'' and explaining that evidence is ''relevant'' when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred. 87 FR 41419. These final regulations require access to a similar scope of evidence with one exception: unlike the 2020 amendments, these final regulations prohibit a recipient from disclosing evidence of the complainant's sexual interests and

[56] FIRE, *Spotlight on Due Process 2020–2021,* at 7–8, 10 *https://www.thefire.org/research-learn/spotlight-due-process-2021-2022* (last visited Mar. 12, 2024).

prior sexual conduct, except as narrowly permitted by § 106.45(b)(7)(iii). The expansive definition of ''relevant,'' combined with the additional requirement that a description of the evidence be ''accurate,'' addresses commenters' concern that recipients would have too much discretion to determine relevance; that it would lead students and faculty to censor their speech; and that it would impair a decisionmaker's ability to be neutral and fair. For further explanation of the definition of ''relevant,'' see the discussions of §§ 106.2 and 106.46(e)(6).

With respect to commenters' concerns that providing a description of the relevant evidence could violate a collective bargaining agreement, the Department notes that, under § 106.45(f)(4), recipients have the option to provide the underlying relevant and not otherwise impermissible evidence instead of a description and that parties have the right to receive access to this evidence upon the request of any party.

Changes: The Department has modified § 106.45(f)(4) to expressly identify two options for a recipient to provide each party with an equal opportunity to access the relevant and not otherwise impermissible evidence—namely, to provide access to the evidence, or to provide an accurate description of such evidence. In addition, the Department has added a sentence to final § 106.45(f)(4)(i) to state that if the recipient initially chooses the description option and then a party requests access to the evidence, the recipient is required to provide the parties with an equal opportunity to access the underlying relevant and not otherwise impermissible evidence. The Department has also restructured § 106.45(f)(4) to clarify that both the evidence option and the description option require a recipient to give the parties a reasonable opportunity to respond.

§ 106.45(f)(4)(ii): Reasonable Opportunity To Respond to Evidence

Comments: Commenters asked for clarification of what constitutes a reasonable opportunity to respond. Some commenters asked for examples, and some asked whether what is reasonable can vary based on specific factors such as the amount of evidence. Other commenters requested clarity on whether the opportunity to respond would take place at the end of the investigation or at another time.

Discussion: The parties must be given a reasonable opportunity to respond to the evidence or to the accurate description of the evidence under § 106.45(f)(4)(ii). When properly implemented, both the evidence option and the description option give parties a reasonable opportunity to respond. In determining reasonableness, a recipient must ensure that the parties can meaningfully respond to the evidence. *See Goss,* 419 U.S. at 579 (noting that in the context of short suspensions from public elementary schools and secondary schools, procedural due process requires, at a minimum, notice and a meaningful opportunity to be heard). Because a reasonable timeframe accommodates the nature and volume of evidence, which can vary greatly based on the allegations in a complaint, the Department declines to provide examples. The opportunity to respond to the evidence would generally take place at the end of the investigation after the evidence is gathered, but recipients have the discretion to permit the parties to respond at another point in the investigation.

Changes: The Department has revised § 106.45(f)(4)(ii) to make it clear that a recipient must provide a reasonable opportunity to respond to the evidence or to the accurate description of the evidence described in § 106.45(f)(4)(i).

§ 106.45(f)(4)(iii): Unauthorized Disclosures

Comments: Some commenters expressed concerns about protecting student privacy while allowing the parties access to a description of the evidence. Multiple commenters expressed concern that sharing information about a student's complaint will open the student up to further harassment or retaliation, especially if the respondent is an employee of the recipient. Multiple commenters emphasized that sharing the party's evidence (even a description of the evidence) with other parties could have a significant chilling effect on students' willingness to report.

Discussion: The Department appreciates commenters' concerns regarding the impacts of disclosing relevant evidence to parties, regardless of whether the recipient uses the description option or evidence option. Access to the evidence in some format, whether through access to the underlying evidence or access to an accurate description of the evidence, is necessary for fair grievance procedures and required under these regulations. But in order to minimize these impacts, the Department is persuaded that the final regulations must require recipients to take reasonable steps to prevent and address the parties' unauthorized disclosure of information, so as to prevent a chilling effect on reporting, fear of retaliation, harassment, or other harmful consequences. The unauthorized disclosure of sensitive information could threaten the fairness of the grievance procedures by deterring parties or witnesses from participating, affecting the reliability of witness testimony, leading to retaliatory harassment, and other consequences. The Department is not proposing specific steps that a recipient must take, as what is reasonable to prevent unauthorized disclosure may vary depending on the circumstances. As discussed in the July 2022 NPRM with respect to proposed § 106.46(e)(6)(iii), *see* 87 FR 41501, in some circumstances, it may be sufficient to inform the parties of the recipient's expectations for how the parties should safeguard the evidence and the consequences for unauthorized disclosures, whereas other circumstances may warrant software that restricts further distribution. Under the grievance procedures applicable to postsecondary institutions for complaints of sex-based harassment involving a student complainant or student respondent, § 106.46(e)(6)(iii) addresses unauthorized disclosures, and the Department is adding an analogous provision at § 106.45(f)(4)(iii) of the final regulations.

In both §§ 106.45(f)(4)(iii) and 106.46(e)(6)(iii), the Department is adding a sentence to make clear that disclosures of information and evidence for purposes of administrative proceedings or litigation related to the complaint of sex discrimination are authorized. The Department does not intend to limit—and does not view §§ 106.45(f)(4)(iii) or 106.46(e)(6)(iii) as limiting—the parties' ability to disclose information obtained solely through the grievance procedures as part of exercising their legal rights, such as the right to file an OCR complaint and the right to initiate (or defend against) a related legal proceeding. Additional discussion related to unauthorized disclosures in connection with § 106.46(e)(6)(iii) is addressed in that section of this preamble.

Changes: The Department has added § 106.45(f)(4)(iii), which requires a recipient to take reasonable steps to prevent and address a party's unauthorized disclosure of information and evidence obtained solely through the grievance procedures. The provision also states that for purposes of paragraph (f)(4)(iii), disclosures of such information and evidence for purposes of administrative proceedings or litigation related to the complaint of sex discrimination are authorized.

§ 106.45(f)(4) and FERPA

Comments: Some commenters questioned how a recipient could share relevant evidence with the parties in a manner consistent with FERPA. Some commenters noted that recipients have at times cited FERPA as a reason to withhold some evidence obtained in the investigation or the outcome of the investigation. Some commenters requested clarification regarding what information about grievance procedures will be shared with parents of elementary school students.

Discussion: The Department appreciates the opportunity to clarify the interaction between FERPA and the Title IX provisions requiring disclosure of evidence. FERPA and its implementing regulations define ''education records'' as, with certain exceptions, records that are directly related to a student and maintained by an educational agency or institution, or by a person acting for the agency or institution. 20 U.S.C. 1232g(a)(4); 34 CFR 99.3.

Under FERPA, a parent or eligible student has the right to inspect and review the student's education records with certain limitations. 20 U.S.C. 1232g(a)(1); 34 CFR part 99, subpart B. In the context of disciplinary proceedings, the Department has previously recognized that under FERPA, ''a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning.'' 73 FR 74832–33.[57] These final Title IX regulations, at §§ 106.45(f)(4) and 106.46(e)(6), require a recipient to provide the parties with an equal opportunity to access the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible. The Department acknowledges that certain evidence that is relevant to the allegations may not necessarily be directly related to all parties for purposes of FERPA. While there may be instances in which unrelated material could be redacted without compromising due process, to the extent that these Title IX regulations require disclosure of information from education records to the parties (or their parents, guardians, authorized legal representatives, or advisors) that would not comply with FERPA, the constitutional override and the GEPA override apply and require disclosure of evidence under §§ 106.45(f)(4) and 106.46(e)(6) to the parties and their advisors.[58] *See New York,* 477 F. Supp. 3d at 301–02 (upholding a similar approach to the interaction between FERPA and Title IX in the 2020 amendments against an arbitrary and capricious challenge). With respect to the rights of parents, § 106.6(g) states that nothing in Title IX may be read in derogation of any legal right of a parent, guardian, or other authorized legal representative to act on behalf of a complainant, respondent, or other person. Additional discussion related to the interaction between FERPA and the evidentiary disclosures required by the Title IX regulations is addressed in the discussion of § 106.46(e)(6).

Changes: None.

18. Section 106.45(g) Evaluating Allegations and Assessing Credibility

Comments: Commenters supported proposed § 106.45(g) for many reasons. For example, some commenters supported it because it would provide needed flexibility for elementary schools and secondary schools and make it easier to establish credibility.

Some commenters opposed proposed § 106.45(g) because it would permit methods of assessing credibility other than cross-examination, it would decrease uniformity of process across recipients, or it might interfere with parties' due process rights. Some commenters were concerned that it requires elementary schools and secondary schools to develop a formalized hearing process, which could burden recipients. Some commenters asserted proposed § 106.45(g) would be too prescriptive for cases of sex discrimination not involving allegations of sex-based harassment.

One commenter was concerned about removing the language from the 2020 amendments regarding the right of elementary school and secondary school students to submit questions to be asked of the other party and witnesses.

One commenter asked the Department to add language prohibiting a recipient from using a live hearing or cross-examination to assess credibility under proposed § 106.45(g) because they are not appropriate for elementary school and secondary school students. Another commenter asked the Department to require a live hearing and cross-examination at the elementary school and secondary school levels because respondents face severe and long-lasting consequences. One commenter suggested that instead of applying proposed § 106.45(g) to complaints of sex discrimination involving elementary school and secondary school students, the Department should develop a process based on State anti-bullying laws.

Some commenters were concerned that the types of questions asked when assessing credibility could make the process traumatizing for complainants.

Some commenters sought supplemental guidance on the phrase ''provide a process'' in proposed § 106.45(g), including how to implement it effectively for students of different ages, what process would be required under proposed § 106.45(g), and whether review of the evidence would be sufficient to satisfy proposed § 106.45(g).

Discussion: The Department acknowledges the commenters' support for proposed § 106.45(g). The Department understands that some commenters would prefer the Department maintain the requirement in § 106.45(b)(6)(ii) from the 2020 amendments that each party must be afforded the opportunity to submit written relevant questions to be asked of the other party and witnesses and were concerned about removing that right for elementary school and secondary school students, and other commenters were concerned that requiring recipients to create a process for assessing credibility was unnecessary, not beneficial, and could lead to lack of uniformity. After carefully considering the views expressed by the commenters, the Department maintains the position articulated in the July 2022 NPRM that, in order to fully effectuate Title IX's nondiscrimination mandate, it is necessary to require recipients to create a process for assessing the credibility of parties and witnesses under § 106.45(g), to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination. *See* 87 FR 41482. The requirements of § 106.45 apply to complaints alleging all forms of sex discrimination, that is they are not limited to sex-based harassment, and the requirements apply to all types of recipients. In light of these variations, the Department has determined that it is appropriate to provide recipients flexibility and discretion to structure the process for assessing credibility, taking into account due process, their administrative structure, their education community, and applicable Federal and State case law and State or local legal requirements. *See id.*

[57] The Department made this statement in its FERPA rulemaking in response to concerns about impairing due process in student discipline cases.

[58] The constitutional override is explained in greater detail in the discussion of § 106.6(e).

The Department disagrees that providing recipients with this discretion is arbitrary and capricious or does not adequately protect due process. As explained in the discussions of § 106.46(f)–(g) in the July 2022 NPRM and the preamble to the 2020 amendments, what constitutes a meaningful opportunity to be heard depends on the specific circumstances. *See* 87 FR 41504; 85 FR 30327. The requirement in § 106.45(g) is designed to provide recipients with a way to assess credibility without engaging in a quasi-legal process that may be inappropriate in some circumstances, including at the elementary school and secondary school levels due to the age or education level of the parties. The Department maintains that requiring recipients to design a process allowing the decisionmaker to question parties and witnesses to assess credibility, but giving them discretion over how the process works, will provide recipients with necessary flexibility while enabling them to fully effectuate Title IX's nondiscrimination mandate and provide all parties with a meaningful opportunity to respond to allegations. The Department notes, however, that a recipient may be required to provide additional process in individual cases to satisfy constitutional due process. Moreover, anyone who believes that a recipient has failed to comply with § 106.45(g), including by abusing its discretion, may file a complaint with OCR. For additional discussion of OCR's enforcement authority, see the discussion of OCR Enforcement (Section VII).

In *Mathews* v. *Eldridge,* the Supreme Court held that determining the adequacy of due process procedures involves a balancing test that considers the private interest of the affected individual, the risk of erroneous deprivation and benefit of additional procedures, and the government's interest, including the burden and cost of providing additional procedures. 424 U.S. at 335, 349. Following the analysis in *Mathews,* the Department considered a number of factors in determining whether to require a decisionmaker rather than the parties themselves to ask questions, including the interests of the respondent, the goal of ensuring that Title IX grievance procedures are prompt and equitable, providing the parties with a meaningful opportunity to be heard and respond, producing reliable outcomes, and the potential administrative burden additional procedural requirements would place on recipients. The Department recognizes that the interests of the respondent will vary depending on the education level and the severity of the potential disciplinary sanctions. However, the Department maintains that requiring the decisionmaker to question a party or witness to adequately assess that party's or witness's credibility along with the other requirements in § 106.45, including an adequate, reliable, and impartial investigation of complaints, provides the respondent with a meaningful opportunity to be heard and respond and will produce reliable outcomes. The Department has no reason to conclude that requiring additional procedures in all cases, like permitting the parties to ask questions, would significantly improve the reliability of the outcome of the grievance procedures. In addition, permitting party questioning would increase the administrative burden on recipients, especially elementary schools and secondary schools. Given the age of the students they serve, elementary school and secondary school recipients would have to be more actively involved in facilitating the process of obtaining the written questions and answers from the parties and would need to work with the parties' parents as to facilitate this process, which would impact their ability to respond promptly to all complaints of sex discrimination. Weighing these factors, the Department reasonably concluded that questioning by a decisionmaker, and not the parties themselves, provides for a fair process that will produce reliable outcomes in investigations of Title IX violations. Nothing in Title IX or these regulations prevents recipients from implementing additional processes for certain types of proceedings that, in line with the *Mathews* balancing test, raise due process implications.

The Department notes that nothing in the final regulations precludes a recipient, including an elementary school or secondary school, from using a process that permits the parties to submit written questions like that required under § 106.45(b)(6)(ii) in the 2020 amendments to satisfy its obligations under § 106.45(g) or from providing other procedures in addition to questioning by the decisionmaker.

In addition, § 106.45(g) is consistent with permitting a recipient to choose a single-investigator model instead of holding a live hearing with questioning by an advisor because § 106.45(g) provides recipients with discretion to design a process for assessing credibility that does not include a live hearing with questioning by an advisor. For additional discussion of the requirements for assessing credibility in complaints of sex-based harassment involving student complainants or student respondents at postsecondary institutions, see the discussion of § 106.46(f) and (g). For additional discussion of the single-investigator model, see the discussion of § 106.45(b)(2).

In response to commenters who found proposed § 106.45(g) vague or confusing, the Department has revised the language to clarify that the process required under § 106.45(g) is one that enables the decisionmaker to question parties and witnesses to adequately assess the party's or witness's credibility. This revision addresses the confusion the commenters identified by making clear that the process for assessing credibility must include questioning parties and witnesses and thus reviewing the evidence would not be sufficient to satisfy a recipient's obligations under § 106.45(g). The Department notes however that nothing in the final regulations requires a recipient to use the type of process described in § 106.46(f) or (g) to satisfy its obligations under § 106.45(g), although a recipient is permitted to do so if it so chooses.

In response to commenters who suggested that credibility may be at issue in most cases, the Department cannot opine on the percentage of sex discrimination complaints in which credibility is at issue. The Department notes that § 106.45(g) applies to all complaints of sex discrimination, not just sex-based harassment complaints, and that the potential number or percentage of impacted cases would not dictate the appropriateness of this provision. At least one Federal court has recognized that credibility disputes may be more common in sexual assault or harassment cases than other types of cases that recipients handle. *See Univ. of Cincinnati,* 872 F.3d at 406. The Department declines to define credibility, but notes that at least one Federal court has explained that cases in which credibility is in dispute and relevant to evaluating the allegations of sex discrimination would include those in which the recipient's determination relies on testimonial evidence, including cases in which a recipient ''has to choose between competing narratives to resolve a case.'' *Baum,* 903 F.3d at 578, 584.

Similar to the position taken by the Department in the preamble to the 2020 amendments, the Department maintains that it is appropriate not to require live hearings or questioning by an advisor for all complaints of sex discrimination, including complaints of sex-based harassment involving elementary school

and secondary school students. *See* 85 FR 30363–64. The Department maintains the view that because elementary school and secondary school students are usually under the age of majority and generally do not have the same developmental ability or legal rights as adults to pursue their own interests, it is not appropriate to require live hearings or questioning by an advisor under § 106.45(g). *See* 85 FR 30364.

The Department notes, however, that nothing in the final regulations precludes an elementary school or secondary school or a postsecondary institution in cases other than sex-based harassment involving a student party from choosing to use a live hearing either with or without questioning by an advisor. As explained in the discussion of § 106.46(g), the Department maintains its general position from the 2020 amendments that if an elementary school or secondary school or a postsecondary institution in cases other than sex-based harassment involving a student party chooses to hold a live hearing as part of its process for questioning parties and witnesses under § 106.45(g), it is not subject to the live hearing procedures in § 106.46(g) that apply to postsecondary institutions for cases of sex-based harassment involving a student party because the Department intends to leave such recipients with flexibility to apply live hearing procedures that fit the needs of their educational environment and the nature of the allegations. *See* 85 FR 30365. This is consistent with the Department's position in the 2020 amendments acknowledging that, for example, an elementary school and secondary school recipient could determine that their education community is best served by holding live hearings for high school students, for students above a certain age, or not at all. *See* 85 FR 30365. In addition, recipients located in a jurisdiction where applicable law requires live hearings for certain disciplinary matters may be required to hold a live hearing under those laws.

In addition, the Department notes that the final regulations at § 106.45(j) require that any additional provisions adopted by a recipient as part of its grievance procedures for handling sex discrimination must apply equally to the parties. This includes any provision a recipient adopts regarding how it conducts a live hearing.

The Department disagrees that proposed § 106.45(g) is too prescriptive for cases of sex discrimination that do not involve allegations of sex-based harassment and declines to narrow its application. The Department notes that a recipient is only required to use the process implemented under § 106.45(g) to the extent credibility is in dispute and relevant to evaluating the allegations of sex discrimination. The Department also emphasizes that § 106.45(g) gives recipients flexibility to design their own process, and nothing in the final regulations requires a recipient to use the type of process described in § 106.46(f) to satisfy its obligations under § 106.45(g), although they are not prohibited from doing so if they so choose.

The Department declines to replace proposed § 106.45(g) with a process based on State anti-bullying laws, but notes that nothing in the final regulations precludes a recipient from consulting its State anti-bullying laws when designing a process for the decisionmaker to question parties and witnesses to assess credibility to satisfy its obligations under § 106.45(g). The Department also notes that nothing in the final regulations precludes a recipient from using an existing process to satisfy its obligations under § 106.45(g) to assess credibility, if that process otherwise satisfies § 106.45(g).

The Department acknowledges that recipients may want to take into account the age and developmental level of their students when designing a process to comply with their obligations under § 106.45(g). The Department declines to provide specific information regarding how to design such a process, but will offer technical assistance and guidance, as appropriate, to promote compliance with these final regulations.

Regarding concerns that the process for assessing credibility can be traumatizing for complainants due to the nature of the questions, the Department notes that any questions a decisionmaker asks of parties and witnesses as part of the process for assessing credibility under § 106.45(g) must comply with the evidentiary standard applicable to all evidence in the grievance procedures, that they be relevant and not otherwise impermissible under §§ 106.2 and 106.45(b)(7).

Changes: The Department has revised § 106.45(g) to clarify that it covers questioning parties and witnesses to aid in evaluating allegations and assessing credibility and that the process required under § 106.45(g) is one that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility.

19. Section 106.45(h)(1) Standard of Proof and Directed Question 4

Comments: The text below documents examples of the comments received and incorporates responses to Directed Questions 4.a.–c., about proposed § 106.45(h)(1) from the July 2022 NPRM.

Standards of Proof

Comments: Some commenters supported the requirement in proposed § 106.45(h)(1) that recipients use the preponderance of the evidence standard to determine whether sex discrimination occurred unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings. Commenters appreciated that proposed § 106.45(h)(1) honors the diversity of recipients' student codes of conduct and gives recipients the flexibility to choose one standard of proof for all comparable proceedings instead of mandating the uniform use of one standard, and that it allows recipients to treat student and employee misconduct as required by State law and contractual obligations.

Some commenters supported the use of the preponderance of the evidence standard for multiple reasons and urged the Department to mandate its use in all Title IX investigations. Some commenters asserted that the preponderance of the evidence standard best promotes compliance with Title IX because it is less burdensome than the clear and convincing evidence standard and balances the interests of the parties by giving equal weight to the evidence supporting each party. Some commenters supported the use of the preponderance of the evidence standard because it is more easily understood by decisionmakers and therefore more likely to be applied correctly. Some commenters opined that the preponderance of the evidence standard is most appropriate because it is the standard used by courts in civil rights cases and other civil proceedings, has long been the standard used by most recipients for Title IX claims, and has been recommended for use in student disciplinary matters for nearly 30 years. Other commenters noted that different evidentiary standards are appropriate in different contexts, and here, when there is not the same risk of harm as in a criminal proceeding and both parties have equal stakes in the outcome (often, the ability to continue attending the school of their choice), the comparatively lower standard of a preponderance of the evidence is appropriate. Other commenters argued that using the preponderance of the evidence standard would encourage complainants to come forward to report complaints because it would give them more trust in the process, which they said was particularly important for complainants from groups that have

historically been less able to trust adjudicatory proceedings, including students of color and LGBTQI+ students. By contrast, commenters stated, the 2020 amendments' permission to use a higher standard of proof, combined with other legalistic requirements, had suggested that recipients would not believe complainants, and thus deterred complainants from coming forward.

Some commenters objected to proposed § 106.45(h)(1) based on a misunderstanding of what the proposed provision would require and what the 2020 amendments required. Some thought § 106.45(h)(1) would mandate use of the preponderance of the evidence standard of proof and that the 2020 amendments required use of the clear and convincing evidence standard; other commenters misunderstood the 2020 amendments to require the beyond a reasonable doubt standard. Commenters who had these misunderstandings opposed proposed § 106.45(h)(1) because they believed that requiring the preponderance of the evidence standard would violate respondents' due process rights, improperly place the burden on the respondent to demonstrate that no discrimination occurred, and increase litigation against recipients by respondents alleging that their rights were violated.

Some commenters objected to proposed § 106.45(h)(1) because they asserted that the risks of harm to the respondent are so significant that the standard must be higher than a preponderance of the evidence. For more on what commenters said regarding the risks of harm for respondents, see the discussion of Due Process Generally above. Some of these commenters urged the Department to require recipients to adopt a clear and convincing evidence standard in all instances, while some of these commenters urged the Department to require use of the beyond a reasonable doubt standard in all instances. Some commenters raised concerns that proposed § 106.45(h)(1) would reduce confidence in the Title IX system and chill speech.

Some commenters urged the Department to require recipients to use a sliding scale approach whereby a higher standard of proof is required to impose more severe consequences. Similarly, some commenters suggested that the standard of proof should vary based on the severity of the alleged violations, with a preponderance of the evidence standard more appropriate for the equivalent of civil claims, and the beyond a reasonable doubt standard more appropriate for the equivalent of criminal violations.

Discussion: The Department appreciates the variety of views shared by commenters and has carefully considered the support for and objections to the proposed standard of proof. The Department understands commenters' different perspectives about which standard of proof is most appropriate for a recipient to use in making a determination about whether sex discrimination occurred. The Department heard many similar views shared by stakeholders during the June 2021 Title IX Public Hearing and in listening sessions the Department conducted prior to the development of the July 2022 NPRM.

The Department has decided to retain the standard of proof proposed in the July 2022 NPRM, without any changes. Under the final regulations, therefore, in determining whether sex discrimination occurred following an investigation and the evaluation of evidence under § 106.45, and if applicable § 106.46, a recipient must use the preponderance of the evidence standard of proof unless the recipient uses the clear and convincing evidence standard in all other comparable proceedings, including proceedings relating to other discrimination complaints, in which case the recipient may elect to use the clear and convincing evidence standard of proof for sex discrimination cases as well. The 2020 amendments also gave recipients a choice between the preponderance of the evidence standard and the clear and convincing evidence standard, but the 2020 amendments required recipients to apply the same standard of evidence for complaints against students as for complaints against employees, including faculty, which these final regulations do not require. Also, the 2020 amendments required recipients to apply the same standard of evidence to all formal complaints of sexual harassment, whereas the final regulations regarding grievance procedures apply to all cases of sex discrimination, not just sex-based harassment.

The Department is committed to ensuring that a recipient's grievance procedures provide a fair and reliable process for all involved, and it is the Department's view that the final regulations establish a strong framework for such a process. As stated in the preamble to the July 2022 NPRM, several Federal courts, including appellate courts, have held that the preponderance of the evidence standard is constitutionally sound and sufficient to satisfy the requirements of due process to a respondent when a school evaluates allegations of sexual harassment. 87 FR 41484 (citing *Doe* v. *Univ. of Ark.-Fayetteville,* 974 F.3d 858, 868 (8th Cir. 2020) (''[W]e do not think a higher standard of proof [than preponderance of the evidence] is compelled by the Constitution. . . . . A heightened burden of proof may lessen the risk of erroneous deprivations for an accused, but it also could frustrate legitimate governmental interests by increasing the chance that a true victim of sexual assault is unable to secure redress and a sexual predator is permitted to remain on campus.''); *Lee* v. *Univ. of N.M.,* 449 F. Supp. 3d 1071, 1132 (D.N.M. 2020) (''[D]ue process permits state education institutions . . . to adjudicate sexual misconduct disciplinary proceedings according to a preponderance-of-the-evidence standard.''); *Messeri* v. *DiStefano,* 480 F. Supp. 3d 1157, 1167–68 (D. Colo. 2020) (''Increasing the evidentiary standard would undoubtedly make it less likely that the University erroneously sanctioned Plaintiff or others similarly situated. . . . [but] requiring a higher evidentiary standard would . . . detract from the University's 'strong interest in the educational process, including maintaining a safe learning environment for all its students.' . . . Balancing these interests, the Court concludes that it is beyond dispute that due process currently permits state educational institutions to adjudicate disciplinary proceedings relating to sexual misconduct using a preponderance of the evidence standard.'' (quoting *Plummer* v. *Univ. of Hous.,* 860 F.3d 767, 773 (5th Cir. 2017))); *Haas,* 427 F. Supp. 3d at 350 (''The Court also rejects the contention that due process required that the university apply a standard more stringent than the preponderance of the evidence. Such a standard is the accepted standard in the vast majority of civil litigations and . . . courts have rejected the notion that the safeguards applicable to criminal proceedings should be applied in the school disciplinary context.'')).

In addition, Federal courts have upheld the preponderance of the evidence standard based on the fact that other procedures in the Title IX regulations work together with the standard to provide sufficient process for the respondent. *See, e.g., Doe* v. *Cummins,* 662 F. App'x 437, 449 (6th Cir. 2016) (''Allocating the burden of proof [equally under the preponderance of the evidence standard]—in addition to having other procedural mechanisms in place that counterbalance the lower standard used (*e.g.,* an adequate appeals process)—is constitutionally sound and

does not give rise to a due-process violation.''). These final regulations establish, and in some instances maintain from the 2020 amendments, a number of procedural safeguards that together ensure that a recipient's grievance procedures provide a fair process for all involved, including requirements that a recipient's grievance procedures, among other things: treat complainants and respondents equitably, § 106.45(b)(1); provide the recipient the discretion to dismiss a complaint in four different circumstances, including when the allegations, even if proven, would not constitute sex discrimination under Title IX, § 106.45(d); require notice to the parties of the allegations, § 106.45(c); must be followed before the imposition of any disciplinary sanctions against a respondent, § 106.45(h)(4), which may be imposed only if it is determined that the respondent engaged in prohibited sex discrimination, § 106.45(h)(3); require an objective evaluation of all relevant evidence and exclude certain types of evidence as impermissible, § 106.45(b)(6) and (7); place the burden on the recipient to conduct an investigation that gathers sufficient evidence to reach a determination, § 106.45(f)(1); provide an equal opportunity for the parties to present fact witnesses and other inculpatory and exculpatory evidence that are relevant and not otherwise impermissible, § 106.45(f)(2); provide each party with an equal opportunity to access the evidence that is relevant and not otherwise impermissible and a reasonable opportunity to respond to that evidence, § 106.45(f)(4); and require the decisionmaker to adequately assess a party's or witness's credibility to the extent credibility is in dispute and relevant to the allegations, § 106.45(g). Moreover, a recipient may adopt additional provisions as part of its grievance procedures as long as they are applied equally to the parties. *See* § 106.45(j).

In addition, there are a number of safeguards that protect against bias in Title IX proceedings. For example, § 106.45(b)(2) requires that a decisionmaker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent; § 106.45(b)(3) requires the grievance procedures to include a presumption that the respondent is not responsible for the alleged conduct until a determination whether sex discrimination occurred is made at the conclusion of the recipient's grievance procedures; and § 106.45(b)(5) requires a recipient to take reasonable steps to protect the privacy of the parties and witnesses during the grievance procedures. There are also requirements in § 106.8(d) about training for decisionmakers, including training on how to serve impartially by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. Section 106.45(i) of the final regulations provides that a recipient must offer the parties an appeal that, at a minimum, is the same as it offers in all other comparable proceedings, if any, while § 106.45(d)(3) provides the right to appeal the dismissal of a complaint, and § 106.46(i) requires a postsecondary institution to offer an appeal based on—among other things—a procedural irregularity or bias or conflict of interest by the decisionmaker that would change the outcome. A postsecondary institution may offer an appeal equally to the parties on additional bases, as long as the additional bases are available to all parties. In addition, the Department reminds all stakeholders that under the regulations, the burden is on the recipient to gather evidence that meets the standard of proof, not on the complainant or the respondent. *See* 106.45(f)(1).

While the above safeguards are not all the same safeguards that are available in civil litigation in a court of law, they are legally sufficient to provide the due process and fundamental fairness required in the school discipline context. As discussed in the July 2022 NPRM, the requirements for grievance procedures under § 106.45 comport with the requirements set out by *Goss* v. *Lopez,* 419 U.S. 565 (1975). *See* 87 FR 41456 (explaining that at a minimum, *Goss* requires recipients to provide students facing temporary suspension notice of the allegations against them and an opportunity to present their account of what happened). Courts have also made clear that school disciplinary proceedings are not civil or criminal trials and, as such, the parties are not entitled to the same rights as parties in a civil trial or defendants in a criminal trial. *See, e.g., Horowitz,* 435 U.S. at 88 (''A school is an academic institution, not a courtroom or administrative hearing room.''); *Doe* v. *Univ. of Ky.,* 860 F.3d 365, 370 (6th Cir. 2017) (holding that ''school disciplinary proceedings, while requiring some level of due process, need not reach the same level of protection that would be present in a criminal prosecution'' (citing *Cummins,* 662 F. App'x at 446)); *Nash* v. *Auburn Univ.,* 812 F.2d 655, 664 (11th Cir. 1987) (''Due process requires that appellants have the right to respond, but their rights in the academic disciplinary process are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial.''). Because a recipient's disciplinary goals are different than the goals of the civil and criminal legal systems, requiring use of the preponderance of the evidence standard would not cause a recipient to diminish a respondent's due process rights. In any event, however, the Department is not requiring use of the preponderance of the evidence standard across the board; use of that standard is only required of a recipient if it uses that standard for all comparable proceedings. For further explanation of how the final regulations comply with legal due process and fundamental fairness requirements, see the discussion of Due Process Generally above.

After fully considering all of the comments received, the Department maintains its view that the preponderance of the evidence standard of proof best promotes compliance with Title IX because it ensures that when a decisionmaker determines, based on the evidence, that it is more likely than not that sex discrimination occurred in its education program or activity, the recipient can take sufficient steps to end the sex discrimination, prevent its reoccurrence, and remedy the effects. The Department continues to believe, and many commenters emphasized, that the preponderance of the evidence standard best recognizes that all parties to a Title IX complaint have a strong interest in the outcome of the proceedings, including the right to equal access to education absent discrimination on the basis of sex. For instance, as commenters noted when discussing interests in the outcome of grievance proceedings, a respondent found responsible for sex-based harassment might face suspension or expulsion, the latter of which could restrict their ability to attend school elsewhere, and a complainant alleging sex-based harassment by a respondent who is found not responsible may be denied certain remedies and potentially feel compelled to transfer schools or drop out if the respondent remains at their school. In addition, all parties may face the possibility of reputational harm or stigma, peer harassment, or retaliation as a result of their involvement in a sex-based harassment matter if their involvement becomes known.

The Department also agrees that by applying the preponderance of the evidence standard of proof to Title IX allegations, a recipient can help

encourage students—such as those who may find a recipient's use of the clear and convincing evidence standard to be intimidating or may take it as a signal that the recipient thinks allegations of sex discrimination are suspect—to come forward and report instances of sex discrimination. This makes it more likely that sex discrimination will be addressed and deterred from happening again in the future, and helps recipients meet their Title IX obligations to provide an educational environment free from sex discrimination.

The Department does not agree with the assertion of some commenters that using a preponderance of the evidence standard of proof will encourage frivolous claims that are not supported by evidence. Commenters did not provide any evidence to support their prediction. Allowing use of the preponderance of the evidence standard is not new with this rulemaking, and the preamble to the 2020 amendments does not indicate that the Department was concerned about frivolous claims when it decided to allow recipients to use either the preponderance of the evidence standard or the clear and convincing evidence standard for complaints of sex-based harassment. The overall number of sex discrimination complaints filed may increase if a recipient that has been using the clear and convincing evidence standard begins to apply the preponderance of the evidence standard to comply with these regulations, but encouraging reporting and facilitating complaints is an important part of the recipient's duty to effectuate Title IX's nondiscrimination mandate. As a condition of receiving Federal funds, a recipient agrees to operate its education program or activity free from sex discrimination; doing so requires knowing about possible sex discrimination and investigating it to determine the need for remedy, if any. In addition, procedural protections are built into the grievance procedures to address such a circumstance. For example, the regulations governing permissive dismissal allow a recipient to dismiss a complaint on any of the bases listed in § 106.45(d)(1)(i)–(iv), including if the recipient determines that the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX. And the grievance procedures are structured to be fair and accurate, so even if a permissive dismissal is not available, the procedural safeguards mean that recipients can be confident in the integrity of the outcome because complaints made in bad faith will not result in a determination that sex discrimination occurred. In light of this framework, the Department has carefully considered the concerns raised by commenters and has decided that the above-stated benefits to a recipient and to the parties of allowing use of the preponderance of the evidence standard of proof justify the risk that a complaint will be made in bad faith.

The Department also disagrees with commenters' concerns that allowing use of the preponderance of the evidence standard in § 106.45(h)(1) will reduce confidence in the system and cause professors and students to censor their speech to avoid the risk of harm. Allowing recipients to use the preponderance of the evidence standard is not a change from the 2020 amendments. Students' confidence in the system should not be affected because, as the Department explained in the 2020 amendments and again in the July 2022 NPRM, both the preponderance of the evidence and clear and convincing evidence standards of proof can be used to produce reliable, accurate outcomes. *See* 85 FR 30381; 87 FR 41484. As explained above, the regulations contain procedural protections to help ensure a fair process. And the Department reaffirms that nothing in the final regulations should be interpreted to impinge upon rights protected under the First Amendment, and the protections of the First Amendment must be considered if issues of speech or expression are involved. *See* § 106.6(d). For additional explanation of the interaction between Title IX and the First Amendment, see the discussion of the definition of ''sex-based harassment'' in § 106.2 and the discussion of § 106.44(a).

Still, the Department recognizes that some commenters believe the clear and convincing evidence standard to be clearer and fairer. Under the Department's approach, if a recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints, it may do so for sex discrimination complaints, which may promote perceptions of fairness. 87 FR 41486 (citing *Doe* v. *Brandeis Univ.,* 177 F. Supp. 3d 561, 607 (D. Mass. 2016) (holding that a university deprived a student accused of sexual misconduct of ''basic fairness,'' in part because the university used a lower standard of proof for sexual misconduct cases than for ''virtually all other forms of alleged misconduct'')). Under these final regulations, recipients will have the flexibility to select the standard of evidence that they believe is most appropriate for sex discrimination complaints, as long as the standard selected for allegations of sex discrimination is not higher than the standard selected for allegations of other types of discrimination or comparable offenses. A recipient may not use the clear and convincing evidence standard of proof for sex discrimination allegations if it uses a lower standard of proof for other comparable proceedings because that would impermissibly discriminate based on sex in violation of Title IX's mandate and reinforce harmful myths about the credibility of sex discrimination complainants. 87 FR 41486.

A relatively small number of recipients use the clear and convincing evidence standard for all student conduct violations. Some commenters asked whether the Department knows what proportion of recipients are using the preponderance of the evidence standard, and according to commenters who described themselves as representing K–12 and postsecondary recipients, the preponderance of the evidence standard is used by ''the overwhelming majority of postsecondary institutions . . . for the resolution of non-sex discrimination incidents,'' and preponderance of the evidence is ''the most common standard of evidence used by public schools in student sexual harassment and other incidents.'' Again, either the preponderance of the evidence standard or the clear and convincing evidence standard may be used to produce reliable outcomes, and thus the Department felt comfortable allowing recipients the flexibility to select the standard of evidence they believed was most appropriate in the 2020 amendments, 85 FR 30373, 30382, and continues to do so now.

While a commenter correctly pointed out that the new regulatory language does not directly address what standard should be used if a recipient uses a higher standard of proof than the clear and convincing evidence standard for comparable proceedings, such as the beyond a reasonable doubt standard, the Department emphasizes that—as it made clear both in the preamble to the 2020 amendments, 85 FR 30373, and in the July 2022 NPRM, 87 FR 41486—the beyond a reasonable doubt standard is never appropriate to use in sex discrimination proceedings. *See also Santosky* v. *Kramer,* 455 U.S. 745, 768 (1982) (noting that the Supreme Court hesitates to apply the ''unique standard'' of beyond a reasonable doubt ''too broadly or casually in noncriminal cases'') (internal quotation marks and citations omitted). The Department

thinks few, if any, recipients are using the beyond a reasonable doubt standard for comparable proceedings.

The Department acknowledges that its position, allowing a recipient to choose which standard to use yet expressing its view that the preponderance of the evidence is the better standard for Title IX purposes, is a change from the 2020 amendments. For the reasons stated above, the preponderance of the evidence standard is a more appropriate choice for Title IX proceedings, and the Department wants recipients to consider using it. However, the Department stands by its decision to allow recipients a choice because it is important for them to have the flexibility to choose the standard that best meets their unique needs and reflects the values of their educational community, and both standards are fair and can lead to reliable outcomes. See 85 FR 30382. One of the primary concerns commenters shared about the clear and convincing evidence standard was that it is vague and a factfinder trying to apply it might be tempted to borrow from the beyond a reasonable doubt standard, particularly in light of the presumption of non-responsibility in proposed § 106.45(b)(3). The Department has made it clear, however, that the beyond a reasonable doubt standard must not be used for Title IX proceedings under any circumstances. Another concern raised was that the use of the clear and convincing evidence standard suggests that allegations of sex discrimination are inherently untrustworthy and reinforces stereotypes about the veracity of sexual harassment allegations. However, if all comparable proceedings are judged by the clear and convincing evidence standard as well, then sex-based harassment complaints will not be singled out as inherently untrustworthy.

The Department does not think the sliding scale approach some commenters recommended would be appropriate or practicable, whether based on the type of disciplinary sanction or based on the nature of the allegations. For example, determining the applicable standard of proof based on possible disciplinary consequences would be difficult for recipients to administer because often there are a range of possible disciplinary sanctions for a student conduct offense, depending on the severity of the conduct and other facts. A recipient will not necessarily be able to predict before the investigation and adjudication what the disciplinary consequence will be. And applying the same standard of proof to every offense that presents any possibility of a consequence such as suspension or expulsion might be a distinction without a difference because that might include all offenses, depending on the recipient's code of conduct. Creating a tiered system requiring a higher standard for potentially criminal Title IX offenses may result in those offenses being subjected to a higher standard of proof than non-Title IX potentially criminal offenses covered by the recipient's code of conduct, which would raise the same concerns about comparable complaints not being treated comparably. And under either of these tiered approaches, the lack of predictability would be problematic not only for recipients but also for students and employees, whether complainants or respondents, who deserve to know ahead of time what standard will be used to evaluate claims of sex discrimination.

After thoughtfully reviewing all of the input from commenters and re-weighing the costs and benefits of its proposed approach, the Department has decided to keep the standard of proof provision as proposed in the July 2022 NPRM. In addition, for clarity and consistency with other provisions in the regulations, the Department revised the second sentence of § 106.45(h)(1) to clarify that under either standard of proof, the evidence the decisionmaker must evaluate must be both ''relevant'' and ''not otherwise impermissible.''

Changes: In the second sentence of § 106.45(h)(1), the Department has added the words ''and not otherwise impermissible'' after the word ''relevant'' to describe the evidence that the decisionmaker must evaluate for its persuasiveness under either standard of proof.

''Comparable Proceedings'' and Other Requests for Clarification

Comments: Some commenters sought clarification of the term ''comparable proceedings'' as used in § 106.45(h)(1).

Some commenters requested that the Department amend the language of proposed § 106.45(h)(1) to state that a decisionmaker ''must not'' (instead of ''should not'') determine that sex discrimination occurred if the decisionmaker is not persuaded by the evidence, and conversely, ''must'' determine that sex discrimination did occur if the decisionmaker is persuaded by the evidence.

Some commenters urged the Department to reiterate that the recipient still has an obligation to take prompt and effective action to end sex discrimination, prevent its recurrence, and remedy its effects, regardless of whether the recipient determines that the standard was met in a given instance.

Discussion: The Department appreciates the questions from commenters about what is meant by ''comparable proceedings,'' but declines to define that term in the final regulations. There are many different types of disciplinary proceedings, which may vary from recipient to recipient, and the Department does not want to enshrine too rigid a definition of ''comparable proceedings'' in the regulatory text instead of leaving determinations of comparability to each recipient's reasonable discretion. As the Department explained in the preamble to the July 2022 NPRM, what proceedings are comparable may depend on a recipient's student code of conduct, but certainly would include, but not be limited to, proceedings related to complaints of other types of discrimination involving the same category of respondents (*e.g.,* students or employees). 87 FR 41487.

The Department acknowledges commenters' concerns that some recipients might interpret ''comparable proceedings'' too narrowly, which might lead to allegations of non-sexual physical violence being evaluated under the preponderance of the evidence standard of proof and allegations of sexual violence being evaluated under the higher standard of clear and convincing evidence. The Department agrees that such a discrepancy would be inequitable and would reinforce stereotypes about sexual assault survivors and the perceived veracity of sexual assault allegations. To avoid that outcome, the Department clarifies that it generally understands and intends comparable proceedings to include, for example, allegations of similar types of person-to-person (as distinct from recipient-to-person) offenses that are physical in nature and not based on sex. In addition, the Department clarifies that under the final regulations, a recipient may only use the clear and convincing evidence standard for sex discrimination proceedings if it uses that standard for all of its comparable proceedings. If a recipient uses the clear and convincing evidence standard for some comparable proceedings and the preponderance of the evidence standard for others, then it must use the preponderance of the evidence standard to evaluate sex discrimination complaints.

The Department also acknowledges the concerns raised by commenters who pointed out that under the regulations as proposed, a recipient that uses the clear and convincing evidence standard of proof for student conduct complaints,

including complaints of race discrimination, could still choose to use the preponderance of the evidence standard for sex discrimination complaints, even though sex and race discrimination complaints are comparable. A recipient must consider the standard it uses for other civil rights allegations in deciding what standard is appropriate to use for Title IX allegations, and nothing in these regulations obviates a recipient's separate obligation to comply with other Federal civil rights laws. This approach to the Title IX standard of proof does not require the violation of any statutory or regulatory requirements under Title VI or Title VII that may apply to recipients. See 85 FR 30382. Some commenters accused the Department of acting arbitrarily and capriciously by not considering the possible effect its standard of proof approach might have on the enforcement of other laws, such as Title VI, if a recipient chooses to raise all of its standards of proof in order to come into compliance with § 106.45(h)(1). The Department did consider the possibility of such an outcome, and as the Department explained in the preamble to the July 2022 NPRM, recipients that have been using the clear and convincing evidence standard for claims of sexual harassment but the preponderance of the evidence standard for comparable proceedings, including for claims regarding discrimination on other bases, will have to either lower the standard for sex discrimination claims to preponderance of the evidence, or raise the standard for all comparable proceedings to clear and convincing evidence. *See* 87 FR 41486. The Department has decided that recipients should retain flexibility to select the standard of evidence that they believe is most appropriate, as long as the standard selected for allegations of sex discrimination is not higher and therefore more restrictive than the standard selected for allegations of other types of discrimination or comparable offenses. As stated earlier, the Department's understanding is that a minority of recipients at both the K–12 and postsecondary levels are using the clear and convincing evidence standard for student conduct proceedings, whether for sex discrimination or otherwise. Nonetheless, the Department maintains, as it concluded in 2020, 85 FR 30376, that either the preponderance of the evidence standard or the clear and convincing evidence standard may be applied to reach reliable outcomes when recipients apply sufficient guardrails to fulfill their nondiscrimination obligations.

Turning to the second sentence of § 106.45(h)(1), the Department agrees with commenters that the words ''should not'' in the second sentence of § 106.45(h)(1) should be changed to ''must not.'' The Department did not intend to suggest that a recipient has discretion, even if the decisionmaker is not persuaded by the available evidence that sex discrimination occurred, to determine that sex discrimination occurred. The Department does not think it is necessary to add language to the regulatory text stating that the converse of that sentence is also true, but agrees that if a recipient is persuaded by the evidence under the applicable standard that sex discrimination occurred, the decisionmaker must determine that sex discrimination occurred.

Finally, the Department appreciates the opportunity to remind recipients that, even when the evidence does not meet the clear and convincing evidence standard, the recipient still has to consider whether it has additional obligations under these regulations, including any obligation it may have to take prompt and effective steps under § 106.44(f)(1)(vii) to ensure that sex discrimination does not continue or recur within its education program or activity, which could, for example, include taking non-disciplinary steps such as providing additional training or educational programming. *See* § 106.44(f)(1)(vii).

Changes: In the second sentence of final § 106.45(h)(1), the word ''should'' has been replaced with the word ''must.''

Different Standards for Students and Employees

Comments: Some commenters appreciated that proposed § 106.45(h)(1) would, in contrast to § 106.45(b)(1)(vii) under the 2020 amendments, afford recipients flexibility to use a different standard when investigating student conduct than they do when addressing employee conduct, as appropriate. Some commenters appreciated the Department providing recipients flexibility to select the standard that best meets the recipient's unique needs and reflects the recipient's values. Others stated that giving recipients a choice is appropriate because there may be collective bargaining agreements, State labor laws, faculty bylaws, systemwide employee policies, or other constraints that a recipient cannot unilaterally change that may dictate the standard of proof that can be used in matters involving employees.

Conversely, some commenters objected to allowing different standards of proof for students and faculty or staff. For example, some commenters asserted this is discriminatory or unfair and contradicts the Department's stated justification of consistency with comparable proceedings. Some commenters asserted that use of a different standard for employee-involved cases sends a message to students that their experience is not being taken as seriously, and that employees are better supported than students. Some commenters noted that students should not be deprived of procedural protections simply because they are not covered by a collective bargaining agreement, and noted that faculty and staff typically have more resources for legal representation and are better able to navigate the grievance process.

Discussion: The Department appreciates all of the comments regarding the Department's proposal to remove the 2020 requirement that a recipient apply the same standard of proof to complaints against students as it does to complaints against employees. After discussing this issue in the July 2022 NPRM and specifically asking for comments on it, 87 FR 41486–87, and carefully considering the comments received, the Department continues to believe that this change from the 2020 amendments is necessary because of the difference in the relationships and obligations recipients have to their students as compared to their employees. Stakeholders told the Department that requiring recipients to use the same standard of proof for complaints against students and employees hampered their flexibility to choose a standard that is responsive to the many differences in their obligations to their students and their employees. For example, recipients may have collective bargaining agreements or be subject to State laws mandating a higher standard of proof for evaluating allegations of employee misconduct that they would prefer not to use, or under State law cannot use, for student conduct allegations. The Department also recognizes that it might be unfair to hold students to the same standard of evidence as employees under a collective bargaining agreement because students are not parties to that agreement and were not able to participate in its negotiation. In addition, as explained in the July 2022 NPRM, 87 FR 41487, the Department does not think it is necessary, for student predictability purposes, to require the same standard of proof to be

used for student and employee complaints because final § 106.45(a)(1) and (h)(1) require recipients to put the grievance procedures in writing and state which standard of proof they will use to determine whether the respondent violated the recipient's prohibition on sex discrimination.

To be clear, the Department does not maintain that sex-based harassment by a recipient employee is less serious or less consequential than sex-based harassment by a student. The Department recognizes that power imbalances between students and employees can create the conditions for sex-based harassment; in fact, the Department's definition of sex-based harassment acknowledges this by including both quid pro quo and hostile environment harassment, and by requiring, in determining whether a hostile environment has been created, a recipient to consider—among other things—the parties' ages and their respective roles within the recipient's education program or activity. *See* discussion of § 106.2 (Definition of ''Sex-Based Harassment''). Some commenters relied on an OCR case resolution letter from the 1990s, Letter from Gary D. Jackson, Reg'l Civil Rights Dir., Office for Civil Rights, U.S. Dep't of Educ., to Jane Jervis, President, The Evergreen State Coll. (Apr. 4, 1995) (Evergreen Letter), *https://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf,*[59] to argue that the power differential between a student and an employee dictates that the preponderance of the evidence standard must be used for allegations brought by students against employees, and that the Department's proposal to allow a different standard to be used for allegations against students and those against employees would reinforce that power imbalance. However, in the Evergreen matter OCR required the recipient to use the preponderance of the evidence standard because OCR policy at the time was that all sexual harassment allegations had to be evaluated using a preponderance of the evidence standard, not because the allegations were brought by a student against a professor. Evergreen Letter at 1. Even under the preponderance of the evidence standard, OCR found the evidence insufficient to support a finding that the Evergreen professor engaged in unwelcome sexual conduct relative to the student or that the professor created a hostile environment for the student. *Id.* at 5–6. OCR did find that the recipient's grievance procedures violated Title IX, not only because the recipient applied a higher standard of proof to allegations against employees, but also because under the recipient's grievance procedures the respondent employee had a right to challenge the composition of the panel of decisionmakers considering the allegations and the complainant did not, and the employee respondent was given a right to present their case to the panel of decisionmakers while the student complainant was not. *Id.* at 9–10. Under these final regulations such inequitable grievance procedures are not permitted.

The Department has said before, and maintains, that consistency with respect to the enforcement of Title IX is desirable. However, in the employment context there are numerous other legal obligations that recipients have to comply with, such as other civil rights laws, State laws regarding employee rights, and contractual obligations such as collective bargaining agreements. The Department has decided that in this case the value of flexibility to recipients to manage their relationships with their employees and students, respectively, counsels against requiring recipients to use the same standard of proof to evaluate allegations against employees that they use to evaluate allegations against students.

Changes: None.

20. Section 106.45(h)(2) Notification of Determination Whether Sex Discrimination Occurred

Comments: Some commenters supported the removal of the written notice requirement in § 106.45(b)(7) of the 2020 amendments because it would eliminate excess paperwork and redundancy and provide recipients with more flexibility. Some commenters supported the inclusion of the requirement in § 106.45(h)(2) that recipients notify both the complainant and respondent about the outcome of a complaint.

In contrast, other commenters opposed the lack of a written requirement in proposed § 106.45(h)(2) for several reasons, including because they believe it would make appeals difficult, reduce confidence in the process and reduce the parties' understanding of why an outcome was reached. Some commenters also noted that written notifications are especially important for elementary and secondary students and for students with disabilities and their parents. Some commenters noted that proposed § 106.45(h)(2) may be inconsistent with the written notice requirements under the Clery Act for postsecondary institutions.

Some commenters asked the Department to clarify some aspects of proposed § 106.45(h)(2), including that a notice of outcome would need to be provided in adaptive formats as necessary to accommodate a student's disability and whether the notice required in proposed § 106.45(h)(2) must include notice of the right to appeal.

Discussion: As discussed in the July 2022 NPRM, the Department heard from elementary school and secondary school recipients during the June 2021 Title IX Public Hearing that they did not have the infrastructure to perform all of the requirements in the 2020 amendments, 87 FR 41488, and the Department received comments raising similar concerns in response to the July 2022 NPRM. After carefully considering comments received in response to proposed § 106.45(h)(2) and in light of the Department's decision to modify § 106.45(i) to require a recipient to offer an appeal process from a determination arising out of a sex discrimination complaint that is the same as it offers in other comparable proceedings, the Department has determined that it is necessary to modify § 106.45(h)(2) to require recipients to provide a written notification of the determination whether sex discrimination occurred. The Department is persuaded that written notification is necessary to ensure transparency and consistency in a recipient's grievance procedures and to provide the parties with the information necessary to utilize their right to appeal, if applicable, under the recipient's procedures. Additionally, for consistency with other provisions in these final regulations and to avoid recipient confusion as to whether a notice of outcome is different from a determination whether sex discrimination occurred, the Department has revised § 106.45(h)(2) to replace the requirement to notify the parties of the outcome of the complaint with the requirement to notify the parties in writing of the determination whether sex discrimination occurred under Title IX or this part. The Department is also persuaded that § 106.45(h)(2) should be modified to require recipients to provide not only a determination whether sex discrimination occurred but also a rationale for such determination, as such information is also necessary to facilitate the appeals process.

The Department has determined that when considered in the context of the overall flexibility provided to recipients in these final regulations, the benefit

[59] The Evergreen Letter is cited for historical purposes only, and recipients should not rely on it for guidance regarding Title IX.

provided to parties in requiring written notification, including notification of the rationale for the determination, outweighs the burden imposed on recipients. The Department also agrees with commenters that written notification will be particularly helpful in ensuring that parents, guardians, or other legally authorized representatives of students in elementary school or secondary school and students with disabilities receive the information they need to understand the outcome of relevant grievance procedures. The Department notes that under the recordkeeping requirements in § 106.8(f)(1), recipients are already required to maintain documentation of the grievance procedures undertaken in response to a complaint of sex discrimination. For this reason, it will not require significantly more work or documentation on the part of an elementary school or secondary school recipient to provide written notification of a determination whether sex discrimination occurred and the rationale for such determination. The Department also notes that § 106.45(h)(2) does not require elementary school and secondary school recipients to provide the same degree of detail as that required of postsecondary institutions in § 106.46(h). Section 106.45(h)(2) provides a recipient with flexibility to choose what information to share in a written notification while setting a baseline requirement that recipients inform any parties of the determination whether sex discrimination occurred under Title IX or this part, the rationale for such determination, and the procedures and permissible bases for the complainant and respondent to appeal, if applicable. Consistent with § 106.8(e), recipients must ensure that such notice complies with the requirements of the IDEA and/or Section 504, if applicable, when a grievance procedure includes students with disabilities.

These changes acknowledge the importance of parties' access to the information necessary to understand how a final determination was reached and are consistent with the numerous requirements in the final regulations that ensure such transparency, including: notice of the allegations to the parties (§ 106.45(c)); equitable treatment of complainants and respondents (§ 106.45(b)(1)); objective evaluation of all relevant, and not otherwise impermissible, evidence (§ 106.45(b)(6) and (7)); allowing the parties an equal opportunity to present fact witnesses and other inculpatory and exculpatory evidence that are relevant and not otherwise impermissible (§ 106.45(f)(2)); providing each party with an equal opportunity to access the evidence that is relevant and not otherwise impermissible (§ 106.45(f)(4)); requiring adherence to these grievance procedures before imposition of any disciplinary sanctions (§ 106.45(h)(4)); and the right to appeal complaint dismissals (§ 106.45(d)(3)).

The Department appreciates commenters' concerns that the Clery Act requires postsecondary institutions to provide written determinations of responsibility and notes that § 106.46(h) requires a written determination for complaints of sex-based harassment involving student complainants or student respondents at postsecondary institutions, which are subject to the Clery Act. Elementary school and secondary school recipients, however, are not subject to the Clery Act. As discussed above, however, the Department has modified § 106.45(h)(2) to require a written determination.

The Department also appreciates the opportunity to clarify that § 106.45(h)(2) also requires a recipient, including at the elementary school and secondary school level, to provide parties with notice of the procedures and permissible bases for the complainant and respondent to appeal, as applicable, under § 106.45(i).

Changes: The Department has modified § 106.45(h)(2) to require notification in writing of the determination whether sex discrimination occurred and has added the requirement that notification include the rationale for such a determination. For the reasons stated previously and consistent with changes made to other provisions, the reference to ''Title IX'' has also been modified to ''Title IX or this part.''

21. Section 106.45(h)(3) Remedies to a Complainant and Other Appropriate Prompt and Effective Steps

Comments: Some commenters expressed general support for proposed § 106.45(h)(3) to ensure recipients consistently take steps to prevent sex discrimination.

Some commenters urged the Department to clarify that the responsibilities assigned to the Title IX Coordinator are responsibilities of the recipient itself and might sometimes be carried out by other personnel.

Some commenters noted the scope of the obligation contemplated by proposed § 106.45(h)(3) is too broad to the extent that it would impose strict liability on recipients or require remedies for persons other than the complainant. One commenter urged the Department to remove ''limited or'' from proposed § 106.45(h)(3) to better align with the standard set by the Supreme Court in *Davis,* 526 U.S. at 652, which uses ''denying . . . equal access to an educational program or activity.''

Some commenters urged the Department to clarify the remedies a recipient may provide, including that remedies may be appropriate when a recipient determines that sex discrimination did not occur (such as requiring a respondent to take classes on consent, issuing no-contact orders, or making changes to schedules); what remedies would apply to students who graduate before resolution of a complaint; and whether recipients must provide notice to the parties of remedies that will be provided to other students.

Discussion: With respect to the Title IX Coordinator's role in providing and implementing remedies, the Department notes that the recipient itself is responsible for compliance with obligations under Title IX, including any responsibilities specifically assigned to the recipient's Title IX Coordinator under these final regulations. Although the proposed and final regulations require one Title IX Coordinator to retain ultimate oversight, the regulations expressly permit delegation of duties at § 106.8(a)(2), which enables a recipient to assign duties to personnel who are best positioned to perform them, to avoid actual or perceived conflicts of interest, and to align with the recipient's administrative structure. In order to eliminate any ambiguity as to the Title IX Coordinator's role with respect to remedies and whether the Title IX Coordinator can delegate the provision and implementation of remedies to designees, the Department revised the description of the Title IX Coordinator's role in § 106.45(h)(3) from ''provide and implement remedies'' to ''coordinate the provision and implementation of remedies.'' For example, remedies that involve transcript changes would need to be coordinated through the registrar's office and remedies that involve counseling would need to be coordinated through counseling resources.

With respect to the concern that proposed § 106.45(h)(3) would broaden the Title IX Coordinator's authority to implement remedies based solely on that person's discretion, the Department disagrees that this provision changes the Title IX Coordinator's authority or discretion regarding remedies. The Department notes that remedies may only be provided after a recipient determines that sex discrimination has occurred, and the recipient is ultimately

responsible for ensuring that any remedies are designed to restore or preserve access to its education program or activity. *See* § 106.2 (definition of ''remedies''). Similarly, a recipient may not impose discipline on a respondent for sex discrimination prohibited by Title IX unless there is a determination at the conclusion of the recipient's grievance procedures that the respondent engaged in prohibited sex discrimination.

In response to the commenter who urged removal of ''limited or'' from proposed § 106.45(h)(3), the Department notes that 20 U.S.C. 1681(a) prohibits any person ''on the basis of sex'' from ''be[ing] excluded from participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination under any education program or activity receiving Federal financial assistance.'' Limiting access based on sex is therefore clearly prohibited by the statute. *Davis* did not purport to hold otherwise. Title IX's broad nondiscrimination mandate requires a recipient to provide an education program or activity that does not unlawfully limit access based on sex, and the Title IX regulations have long prohibited a recipient from ''limit[ing] any person in the enjoyment of any right, privilege, advantage, or opportunity'' based on sex. 34 CFR 106.31(b)(7). For additional explanation regarding the addition of the ''limit or deny'' language to the definition of hostile environment sex-based harassment, please see Hostile Environment Sex-Based Harassment—Limits or Denies (§ 106.2) (Section I.C).

The Department also disagrees that requiring a recipient to ''take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur'' constitutes a strict liability standard. The Department's application of the requirement to respond promptly and effectively is further detailed in the discussion of § 106.44(a) and (f). As explained in the July 2022 NPRM, the Department would not terminate Federal funds from a recipient, without taking further steps, simply because an official failed to take prompt and effective steps to ensure that sex discrimination did not continue or recur. 87 FR 41433. When OCR begins an investigation or compliance review, it provides notice to the recipient of the potential Title IX violations it is investigating; if OCR finds a violation, OCR is required to seek voluntary corrective action from the recipient before pursuing fund termination or other enforcement mechanisms. 20 U.S.C. 1682; 34 CFR 100.7(d) (incorporated through 34 CFR 106.81); *see also Gebser,* 524 U.S. at 287–89. In the administrative enforcement process, there will never be a circumstance in which OCR pursues fund termination without the recipient first having notice and the opportunity to take corrective action to address a Title IX violation.

With respect to the concern about remedies for persons other than the complainant, as explained in the July 2022 NPRM, the Department included this language to recognize that in some situations, remedies may be appropriate for someone other than the complainant. 87 FR 41489. In final § 106.45(h)(3), the Department changed the reference to providing remedies to a complainant ''or other person'' identified by the recipient as having had equal access to its education program or activity limited or denied by sex discrimination, to instead refer to a complainant ''and other persons,'' recognizing that depending on the circumstances of the sex discrimination, a recipient may have to provide remedies to both a complainant and another person or persons. For example, a student reports to her Title IX Coordinator about pervasive sex-based harassment in the school's robotics club, including allegations that boys make the girls carry the equipment, clean up the lab, and take notes for them. The school determines that there is a hostile environment that limited the complainant's access to the benefits of the club and therefore must take steps to end the harassment and eliminate the hostile environment. As part of that response, the recipient determines that the two other girls in the club were subjected to the same hostile environment and were similarly limited in their opportunities to participate in the club. To fully eliminate the effects of the discrimination, the recipient may have to offer remedies to the students who were subjected to the hostile environment but did not report discrimination. Similarly, a recipient that provides a remedy to a complainant who experienced sex-based harassment might also need to provide training or other educational programming to address challenges for other participants in that environment who, while not harassed, may have witnessed the sex-based harassment. The final regulations do not require the recipient to notify the respondent of the remedies provided to the complainant or other persons. It would not further Title IX's purposes or be necessary for a prompt and equitable process, which will at that time be concluded, to notify the respondent of remedies that require no action by the respondent. The Department notes, however, that some remedies might require action by the respondent. For example, if a determination is made after a grievance procedure that an employee respondent gave a student a failing grade based on sex discrimination, and the remedy required that respondent to change the grade, then the respondent would be notified of such remedy. The final regulations do, however, require that the Title IX Coordinator notify the complainant of any disciplinary sanctions imposed on a respondent under § 106.45(h)(3) because such disciplinary sanctions are imposed following a determination that the respondent violated the recipient's prohibition on sex discrimination as to the complainant, and notification to the complainant is necessary to remedy its effects. In some cases, notification to the complainant may also be necessary to prevent recurrence of or end sex discrimination. For example, if a student respondent is found responsible for engaging in sex-based harassment and is removed from an extracurricular activity in which the complainant also participates, it would serve the purpose of ending the harassment to both remove the student from the activity and notify the complainant of this disciplinary action so that the complainant can continue to participate with the knowledge that the respondent will not.

The Department declines a commenter's request to identify remedies a recipient may provide when it is determined that sex discrimination did not occur because under the definition in § 106.2, ''remedies'' cannot be imposed if a recipient determines that sex discrimination did not occur. However, a recipient may offer supportive measures, as that term is defined in the final regulations at § 106.2, even if the recipient does not determine that sex discrimination occurred, as long as the supportive measures do not unreasonably burden a party. For more information regarding supportive measures, see the discussion of § 106.44(g).

In response to a comment about remedies for students who graduate before a complaint is resolved, the Department recognizes that a student's graduation may limit the remedies that may be available or appropriate. For example, a respondent's graduation may limit a recipient's discretion to implement certain remedies that affect the respondent, but the recipient would still have authority, for example, to restrict a respondent's access to campus. A complainant's graduation may also limit the remedies that may be available or appropriate, but there may be

remedies that would serve to restore or preserve a complainant's access to the recipient's education program or activity after graduation. For example, the recipient may decide to prohibit an employee respondent from attending an alumni event that the complainant seeks to attend. And, as noted above, there may be appropriate remedies for students other than the complainant who are still participating in the recipient's education program or activity.

The Department appreciates the opportunity to clarify that when there is a determination that sex discrimination occurred, a recipient, through its Title IX Coordinator or designees, is also required to coordinate the implementation of any disciplinary sanctions on the respondent. This coordination includes notifying the complainant of any disciplinary sanctions the recipient will impose on the respondent. As the Department explained in the 2020 amendments, a complainant should know what sanctions the respondent receives because knowledge of the sanctions may impact the complainant's equal access to the recipient's education program or activity. 85 FR 30428. The Department did not intend to suggest a change from this rationale in the 2020 amendments by excluding this language from proposed § 106.45(h)(3). To ensure that there is no confusion, the Department added language to § 106.45(h)(3) to clarify that these final regulations continue to require a Title IX Coordinator to coordinate the implementation of any disciplinary sanctions on a respondent, including notification to the complainant of such disciplinary sanctions. As stated above, a recipient may not impose discipline on a respondent for sex discrimination prohibited by Title IX unless there is a determination at the conclusion of the recipient's grievance procedures that the respondent engaged in prohibited sex discrimination. The Department has added a statement to § 106.45(h)(3) to clarify its intent in that regard.

Changes: The Department has revised the description of the Title IX Coordinator's role in § 106.45(h)(3) from ''provide and implement remedies'' to ''coordinate the provision and implementation of remedies.'' The Department has changed the words ''or other person'' to ''and other persons.'' Additionally, the Department has revised § 106.45(h)(3) to state that a Title IX Coordinator is also responsible for coordinating the implementation of any disciplinary sanctions on a respondent, and that such coordination should include notification to the complainant of any such disciplinary sanctions. The Department also has made a technical update to the provision by changing the reference to § 106.44(f)(6) to instead reference § 106.44(f)(1)(vii). Finally, the Department has added a statement that a recipient may not impose discipline on a respondent for sex discrimination prohibited by Title IX unless there is a determination at the conclusion of the recipient's grievance procedures that the respondent engaged in prohibited sex discrimination.

22. Section 106.45(h)(4) Comply With This Section Before Imposition of Disciplinary Sanctions

Comments: Some commenters supported proposed § 106.45(h)(4) on the ground that it would require due process before imposing disciplinary sanctions.

Several commenters expressed concern that proposed § 106.45(h)(4) would require a recipient to treat sex-based harassment differently from all other forms of student misconduct. For example, some commenters noted that other forms of student misconduct may be addressed immediately if a respondent admits to the conduct, there are undisputed facts or other irrefutable proof, or staff directly and personally witnesses the misconduct. Some commenters observed that the inability to take prompt actions under proposed § 106.45(h)(4) could result in a hostile environment for a complainant and shared personal experiences of instances in which this occurred.

Other commenters opposed proposed § 106.45(h)(4) because they believed that a recipient should have flexibility to impose sanctions upon a finding of responsibility, instead of after an appeal. Some commenters suggested proposed § 106.45(h)(4) might also incentivize a respondent to engage in meritless appeals to delay sanctions. The commenters also highlighted difficulties a recipient might face under proposed § 106.45(h)(4) if a respondent commits another violation during the period between finding responsibility and when the determination becomes final, or if a respondent graduates or receives a diploma while an appeal is pending. Some commenters suggested the Title IX Coordinator should make a preliminary determination that a Title IX violation might have occurred and if it may result in a warning, suspension, or expulsion, prior to the start of an investigation.

Some commenters requested clarification as to how proposed § 106.45(h)(4) intersects or aligns with other laws. For example, some commenters noted that some State laws require or permit suspension or expulsion within a certain number of days after a recipient determines sexual assault or harassment occurred, citing as an example California Education Code § 48918, 48900(n). Some commenters sought clarification as to how proposed § 106.45(h)(4) would intersect with the emergency removal provisions in the Clery Act.

Some commenters urged the Department to require a recipient to notify State certification authorities of any determination that an employee engaged in sex-based harassment.

Discussion: Following the Department's review of public comments we note that the requirement to comply with the grievance procedures before the imposition of any disciplinary sanctions against a respondent is consistent with the 2020 amendments, which provided in §§ 106.44(a) and 106.45(b)(1)(i) that a recipient's response to sexual harassment must treat complainants and respondents equitably by ''following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures . . . against a respondent.'' 34 CFR 106.44(a). The July 2022 NPRM proposed, and these final regulations maintain, this same general requirement at § 106.45(h), which is a different part of the regulations as explained in the July 2022 NPRM. 87 FR 41489. Section 106.45(h)(4) also applies to all complaints of sex discrimination, not just formal complaints of sexual harassment as it did under the 2020 amendments. The requirement to comply with the grievance procedures before the imposition of any disciplinary sanctions against a respondent in § 106.45(h)(4) is also consistent with § 106.45(b)(3) and supports the implementation of a neutral, bias-free grievance process.

With respect to the comment that § 106.45(h)(4) will require a recipient to treat sex discrimination differently from all other forms of student misconduct, which may be handled more summarily in certain circumstances, § 106.45(h)(4) strikes the right balance between expediency and requiring that recipients conduct a bias-free grievance procedure and comply with grievance procedures before the imposition of disciplinary sanctions. While the Department understands that different types of misconduct may be handled differently, these protections are critical to Title IX's nondiscrimination mandate. The final regulations treat complainants and respondents equitably, create a fair

process for handling complaints, and address concerns that respondents may suffer disciplinary sanctions or punitive action from pending allegations. For this reason, the Department declines commenters' suggestions to require Title IX Coordinators to instead make a preliminary determination that a Title IX violation might have occurred.

The Department appreciates the opportunity to clarify that § 106.44(g)–(i) allows a recipient to protect a complainant's access to the education program and the health and safety of students, such as removing a respondent from an extracurricular activity or employment responsibilities as a non-disciplinary measure, if certain conditions are met. Under § 106.44(g), recipients must offer and coordinate supportive measures, as long as such supportive measures do not unreasonably burden either party, are not provided for punitive or disciplinary reasons, and are designed to protect the safety of the parties or the recipient's educational environment or to provide support during the recipient's grievance procedures under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(k). Such supportive measures may not be provided for punitive or disciplinary reasons because a determination whether sex discrimination occurred has not yet been made under the grievance procedures. Under § 106.44(h), a recipient may remove a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an imminent and serious threat to the health or safety of the complainant, students, employees, or other persons arising from the allegations of sex discrimination justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. Under § 106.44(i), a recipient may place an employee respondent on administrative leave from employment responsibilities during the pendency of the recipient's grievance procedures. Only after a finding that sex discrimination has occurred may disciplinary sanctions be imposed.

The Department disagrees that § 106.45(h)(4) decreases a recipient's flexibility with respect to disciplinary sanctions because recipients retain discretion to determine the disciplinary sanctions that may be imposed. The Department also disagrees that § 106.45(h)(4) will incentivize a respondent to engage in meritless appeals to delay disciplinary sanctions. While any appeal is pending, respondents may continue to be subject to supportive measures, and emergency removal under § 106.44(h) or administrative leave under § 106.44(i), if applicable. The bases for appeal will also be carefully delineated and therefore less suspect to abuse. Under § 106.45(i), a recipient must offer the parties an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints. Recipients have discretion regarding the bases for appeal under § 106.45(i), but a respondent may only appeal on the bases offered by the recipient. The final regulations do not permit a respondent to seek an appeal for reasons beyond those set forth by the recipient. If, as commenters suggested, a respondent committed an additional violation during the pendency of an appeal, a recipient would be obligated to take action to address that violation as well and to provide supportive measures to a complainant as appropriate. Waiting to impose disciplinary sanctions until the conclusion of the grievance procedure through any appeal is consistent with the treatment of sanctions pending appeals under the 2020 amendments, *see* 85 FR 30393, and with § 106.46(h)(2), discussed elsewhere in this preamble. To the extent State law requires disciplinary action to be imposed within a certain period of time after a determination that sex discrimination, including sex-based harassment, occurred, recipients should comply with such State laws unless there is a conflict with these regulations, in which case State law does not obviate or alleviate a recipient's obligations under Title IX and these regulations. *See* § 106.6(b) and the related discussion in this preamble. And consistent with the Department's position in the preamble to the 2020 amendments, these final regulations do not alter requirements under the Clery Act or its implementing regulations. *See* 85 FR 30384.

The Department declines to require recipients to impose particular disciplinary sanctions after a finding that sex discrimination occurred, nor does the Department believe that offering examples of types of disciplinary sanctions is necessary. Recipients retain discretion in determining what disciplinary sanctions may be appropriate, as long as their use of disciplinary sanctions fulfills the Title IX nondiscrimination mandate.

The Department declines to require a recipient to report an employee it determines engaged in sex-based harassment to State authorities. Violations of Title IX are distinct from State criminal laws, and Title IX is not enforced by State authorities. Nonetheless, nothing in the final regulations prevents a recipient from disclosing such determinations of sex discrimination to a State agency.

Changes: For clarity, the Department has changed ''this section'' to ''§ 106.45.''

23. Section 106.45(h)(5) Prohibition on Discipline Based Solely on Determination

False Statements

Comments: Some commenters supported proposed § 106.45(h)(5) based on a belief that it eliminated disciplinary actions for false complaints or false statements. Some of these commenters noted that misperceptions and inconsistencies are not intentionally false but rather can be associated with trauma or the influence of alcohol.

Other commenters supported proposed § 106.45(h)(5) because it would strengthen protections against retaliation for making a complaint or serving as a witness.

Several commenters opposed § 106.45(h)(5) based on the belief that it prohibits a recipient from punishing students for filing false complaints or making false statements. For example, some commenters noted that because of the ''severe consequences'' at stake in Title IX investigations, recipients should hold individuals accountable for false statements. Some commenters expressed concern that proposed § 106.45(h)(5) would encourage or condone false reports, while others felt proposed § 105.45(h)(5) would prevent Title IX decisionmakers from ascertaining the true facts and circumstances around complaints.

One commenter argued that proposed § 106.45(h)(5) would deny respondents the basic rights needed to protect themselves from false accusations.

Several commenters suggested modifications to proposed § 106.45(h)(5), including that recipients should be required to have policies in place to address false statements; that discipline for knowingly false statements should be permitted; and that false statements should be punishable in accordance with existing codes of conduct. Some commenters urged the Department to add a requirement that when allegations are proven false, the students must sign a nondisclosure agreement related to such allegations.

Several commenters expressed confusion about proposed § 106.45(h)(5). Some commenters sought clarification of whether discipline for a false statement based solely on a recipient's decision of whether sex-based discrimination occurred is prohibited retaliation. Some commenters suggested the Department use the language in § 106.71(b)(2) of the 2020 amendments because it is clearer. Some commenters requested clarification on whether proposed § 106.45(h)(5) would prohibit a recipient from punishing someone who makes a materially false statement in bad faith.

Discussion: The Department appreciates the opportunity to clarify the meaning of § 106.45(h)(5). Section 106.45(h)(5) does not categorically prohibit recipients from ever disciplining parties, witnesses, or others participating in a Title IX grievance procedure for making false statements. It prohibits recipients from disciplining such individuals ''based solely'' on the recipient's determination whether sex discrimination occurred. As discussed in the July 2022 NPRM, § 106.45(h)(5) furthers the Department's goal of ensuring that a recipient's efforts to address sex discrimination are equitable by allowing parties, witnesses, and others to participate in grievance procedures without fear that the outcome alone could lead to a determination that false statements were made. 87 FR 41490. Under § 106.71(b)(2) of the 2020 amendments, charging an individual with a code of conduct violation for making a materially false statement in bad faith during a Title IX grievance proceeding was permitted as long as the recipient did not base its charge solely on the outcome of the grievance proceeding. The Department incorporated that same principle from the 2020 amendments into § 106.45(h)(5). 87 FR 41490. Section 106.45(h)(5) continues to protect anyone who participates in the grievance procedures, not just those who participate as complainants, and as discussed in the July 2022 NPRM, it addresses concerns that the general retaliation provision in the 2020 amendments had a chilling effect on a person's participation in a recipient's grievance procedures due to confusion from the wording. 87 FR 41490. Section 106.45(h)(5) maintains the recipient's discretion to discipline those who make false statements, including materially false statements made in bad faith, based on evidence other than or in addition to the outcome of its Title IX grievance procedures.

The Department disagrees that § 106.45(h)(5) will condone or encourage false reports. As discussed above, the 2020 amendments contained a similar provision, and commenters provided no evidence that false reports have increased, nor is the Department aware of any. To be clear, § 106.45(h)(5) permits a disciplinary process to be initiated under a recipient's code of conduct to address false statements as long as there is evidence independent of the determination whether sex discrimination occurred, and evidence developed during the Title IX grievance process may be used in such a disciplinary process.

In response to commenter concerns, the Department also notes that § 106.45(h)(5) will not inhibit the ability of Title IX decisionmakers to ascertain the facts and circumstances of a complaint because this provision does not pertain to the factfinding phase of a recipient's grievance procedure. Section 106.45(h)(5) is only applicable after a determination of sex discrimination is made and only if a recipient is considering whether to initiate a disciplinary process alleging a party, witness, or other participant in the Title IX grievance procedure made a false statement.

The Department disagrees that § 106.45(h)(5), which applies equally to all parties, will deny procedural rights to a respondent. Nothing in § 106.45(h)(5) prohibits a recipient from considering the credibility of any party or witness during the grievance procedure.

The Department appreciates the opportunity to clarify that threatening to institute or instituting disciplinary proceedings against a party, witness, or other person who participated in a grievance procedure could, under the circumstances outlined in § 106.71, constitute retaliation under that section. Section 106.45(h)(5) informs parties, witnesses, and others that they cannot be disciplined under any circumstance for making a false statement—whether the discipline would constitute retaliation or not—if the discipline is based solely on the recipient's determination whether sex discrimination occurred.

The Department appreciates commenters' suggestions for modifications to § 106.45(h)(5). The Department declines commenters' suggestions that the Department impose requirements on recipients' non-Title IX disciplinary processes for false statements, such as requiring recipients to have policies and procedures in place to address false statements generally, requiring recipients to impose discipline for false statements made during a grievance process in situations that would not violate § 106.45(h)(5), or requiring recipients to impose nondisclosure agreements on the relevant parties when allegations are proven false. How recipients structure their disciplinary processes for false statement offenses is not the subject of this rulemaking.

Changes: None.

Consensual Sexual Activity

Comments: Some commenters expressed support for proposed § 106.45(h)(5) because they believe the practice of punishing students who report sexual harassment for engaging in prohibited consensual sexual conduct interferes with a survivor's access to education and chills reporting.

Some commenters opposed proposed § 106.45(h)(5), stating that the language addressing consensual sexual misconduct is unnecessary because they believe a postsecondary recipient would not discipline students for engaging in consensual sexual conduct.

Some commenters stated that because ''consensual sexual conduct'' is a different topic from ''false statements,'' they should be addressed in separate provisions with more clarity.

Discussion: The Department is aware that some recipients have codes of conduct that prohibit students from engaging in consensual sexual conduct. The Department received comments in the June 2021 Title IX Public Hearing and in response to the July 2022 NPRM supporting a broader prohibition on discipline for collateral conduct violations, such as consensual sexual conduct, and the Department noted that the concern regarding discipline for consensual sexual conduct had been raised by plaintiffs in Title IX litigation as well as in OCR's enforcement practice. 87 FR 41490. As discussed in the July 2022 NPRM, the Department recognizes that discipline for collateral conduct violations that may be connected to conduct at issue in a Title IX complaint, including consensual sexual conduct, may create a barrier to participation in the recipient's grievance procedures. 87 FR 41490. By providing protection from collateral discipline for consensual sexual conduct, the regulations remove this potential barrier to information sharing in the grievance procedures, which, in turn, promotes a fair process in which parties, witnesses, and participants are not discouraged from fully and accurately relating necessary facts.

The Department disagrees with the commenters that the inclusion of consensual sexual activity in § 106.45(h)(5) is unnecessary. While the commenters may be correct that many

postsecondary institutions would not discipline students for consensual sexual activity, other postsecondary institutions do.

The Department appreciates commenters' requests to clarify why § 106.45(h)(5) addresses both false statements and consensual sexual conduct. As discussed in the July 2022 NPRM, in order to provide an education program or activity free from sex discrimination, a recipient must implement grievance procedures in a manner that does not impede parties, witnesses, and other participants from providing information to the recipient regarding sex discrimination that may have occurred in the recipient's education program or activity. *Id.* Section § 106.45(h)(5) addresses two concerns—the possibility of discipline for engaging in consensual sexual activity and the fear of being accused of false statements—that have repeatedly been raised about potential barriers to participation in a recipient's grievance procedures. Addressing these concerns is consistent with the Department's Title IX authority because, as noted above, § 106.45(h)(5) directly fosters a more equitable sex discrimination grievance process by protecting all participants from collateral discipline based solely on a determination whether sex discrimination occurred, which promotes full and accurate factfinding.

Changes: None.

24. Section 106.45(i) Appeals

Comments: Some commenters appreciated the narrowed scope of the proposed appeals requirements for several reasons, including that it is clearer and more streamlined and treats the parties more fairly.

In contrast, other commenters expressed concern that the proposed regulations only require recipients to offer appeals from a dismissal of a sex discrimination complaint under proposed § 106.45(d)(3) or from a determination whether sex-based harassment occurred in a complaint that involves a postsecondary student under proposed § 106.46(i). Some commenters characterized the Department's interest in improving the expediency of grievance procedures for some complaints in an elementary school or secondary school setting as arbitrary, capricious, and in conflict with case law. These commenters questioned why the rationale offered in the preamble to the 2020 amendments (*i.e.,* increasing the likelihood that recipients reach sound determinations and giving the parties greater confidence in the ultimate outcome) would not necessitate a requirement to offer an appeal from any determinations of whether sex discrimination occurred.

Some commenters interpreted the proposed provisions related to appeals as a return to Title IX enforcement prior to the 2020 amendments, which they opposed, and urged the Department to retain the 2020 amendments in full.

Some commenters urged the Department to require an appeal from a determination in sex discrimination complaints generally or for specific categories of complaints, such as complaints that allege employee-to-employee sex discrimination, discrimination based on gender identity, or that a postsecondary institution engaged in discrimination.

Other commenters suggested amending proposed § 106.45 to require an elementary school or secondary school to offer an appeal from a determination in a sex discrimination complaint that is the same as what the recipient would offer in comparable complaints. The commenters asserted that such a revision would prevent an elementary school or secondary school from providing fewer opportunities to appeal a sex discrimination complaint than other comparable complaints, which one commenter stated could constitute sex discrimination itself. Commenters also suggested that such a revision would prevent an elementary school or secondary school from providing greater appeal rights for a sex discrimination complaint than other comparable complaints, which one commenter stated could reinforce a belief that sex-based harassment is exceptional as compared to other forms of harassment.

Other commenters requested guidance on what sort of appeal process is permitted or required under § 106.45.

Discussion: The Department acknowledges comments that supported the narrowed scope of the proposed appeals requirements but is persuaded by commenters' recommendation to require a recipient to offer an appeal process from a determination arising out of a sex discrimination complaint that is the same as it offers in other comparable proceedings. Specifically, the Department recognizes that a recipient may have existing appeal procedures for other offenses in its code of conduct that may reflect certain values of its educational community related to student discipline, advance other institutional interests in a broad array of disciplinary cases, or be guided by other historical or legal factors. The Department also notes that offering the opportunity to appeal a determination in proceedings related to other student conduct violations, while denying the same opportunity for sex discrimination complaints, may give rise to confusion, the perception of unfairness, and resentment in ways that are counterproductive to preventing and responding to sex discrimination in the recipient's education program or activity.

Accordingly, the Department has added a new § 106.45(i) in these final regulations to state that, in addition to an appeal of a dismissal consistent with § 106.45(d)(3), a recipient must offer the parties an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints. Final § 106.45(i) also clarifies that, for complaints of sex-based harassment involving a postsecondary student, a postsecondary institution must also offer an appeal on the bases set out in § 106.46(i)(1). This addition is consistent with the Department's view, stated in the July 2022 NPRM and reiterated here, that for complaints of sex discrimination, other than complaint dismissals or final determinations of complaints of sex-based harassment involving a student at a postsecondary institution, a recipient has discretion to decide whether the opportunity to appeal a determination would be appropriate for a given type of complaint, as long as a recipient does not exercise this discretion arbitrarily. 87 FR 41489. Accordingly, final § 106.45(i) includes protections against the kind of arbitrary decisionmaking referenced in the preamble to the July 2022 NPRM. For the same reasons, the Department declines to require specific categories of appeals in § 106.45(i), such as for complaints alleging discrimination based on gender identity or complaints alleging employee-to-employee sex discrimination, when a recipient does not provide them for comparable proceedings. The Department recognizes that recipients have obligations under Federal law to employees under Title VII and Title IX and may also have obligations under other State or local laws, which may require processes that are specifically adapted for employee-to-employee complaints and may include the opportunity to appeal a determination.

The Department declines to require a postsecondary institution to offer an appeal of a complaint that alleges a recipient engaged in sex discrimination because other provisions in § 106.45 sufficiently account for the power differentials in such complaints. Specifically, requirements related to the equitable treatment of the parties under § 106.45(b)(1); decisionmakers being

free of bias or conflicts of interest under § 106.45(b)(2); guidelines for ensuring the objective evaluation of relevant and not otherwise impermissible evidence and the adequate, reliable, and impartial investigation of the complaint under § 106.45(b)(6) and (f)(1); the opportunity for parties to present and access relevant and not otherwise impermissible evidence under § 106.45(f)(2) and (4); and guidelines for how a decisionmaker must assess such evidence and credibility under § 106.45(b)(6), (f)(3), and (g) address power differentials in such complaints by ensuring an objective and transparent investigation, impartial decisionmaker, and a meaningful opportunity for a complainant to respond to evidence prior to the determination whether sex discrimination occurred. These requirements provide procedural safeguards in how a recipient must resolve sex discrimination complaints in more types of proceedings than were previously required under the 2020 amendments. *See* 34 CFR 106.8(c), 106.45 (requiring a recipient to adopt and publish grievance procedures that provide for the prompt and equitable resolution of sex discrimination complaints, but only outlining procedural requirements for complaints that allege sexual harassment). The Department again reiterates that, consistent with final § 106.45(i), a recipient must offer the opportunity to appeal the outcome of a sex discrimination complaint against a recipient if it provides such a process for other comparable proceedings, including other discrimination complaints.

The Department also appreciates the opportunity to note that, despite some commenters' objections, balancing equity with promptness in grievance procedures has been a requirement in Title IX regulations since 1975 (*see* 34 CFR 106.8(c); 40 FR 24139), and it is the Department's view that promptness in grievance procedures serves Title IX's nondiscrimination mandate by avoiding unnecessary delay in the resolution of sex discrimination complaints. Commenters cited no case law, and the Department is unaware of any, that indicates this view is contrary to Title IX.

The Department notes that nothing in the final regulations prevents a recipient from adopting additional appeal provisions in its grievance procedures as long as such provisions apply equally to the parties, including notification of any such procedures and the permissible bases for appeal, consistent with § 106.45(h)(2). The Department also notes that the final regulations do not require recipients to adopt a specific timeframe for an appeal and that a recipient has discretion to set its own reasonably prompt timeframe for implementing appeals under § 106.45(i). *See* § 106.45(b)(4) and related discussion.

Changes: The Department has added to the final regulations a new § 106.45(i), requiring that, in addition to an appeal of a dismissal consistent with § 106.45(d)(3), a recipient must offer the parties an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints. Final § 106.45(i) also clarifies that, for complaints of sex-based harassment involving a postsecondary student, a postsecondary institution must offer an appeal on the bases set out in § 106.46(i)(1). As a result of this addition, the Department has redesignated proposed § 106.45(i) and (j) as § 106.45(j) and (k).

25. Section 106.45(j) Additional Provisions

Comments: The Department notes that proposed § 106.45(i) has been redesignated as § 106.45(j) in the final regulations, and the following comment summaries and discussion refer to the provision as § 106.45(j) for ease.

One commenter suggested changing ''equally'' to ''equitably'' to align with the examples provided in the preamble to the July 2022 NPRM, which the commenter viewed as examples of equitable rather than equal treatment. Another commenter suggested that the Department modify § 106.45(j) to recognize that shared governance and collective bargaining are important means to allow a recipient to exercise its discretion to adopt practices not required by the regulations and suggested involving faculty in developing grievance procedures through shared governance and collective bargaining agreements.

Discussion: The Department maintains its position, as stated in the preamble to the 2020 amendments, that under Title IX, ''recipients [have] discretion to adopt rules and practices not required under § 106.45 [or § 106.46].'' 85 FR 30209. The 2020 amendments require that any additional provisions that a recipient adopts as part of its grievance procedures must apply equally to the parties. The Department did not propose removing that requirement in the July 2022 NPRM. Instead, the Department proposed moving the requirement from § 106.45(b) to § 106.45(i) and broadening it to apply to grievance procedures for all forms of sex discrimination, not only sexual harassment. The final regulations include this requirement at § 106.45(j).

The Department declines to change ''equally'' to ''equitably'' in § 106.45(j). As explained above, the Department is maintaining the requirement from the 2020 amendments that any additional provisions a recipient adopts as part of its grievance procedures must apply equally to the parties. Consistent with the Department's position in the 2020 amendments, the examples offered by the Department in the preamble to the July 2022 NPRM clarify for recipients that, while any additional provisions a recipient adopts in its grievance procedures must be applied equally to the parties, identical treatment of both parties is not always required in the implementation of those provisions. 87 FR 41491 (citing 85 FR 30186). A recipient is permitted to take into account the individual needs and circumstances of a person when applying the additional provisions. *See* 85 FR 30189. For example, a provision under which a recipient offers disability accommodations or an interpreter as part of its grievance procedures applies equally to the parties even if only one party needs and receives such accommodations or an interpreter. The recipient does not have to provide an interpreter or disability accommodation to any party that does not need one simply because another party that does need one is receiving one. The fact that the parties had an equal opportunity to receive an accommodation or an interpreter as needed is enough to satisfy § 106.45(j). For additional information regarding equitable treatment of the parties, see the discussion of § 106.45(b)(1).

The Department acknowledges that a recipient may use shared governance and collective bargaining to adopt additional rules and practices beyond those required by the final regulations and that some employees have additional rights created by shared governance and collective bargaining agreements. This is permissible under the final regulations and consistent with the Department's statement in the July 2022 NPRM that nothing in the final regulations precludes a recipient's Title IX grievance procedures from recognizing that employee parties have additional rights in a collective bargaining agreement or other shared governance policy. *See* 87 FR 41491. The Department also notes that as explained in the July 2022 NPRM and as discussed above, identical treatment is not always required in the application of any additional rules or practices, and, as such, the Department recognizes that

employee parties may have distinct rights in a shared governance or collective bargaining agreement that are not applicable to parties who are not employees. *See id.* The Department further notes that the final regulations do not make any changes to current § 106.6(f), which states that ''[n]othing in this part may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder.'' These final regulations permit recipients to use existing grievance procedures under collective bargaining agreements, as long as they comply with these final regulations. The Department reminds recipients that under § 106.45(b)(8), if a recipient adopts grievance procedures that apply to the resolution of some, but not all complaints, the recipient must articulate consistent principles for how the recipient will determine which procedures apply.

The Department understands that a postsecondary institution may involve faculty in developing its Title IX grievance procedures through a shared governance or collective bargaining process, and these final regulations do not preclude faculty participation in a postsecondary institution's efforts to address sex discrimination under Title IX. A recipient has discretion to determine how best to develop its Title IX grievance procedures, including how and whether to involve faculty through shared governance, in accordance with § 106.45, and if applicable § 106.46.

Changes: Proposed § 106.45(i) has been redesignated as § 106.45(j) in the final regulations.

26. Section 106.45(l) Range of Supportive Measures and Disciplinary Sanctions and Remedies

Comments: The Department notes that proposed § 106.45(k) has been redesignated as § 106.45(l) in the final regulations, and for ease the following comment summaries and discussion refer to the provision as § 106.45(l).

Some commenters opposed § 106.45(l), arguing that section § 106.45(b)(1)(ix) of the 2020 amendments has been upheld by courts and that proposed § 106.45(l)(2) is inconsistent with the Clery Act requirements to list sanctions.

Some commenters requested that the Department move proposed § 106.45(l) to proposed § 106.46 because paragraph (l) would apply only to cases alleging sex-based harassment.

Some commenters requested clarification about disciplinary sanctions, including whether a Title IX Coordinator has authority to bring civil or criminal charges against a respondent and what sanctions a recipient can impose on a respondent, including after the respondent has graduated.

Discussion: The Department acknowledges commenters' opposition to modifying the 2020 amendments. As explained in the July 2022 NPRM, § 106.45(l)(1) maintains the requirement previously in § 106.45(b)(1)(ix) of the 2020 amendments that a recipient include a description of the range of supportive measures available to a complainant and respondent in its grievance procedures for sexual harassment claims. *See* 87 FR 41492. Similarly, the Department has maintained the existing requirement (previously in § 106.45(b)(1)(vi) of the 2020 amendments) that a recipient must either describe the range of possible disciplinary sanctions and remedies that a recipient may impose after completion of the grievance procedures for sexual harassment claims or list the possible disciplinary sanctions and remedies. These requirements will continue to ensure that a recipient is transparent about its variety of supportive measures, disciplinary sanctions, and remedies. In response to the commenter's request for clarification, a recipient may impose on a respondent only disciplinary sanctions that are set forth in the range or list of possible disciplinary sanctions that a recipient may impose, including after a respondent has graduated.

The Department disagrees that § 106.45(l) should be modified to mirror the Clery Act by requiring a list of sanctions. *See* 20 U.S.C. 1092(f)(8)(B)(ii). Consistent with the Department's position in the preamble to the 2020 amendments, these final regulations do not alter requirements under the Clery Act or its implementing regulations. *See* 85 FR 30384. If the Clery Act applies to a recipient, the recipient must provide a list of sanctions that the postsecondary institution may impose following a disciplinary proceeding based on an allegation of rape, acquaintance rape, dating violence, domestic violence, sexual assault, or stalking. 20 U.S.C. 1092(f)(8)(B)(ii). Such a list also satisfies the requirement in § 106.45(l)(2) to describe the range of possible disciplinary sanctions or list the possible disciplinary sanctions that a recipient may impose on a respondent at the conclusion of grievance proceedings regarding sex-based harassment. However, if a recipient intends to impose additional types of disciplinary sanctions in cases involving sex-based harassment that are not covered by the Clery Act (*e.g.,* quid pro quo and hostile environment), a recipient would need to supplement any list required by the Clery Act to describe the range of such sanctions or provide a list of such sanctions under § 106.45(l)(2). The Department notes that the requirements of the Clery Act were designed to fit the population, environment, and traditional procedures used by postsecondary institutions. Section 106.45(l) applies to elementary schools, secondary schools, and to types of conduct outside of the Clery Act's scope. The Department maintains that it is appropriate for elementary schools and secondary schools and other recipients to retain discretion in imposing sanctions in cases involving sex-based harassment while also ensuring that the parties know the sanctions that may be imposed upon a determination that sex-based harassment occurred. Accordingly, the Department will continue to allow recipients to describe the range of possible sanctions or list all possible sanctions. Because the Department is retaining the language in § 106.45(l)(2) that permits a recipient to provide a range of possible disciplinary sanctions and remedies as an alternative to a list, it is not necessary to add language permitting a recipient to utilize a disciplinary sanction or remedy that is not contained in the recipient's list.

In order to further clarify that a recipient may list, or describe the range of, the possible disciplinary sanctions that a recipient may impose and remedies that the recipient may provide following a determination that sex-based harassment occurred, the Department has revised § 106.45(l)(2) from ''Describe the range of, or list,'' to ''List, or describe the range of.''

The Department declines to move § 106.45(l) to § 106.46 because the additional requirements in § 106.46 are limited to sex-based harassment complaints involving a student at a postsecondary institution. Although § 106.45(l) applies only to sex-based harassment complaints, it applies to all recipients, including elementary schools and secondary schools. Proposed § 106.45(l) and the prior language in § 106.45(b)(1)(vi) under the 2020 amendments provide consistency, predictability, and transparency about the range of consequences all students can expect from the outcome of grievance procedures regarding sex-based harassment. It is important to provide all students, faculty, and other personnel subject to a sex-based harassment complaint, including those at the elementary school and secondary school levels, with this information.

The Department appreciates the opportunity to clarify that a Title IX

Coordinator does not have the authority to bring civil or criminal charges against a respondent. The Department declines to specify the disciplinary sanctions a recipient may impose on a respondent, including after the respondent has graduated, which may vary depending on the type of recipient, the population it serves, State laws, and other factors. The Department respects a recipient's discretion to make disciplinary decisions under its own code of conduct as long as it complies with § 106.45, and if applicable § 106.46, before the imposition of any disciplinary sanctions against a respondent.

Changes: Proposed § 106.45(k) has been redesignated as § 106.45(l) in the final regulations. The Department has also revised § 106.45(l) to require recipients to ''List, or describe the range of'' the possible disciplinary sanctions that the recipient may impose and remedies that the recipient may provide following a determination that sex-based harassment occurred.

E. Grievance Procedures for the Prompt and Equitable Resolution of Complaints of Sex-Based Harassment Involving a Student Complainant or Student Respondent at Postsecondary Institutions [60]

1. Section 106.46(b) Student-Employees

Comments: Some commenters supported proposed § 106.46(b) because it would provide appropriate guidance to postsecondary institutions without being overly prescriptive.

Other commenters did not support proposed § 106.46(b). For example, one commenter stated that the Department did not explain how the two factors a postsecondary institution must consider—whether the party's primary relationship with the postsecondary institution is to receive an education, and whether the alleged sex-based harassment occurred while the party was performing employment-related work—relate to one another. Another commenter was concerned that proposed § 106.46(b) would not address a postsecondary institution's ability to take adverse employment action against a student-employee who is alleged to have perpetrated sex-based harassment.

One commenter asked the Department to add language stating that complainants or respondents shall only be subject to one resolution process for a complaint, either §§ 106.45 or 106.46, as determined by the fact-specific inquiry.

Discussion: The Department agrees with commenters that proposed § 106.46(b) will assist a postsecondary institution in making an appropriate determination regarding whether the grievance procedure requirements in § 106.46 apply to complaints involving a party who is both a student and an employee. The Department also agrees it is important for postsecondary institutions to consider the needs of student-employees and that the fact-specific inquiry in § 106.46(b) enables postsecondary institutions to do so.

The Department appreciates this opportunity to further explain in response to comments how the two factors in § 106.46(b) relate to one another. Section 106.46 potentially applies based on the student-employee's status as a student in a postsecondary institution (when the other party is not a student) if, after undertaking a fact-specific inquiry, the institution determines either that the student-employee's primary relationship with the institution is to receive an education; or that the alleged sex-based harassment occurred while the student-employee was engaged in an education-related activity (rather than performing employment-related work); or both. Satisfying either one of these factors would be sufficient for § 106.46 to apply but would not require that § 106.46 apply. Whether § 106.46 applies for a complaint involving a party who is both a student and an employee is ultimately a fact-specific inquiry in which the recipient may consider any other factors the postsecondary institution reasonably deems appropriate and then determine, in light of all the factors, whether to apply § 106.46. Because such an inquiry is fact-specific, and student employment at postsecondary institutions depends on a number of factors, it is not appropriate to prescribe how a postsecondary institution must weigh these factors, instead leaving that to the institution's discretion. Doing so will enable a postsecondary institution to take into account any unique needs of its educational community, consider additional relevant factors in determining whether a party is primarily a student or an employee, and take into account any applicable Federal, State, or local law and any collective bargaining or other employment agreements.

If, after conducting a fact-specific inquiry, a postsecondary institution determines that the grievance procedure requirements in § 106.46 do not apply, the postsecondary institution must still comply with the grievance procedure requirements in § 106.45. The grievance procedure requirements in § 106.45 appropriately ensure that a recipient can respond to sex-based harassment involving employees promptly and equitably as required by Title IX, while also providing appropriate procedural protections for employees. *See* 87 FR 41458–59.

In response to a commenter's concern that proposed § 106.46(b) would not address a postsecondary institution's ability to take adverse employment action against a student-employee who is alleged to have perpetrated sex-based harassment, the Department notes that nothing in § 106.46(b) prohibits a postsecondary institution from imposing a disciplinary sanction against a respondent who is both a student and an employee if, after the conclusion of the applicable grievance procedures, the postsecondary institution determines that sex-based harassment occurred. The final regulations at § 106.2 define ''disciplinary sanctions'' as consequences imposed on a respondent following a determination under Title IX that the respondent violated the recipient's prohibition on sex discrimination and do not preclude a postsecondary institution from imposing an adverse employment action as a disciplinary sanction. In addition, the final regulations at § 106.44(i) permit a recipient to place a student-employee respondent on administrative leave from employment responsibilities during the pendency of the recipient's grievance procedures.

The Department also declines to add language stating that complainants or respondents will be subject to only one resolution process for student or employee complaints, as determined by the fact-specific inquiry, because it is sufficiently clear from the structure of these regulations that a person would only be subject to a single set of Title IX grievance procedures for a particular complaint of sex discrimination. The Department clarifies that when a complainant or respondent is both a student and an employee of a postsecondary institution, the postsecondary institution must use the fact-specific inquiry in § 106.46(b) to determine whether the grievance procedures in § 106.46 apply, or whether the complaint will be governed solely by the procedures in § 106.45.

Changes: None.

2. Section 106.46(c) Written Notice of Allegations

Comments on Proposed § 106.46(c)

Comments: Commenters addressed the Department's proposal in § 106.46(c) to maintain, eliminate, or clarify various components of § 106.45(b)(2) in the

[60] The comments, discussion, and changes for § 106.46(a) are included in the section on § 106.45(a)(1).

2020 amendments. For example, commenters addressed the appropriateness of including in proposed § 106.46(c) a statement that the respondent is presumed not responsible and whether proposed § 106.46(c)(1)(ii) permissibly applies to respondents or would give respondents an advantage by creating a delay between notice and an opportunity to be heard. Another commenter urged the Department to revise proposed § 106.46(c)(2)(ii) to notify parties that the person they choose to serve in the role of advisor set out in paragraph (e)(2) may not also serve as a witness in the grievance procedures. Some commenters expressed concern that proposed § 106.46(c)(2)(iv) contradicts proposed § 106.45(h)(5). Some commenters urged the Department to require recipients to notify parties of a recipient's prohibition on knowingly making false statements only when the recipient includes a parallel notice for all disciplinary matters.

Other commenters expressed support for proposed § 106.46(c)(3), which would allow recipients to notify respondents of allegations after they have taken steps to address concerns for the safety of any person that would arise as a result of providing the notice, such as protecting complainants who allege dating and domestic violence from their abusers. Some commenters requested that the Department provide more specificity about this provision, including with respect to what may qualify as a ''legitimate concern for safety,'' timeframes for delaying notice, and the need to document the justification for any delay.

Discussion: The Department notes that proposed § 106.46(c) has been revised and renumbered, and the following discussion refers to the provisions in the final regulations unless we specify the proposed provisions. The Department acknowledges the comments about the intersection of §§ 106.45(b)(3) and 106.46(c) and the impact of such interaction on § 106.46(c)(1)(i). Section 106.46(c)(1)(i) requires that the written notice of allegations include a statement that the respondent is presumed not responsible for the alleged conduct until a determination whether sex-based harassment occurred is made at the conclusion of the grievance procedures.

The Department disagrees with a commenter who argued that giving the respondent time to prepare for an interview is unfair or inconsistent with Title IX. These elements of § 106.46 are an important part of a grievance process that is designed to be fair to all parties and lead to reliable outcomes to further Title IX's nondiscrimination mandate. The notice of allegations must be provided to the parties whose identities are known, including respondents and complainants.

In response to a comment observing that proposed § 106.46(c)(2)(i) referenced parties' ability to present evidence to ''a'' decisionmaker, the Department appreciates the opportunity to clarify that a recipient may have more than one decisionmaker and that the reference to ''a'' decisionmaker is not intended to suggest otherwise. If a recipient has more than one decisionmaker, its written notice of allegations must assure parties that they will have an opportunity to present relevant and not otherwise impermissible evidence to those trained, impartial decisionmakers.

The Department disagrees with a commenter's suggestion to require the notice of allegations to specify that a party's advisor may not also serve as a witness. As explained in more detail in the discussion of § 106.46(e)(2), a recipient may establish restrictions regarding the role an advisor may play in grievance procedures, and the decisionmaker should consider a witness's relationship to a party when making credibility assessments, but a prohibition on an individual serving as both a party's advisor and a witness is not warranted, and the Department declines to require notice of such a specification.

The Department appreciates the opportunity to clarify that the term ''receive'' in proposed § 106.46(c)(2)(iii) was not intended to convey a right for a party to keep a copy of any evidence. As explained in the discussion of § 106.46(e)(6), an institution has discretion to determine whether it will provide access to the relevant and not otherwise impermissible evidence or to a written investigative report that accurately summarizes this evidence. Under § 106.46(e)(6), a postsecondary institution has the discretion to determine the mode of providing access to the investigative report or to the underlying evidence, such as electronic copies, physical copies, or inspection of the institution's copies; however, the institution must exercise this discretion in a manner that ensures that the parties have an equal opportunity to access the evidence. *See* § 106.46(e)(6)(i), (ii). To avoid possible confusion and to more closely align the required contents of the notice of allegations with the text of § 106.46(e)(6), the Department deleted the term ''receive'' in § 106.46(c)(1)(iii) so that the final regulations state that the parties are ''entitled to an equal opportunity to access'' the evidence or investigative report.

The Department does not view final § 106.46(c)(1)(iii) as impermissibly conflicting with FERPA. As described in more detail in the discussion of § 106.46(e)(6) below, under FERPA, an eligible student generally has a right to ''inspect and review'' records, files, documents, and other materials that are directly related to the student and maintained by a postsecondary institution. 20 U.S.C. 1232g(a). The final regulations provide parties an equal opportunity to access the evidence that is relevant to the allegations of sex-based harassment and not otherwise impermissible. But to the extent access to the evidence would conflict with FERPA, the override provision in GEPA, as set forth in 20 U.S.C. 1221(d) and incorporated into the Title IX regulations at § 106.6(e), would apply to permit the disclosure as required by the final Title IX regulations.

The Department disagrees that § 106.46(c)(1)(iv) conflicts with § 106.45(h)(5). Section 106.46(c)(1)(iv) appropriately alerts parties when the recipient's own code of conduct has a policy against making false statements in a disciplinary proceeding, so that both parties understand that risk. Section 106.45(h)(5) prohibits the discipline of a party, witness, or participant for making a false statement ''based solely on the recipient's determination whether sex discrimination occurred.'' While a recipient may discipline a person for making a false statement in a Title IX grievance procedure, it may not find that the person made a false statement based solely on whether the decisionmaker found the respondent responsible for sex discrimination. As explained in the July 2022 NPRM, to discipline a person for making a false statement, the recipient would have to find that the person made the statement knowing that it was false or that the person made it in bad faith. 87 FR 41494–95. The Department also removed the phrase ''any provision in'' from final § 106.46(c)(1)(iv) so that the paragraph more naturally flows from the stem in § 106.46(c)(1).

Similarly, § 106.45(h)(5) addresses concerns about protecting those participating in a grievance procedure from inappropriate discipline that would chill participation in Title IX grievance procedures, but the section also maintains the recipient's discretion to discipline those who make false statements if the basis for alleging false statements is evidence other than the outcome of the grievance procedures. Although any potential discipline

associated with participation in Title IX grievance procedures could have a chilling effect, the Department recognizes that a recipient has a legitimate interest in holding students accountable for knowingly deceitful statements and in preserving the reliability of its determinations in Title IX grievance procedures. In revising §§ 106.45(h)(5) and 106.46(c)(1)(iv), the Department carefully balanced the important interests in encouraging full and honest participation in Title IX grievance procedures. *See also* discussion of § 106.45(h)(5).

The Department disagrees with the commenter's suggestion to require notification of a recipient's prohibition on knowingly making false statements only when the recipient includes a parallel notice for all disciplinary matters. Nothing prevents a recipient from including such a notification as part of its disciplinary process for other violations of a its code of conduct, but the value of knowing the risk of such discipline to a participant in Title IX grievance procedures does not depend on whether notice is provided with respect to other disciplinary matters.

The Department agrees with commenters that protecting survivors of dating and domestic violence from their abusers is important. Section 106.46(c)(3) gives recipients appropriate flexibility to reasonably delay providing written notice of the allegations to address concerns for the safety of any person as a result of providing the notice. The Department notes that delay may be justified based on a need to address a concern for the safety of any person, including a complainant, a respondent, or other person.

With respect to commenters' questions as to what constitutes a ''legitimate concern for safety,'' the Department seeks to use consistent and accessible terminology throughout the final regulations to the extent appropriate. The final regulations have therefore been revised to permit delay in providing the written notice of allegations to address ''reasonable'' safety concerns, which more closely aligns with the language of § 106.44(f)(1)(v)(A)(*2*) and is more common and familiar.

The Department appreciates the opportunity to clarify that a determination as to whether a concern for safety is reasonable necessarily begins with the particular allegations and particular individuals involved and may take into account factors such as any history of violent or abusive conduct, any credible threats of self-harm or harm to others, whether a person needs to secure different housing or a schedule change, or evidence of substance abuse. Section 106.46(c)(3) specifies that the analysis must be individualized and must not rely on mere speculation or stereotypes.

With respect to the timeframe within which notice must be provided after a delay, the Department notes that these determinations will depend on the steps that need to be taken to address the safety concern. For example, if the recipient determines that a complainant lives with the respondent and needs to secure a safe place to stay, the delay should not exceed the amount of time it takes for the complainant to relocate. A recipient may not, however, unreasonably delay providing the notice. The notice may be delayed only to the extent necessary to address reasonable safety concerns, and the recipient must always provide notice with sufficient time for the parties to prepare a response before any initial interview. Further, the Department notes that under § 106.8(f), a recipient must maintain records documenting its implementation of the requirements of § 106.46, including the justification for any delay in providing the notice of allegations under § 106.46(c)(3).

Changes: In § 106.46(c)(1)(i), the Department replaced the reference to ''106.45(c)'' with ''106.45(c)(1)(i) through (iii).'' The Department also removed the phrase ''any provision in'' from § 106.46(c)(1)(iv). Finally, the Department has replaced two uses of the term ''legitimate'' in § 106.46(c)(3) with ''reasonable.''

Other Clarifications to Regulatory Text

Comments: None.

Discussion: The Department observed some inconsistencies between the text of proposed § 106.46(c) and other sections of the regulations.

To more closely align the structure and content of § 106.46(c) with § 106.45(c), and to improve clarity, the Department revised § 106.46(c) to begin with the general requirement to provide the written notice and moved the requirement that the notice be provided with sufficient time for the parties to prepare a response before any initial interview to that first sentence of § 106.46(c). The Department further revised § 106.46(c) to begin numbering of paragraph (1) after that first sentence to cover the required contents of the written notice. Section 106.46(c)(1) requires that the notice include all information required under § 106.45(c)(1)(i) through (iii). The Department removed proposed § 106.46(c)(1)(ii) as redundant in light of other changes to § 106.46(c).

For consistency with other provisions in the regulations, the Department also revised § 106.46(c)(1)(i) and (iii) to clarify that two of the rights listed in the written notice of allegations—to present evidence to the decisionmaker and to receive access to evidence—are limited to ''relevant and not otherwise impermissible'' evidence. To ensure clarity and consistency with § 106.46(e)(6), the Department further revised proposed § 106.46(c) to require a postsecondary institution to inform the parties that, if the recipient provides access to an investigative report, the parties may also request—and then must receive—access to the relevant and not impermissible evidence under § 106.46(e)(6)(i).

The Department also observed that proposed § 106.46(c) lacked a paragraph on the obligation to provide notice of additional allegations, consistent with § 106.45(c)(2). To clarify this obligation under § 106.46(c), the Department added, at § 106.46(c)(2), a statement that, if a recipient decides to investigate additional allegations of sex-based harassment by the respondent toward the complainant that were not included in the original written notice of allegations or that were included in a complaint that is consolidated under § 106.45(e), the recipient must provide written notice of those additional allegations to the parties whose identities are known.

Changes: The Department revised the first sentence of § 106.46(c) to include language requiring that the notice be provided with sufficient time for the parties to prepare a response before any initial interview and renumbered the remaining paragraphs so that § 106.46(c)(1) outlines the required contents of the written notice. Proposed § 106.46(c)(1)(ii) has been removed. In § 106.46(c)(1)(i), the Department has added the words ''and not otherwise impermissible'' after the word ''relevant.'' The Department has also deleted the term ''receive'' in § 106.46(1)(2)(iii) and added the clause ''and if a postsecondary institution provides access to an investigative report, the parties may request and then must receive access to the relevant and not otherwise impermissible evidence'' at the end of that paragraph. The Department added § 106.46(c)(2) to clarify the obligation to provide written notice of additional allegations.

3. Section 106.46(d) Dismissal of a Complaint

Comments: Some commenters supported § 106.46(d) because it would require simultaneous notice of dismissal to both parties. Other commenters

recommended that the Department modify § 106.46(d) to require a recipient to notify a respondent of a dismissal only if the respondent had notice of the underlying complaint, noting that a complaint may be dismissed before the respondent has notice of it because it has been withdrawn by the complainant, there has been reasonable delay by the recipient to prepare interim safety measures for the complainant, or other circumstances.

Discussion: For the same reasons explained in the discussion of § 106.45(d)(3), the Department is persuaded by commenters' recommendation that the Department modify § 106.46(d)(1) so that, when a complaint is dismissed before the respondent has been notified of the allegations, a recipient need only provide the complainant, and not the respondent, with written notice of the dismissal. The Department agrees that notifying a respondent of the dismissal of a complaint for which they had no prior notice would likely cause confusion and could put a complainant at risk of retaliation or sex discrimination, particularly in circumstances in which a complainant withdrew a complaint due to safety concerns. Accordingly, the final regulations have been revised to address commenters' concerns. The Department notes that, because § 106.46(a) incorporates the requirements of § 106.45, a postsecondary institution implementing grievance procedures under § 106.46 also must comply with § 106.45(d)(3) in providing the parties an opportunity to appeal the dismissal of a complaint of sex-based harassment. *See* Notice of Opportunity to Appeal in discussion of § 106.45(d)(3).

Changes: The Department has revised § 106.46(d)(1) to state that if dismissal occurs before the respondent has been notified of the allegations, the recipient must provide written notice of the dismissal and the basis for the dismissal only to the complainant.

4. Section 106.46(e)(1) Notice in Advance of Meetings

Comments: Commenters generally expressed support for requiring sufficient notice of meetings. Some commenters supported requiring sufficient notice of meetings but suggested additional modifications or clarifications. One commenter suggested requiring a reasonable amount of time, rather than sufficient time, to give discretion to recipients and not provide protections for respondents beyond what due process requires.

Discussion: As noted in the July 2022 NPRM, the Department has not substantively changed the language in § 106.46(e)(1) from § 106.45(b)(5)(v) in the 2020 amendments other than the overall change in its prior applicability only to sex-based harassment complaints involving a student complainant or student respondent at a postsecondary institution. 87 FR 41496. The Department does not agree with a commenter's suggestion to substitute ''who will be in attendance'' for ''participants'' because § 106.46(e)(1) is about meetings, and it is sufficiently clear that ''participants'' refers to those who will be attending the meetings. Nor does the Department agree with a commenter that it is necessary to change the language ''with sufficient time for the party to prepare'' for the meeting to ''in a reasonable amount of time before'' the meeting. The phrase ''with sufficient time for the party to prepare'' permits recipients to exercise their discretion regarding how far in advance notice must be given. The provision also applies both to complainants and respondents and therefore, contrary to a commenter's assertion, is not designed to benefit only respondents; complainants, much like respondents, may need time to consult with an advisor, identify witnesses, or otherwise prepare for a meeting. The Department explained in the July 2022 NPRM that ensuring sufficient time for participants to prepare, and possibly consult with others for help preparing, is important for due process, especially in light of the age, maturity, and independence of postsecondary students, many of whom may not have extensive experience with self-advocacy. 87 FR 41496. The Department also notes that postsecondary institutions are separately required by the Clery Act to provide ''timely notice of meetings'' in proceedings based on an allegation of dating violence, domestic violence, sexual assault, or stalking. *See* 34 CFR 668.46(k)(3)(i)(B)(2).

Changes: The Department has made a non-substantive change to replace ''meetings, investigative interviews, or hearings'' with ''meetings or proceedings'' for consistency with § 106.46(e)(2) and (3).

5. Section 106.46(e)(2) Role of Advisor

Advisor Generally

Comments: Some commenters supported § 106.46(e)(2) for allowing students to have an advisor, particularly because postsecondary students are newly independent and thus may have a greater need for assistance from an individual in an advisory role. Some of these commenters noted that § 106.46(e)(2), along with § 106.46(c)(2)(ii), will help to ensure that postsecondary students with disabilities are able to request and receive the support of an advisor. Another commenter supported the flexibility of allowing postsecondary institutions to define the appropriate role for advisors as long as the rules are applied equally and are consistent with other legal requirements.

One commenter opposed § 106.46(e)(2) for limiting parties to one advisor, which forces postsecondary students to choose between the assistance of a parent or a different advisor. Some commenters opposed what they characterized as the removal of the right to an advisor, on due process grounds. A different commenter opposed § 106.46(e)(2) as conflicting with the rights of unionized employees to have a union representative at a meeting that might lead to disciplinary action, and as possibly conflicting with a union's duty to provide fair representation.

Some commenters urged the Department to extend § 106.46(e)(2) to require a recipient to permit advisors for all complaints alleging sex discrimination or for certain categories of complaints. Other commenters asked the Department to require elementary schools and secondary schools to provide a right to an advisor, stating that these schools do not tend to fully comply with their Title IX obligations. Some commenters noted that employee complaints may have protections under the Clery Act that include the right to an advisor.

Some commenters urged the Department to require postsecondary institutions to allow advisors in any type of investigation under § 106.45, with one commenter noting that sex discrimination complaints frequently involve a power imbalance of a student against the recipient. Another commenter criticized the Department for failing to address any harms of excluding advisors in non-sex-based harassment cases involving postsecondary students. One commenter urged the Department to provide the right to an advisor without the rest of the requirements of § 106.46 to sex-based harassment complaints involving a postsecondary student complainant and an employee respondent.

Discussion: Section 106.46(e)(2) requires postsecondary institutions to provide parties with the same opportunities to have an advisor of their choice present during any meeting or proceeding as part of the grievance procedures under § 106.46. The Department notes that the presence of an advisor may violate FERPA;

however, as explained in the discussion of § 106.6(e), the GEPA override dictates that Title IX overrides FERPA when there is a direct conflict. Thus, a postsecondary institution must permit the parties to have an advisor of their choice as required by § 106.46(e)(2).

In response to a request to allow multiple advisors so that postsecondary students can receive assistance from an attorney and a parent, the Department declines to require an institution to allow parties to be accompanied to meetings and proceedings by multiple advisors. Requiring an institution to allow multiple advisors is likely to present scheduling challenges that could delay the proceedings, create a chilling effect on parties and witnesses due to the presence of additional individuals, and weaken privacy protections by disclosing sensitive information to additional individuals. In addition, while a postsecondary student could choose a parent to be their advisor, the Department declines to allow parents the automatic right to attend because, as noted in the discussion of § 106.6(g) in this preamble, a parent or guardian typically does not have legal authority to exercise rights on behalf of a postsecondary student. For further information about the presence of additional individuals at meetings and proceedings, see the discussion of § 106.46(e)(3).

The Department appreciates the opportunity to clarify that in grievance procedures in which one party is a postsecondary student and another party is not, § 106.46(e)(2) requires the postsecondary institution to permit the non-student party the same opportunity for an advisor as the postsecondary student to ensure equitable opportunity to participate under § 106.45(b)(1). For reasons discussed in Framework for Grievance Procedures for Complaints of Sex Discrimination (Section II.C), sex-based harassment complaints involving a postsecondary student complainant and employee respondent must comply with all of the requirements under § 106.46 (and not simply the right to an advisor, as suggested by a commenter). The Department also clarifies that § 106.46(e)(2) provides the parties with the right to be accompanied to any meeting or proceeding, including interviews with investigators, by an advisor of the parties' choice.

The Department acknowledges the concerns raised by a commenter related to the role of labor union representatives in the grievance procedures. The Department clarifies that nothing in these final regulations precludes parties from choosing to have a union representative serve as their advisor in the Title IX grievance procedures. For information about the presence of a union representative who is not serving as a party's advisor of choice, see the discussion of § 106.46(e)(3).

The Department declines to extend the right to an advisor of choice to complaints outside of § 106.46. In general, students at postsecondary institutions are differently situated from other parties to grievance procedures in a way that warrants the right to an advisor of choice for complaints under § 106.46. Unlike elementary school and secondary school students, postsecondary students generally have the authority to act on their own behalf and are generally less likely to be represented by a parent or guardian throughout their educational experience, yet they may also not have the sufficient maturity or experience with self-advocacy to participate in grievance procedures, which are unique compared to other aspects of the educational experience, without the assistance of an advisor. Employees may have access to a union representative or other employee-specific resources, whereas postsecondary students do not tend to have comparable options.

In addition, the Department views postsecondary students who are participating in grievance procedures for complaints of sex-based harassment as differently situated from those who are participating in grievance procedures for complaints involving other types of sex discrimination. Complaints of sex-based harassment often involve multiple parties whose conduct and credibility are subjected to scrutiny; sensitive material and disputes over the relevance and permissibility of the evidence; and a student respondent facing potential disciplinary sanctions. By contrast, complaints of sex discrimination other than sex-based harassment often allege different treatment by an employee or by a recipient's policy or practice, such as different treatment in grading. These cases are less likely to involve credibility assessments of multiple parties, sensitive material, or a party that faces disciplinary sanctions. For example, a complaint alleging discriminatory grading based on sex by a faculty member in a college math course would likely involve a review of the grading rubric and a review of the graded examinations of the other students in the course. While credibility may play a role, it is less likely to be a central role in the evaluation of this type of complaint. The Department thus views postsecondary students as able to meaningfully participate in the § 106.45 grievance procedures for complaints of other types of sex discrimination without the assistance of an advisor. The Department disagrees that student complainants should have the right to counsel under § 106.45 to address any power imbalance because the numerous procedural safeguards within § 106.45 provide sufficient support for these students and impose various obligations on the recipient to ensure equitable proceedings.

There is no conflict between § 106.46(e)(2) and Clery Act protections. The Clery Act protections described in 34 CFR 668.46(k)(2), including the right to an advisor of choice in disciplinary proceedings, *see* 34 CFR 668.46(k)(2)(iv), apply to ''cases of alleged dating violence, domestic violence, sexual assault, or stalking'' at postsecondary institutions. Dating violence, domestic violence, sexual assault, and stalking all fall within the scope of sex-based harassment as defined in § 106.2. The final Title IX regulations require an advisor of choice in § 106.46(e)(2), which applies to complaints alleging sex-based harassment involving a postsecondary student. Thus, the Clery Act and § 106.46(e)(2) similarly provide the right to an advisor. The Department also notes that in proceedings involving an allegation of dating violence, domestic violence, sexual assault, or stalking, postsecondary institutions are separately required by the Clery Act to provide the parties with the opportunity to be accompanied to any meeting or proceeding by an advisor of their choice. *See* 34 CFR 668.46(k)(2)(iii)–(iv). Recipients are able to comply with these final Title IX regulations as well as the Department's regulations implementing the Clery Act.

In response to commenters' due process concerns related to the Department's changes to the parties' right to an advisor, the Department emphasizes that the parties to sex-based harassment grievance procedures involving a postsecondary student retain the right to an advisor of choice under § 106.46(e)(2). The Department is not removing any right to an advisor for complaints involving sex discrimination that is not sex-based harassment because the 2020 amendments do not provide that right: like the final regulations, the 2020 amendments conferred (at § 106.45(b)(5)(iv)), a right to an advisor only in cases involving formal complaints of sexual harassment.

While the final regulations no longer require a recipient to provide a right to an advisor at meetings or proceedings in sex-based harassment cases other than those involving a postsecondary student, the Department reiterates that

nothing in these final regulations prohibits parties from having an advisor of choice outside of the § 106.46 grievance procedures. In the preamble to the 2020 amendments, the Department stated that the right to an advisor in formal complaints of sexual harassment under § 106.45(b)(5)(iv) of the 2020 amendments would make the grievance process more thorough and fair and would result in more reliable outcomes. *See* 85 FR 30297. As discussed in greater detail in Framework for Grievance Procedures for Complaints of Sex Discrimination (Section II.C), the Department received significant feedback that the 2020 amendments are too inflexible, are unduly burdensome, and fail to account for younger students and the unique contexts of elementary schools and secondary schools. In response, the Department reconsidered the requirements of the 2020 amendments and removed certain procedures for complaints under § 106.45. The Department acknowledges that some commenters raised concerns about the lack of an advisor in elementary schools and secondary schools and concerns about these schools' compliance with Title IX; however, the Department views the assistance of a parent, guardian, or other authorized legal representative as sufficient to ensure a thorough and fair investigation and a reliable resolution in the revised grievance procedures that apply to complaints under § 106.45. The Department also notes that anyone who believes that a recipient has failed to comply with Title IX may file a complaint with OCR, which OCR would evaluate and, if appropriate, investigate and resolve consistent with these final regulations.

Changes: The Department has made a non-substantive change to replace ''any meeting or grievance proceeding'' with ''any meeting or proceeding'' for consistency within § 106.46(e)(2), and for consistency with § 106.46(e)(1) and (3).

Choice of Advisor

Comments: Some commenters urged the Department to require a recipient to provide free legal counsel to parties. One commenter appeared to urge the Department to draw from the ''authorized legal representative'' language in § 106.6(g), rather than in § 106.46(e)(2), to provide the right to counsel. Other commenters broadly opposed § 106.46(e)(2) as weakening the right to counsel. Another commenter expressed concern that § 106.46(e)(2) creates the impression that an advisor needs to be an attorney.

Some commenters urged the Department to prohibit recipients from requiring confidential employees to serve as advisors under § 106.46(f) for questioning by an advisor when a party does not have an advisor of their choice, but to otherwise permit parties to select confidential employees to serve as their advisor of choice. Other commenters urged the Department not to allow confidential employees to serve as advisors without distinguishing between advisors appointed by the recipient and those selected by the party. Some commenters urged the Department to clarify that a witness should not be permitted to act as an advisor in any hearing or should be limited in their role as an advisor when acting as a witness due to concerns about witness credibility and the integrity of an investigation or hearing.

One commenter stated that a recipient should be allowed to place reasonable restrictions on the parties' choice of advisor. Another commenter urged the Department to modify § 106.46(e)(2)–(3) to state that, with respect to a student-to-student complaint, the representative for one student at the hearing must not be an individual who has academic or professional authority over the other student. Other commenters suggested allowing a recipient to prevent a person in a position of authority over the other parties or relevant witnesses from serving as the advisor. Different commenters asked for further clarity on the role of the advisor, including how they should be trained, whom they can be, and whether they require compensation from recipients.

Discussion: The Department appreciates the range of comments regarding legal counsel serving as a party's advisor of choice. Consistent with § 106.45(b)(5)(iv) of the 2020 amendments, § 106.46(e)(2) specifies that a party's advisor of choice may be an attorney. The Department acknowledges that a party's choice of advisor may be limited by whether the party can afford to hire an advisor or must rely on an advisor appointed by the postsecondary institution or otherwise available without fee or charge. The Department emphasizes that the status of a party's advisor (*i.e.,* whether the advisor is an attorney) and the financial resources of any party must not affect the institution's compliance with §§ 106.45 and 106.46, including the obligations to objectively evaluate the relevant and not otherwise impermissible evidence, treat complainants and respondents equitably, and use investigators and decisionmakers who are free from bias or conflicts of interest. The Department declines to require recipients to pay for parties' legal counsel or advisors because, as the Department recognized in the 2020 amendments, the procedural rights provided to the parties during the grievance procedures afford all parties the opportunity to engage fully and advance their interests, regardless of financial ability. *See* 85 FR 30297. The Department also notes that while these final regulations do not require an institution to pay for the parties' advisors, nothing in the final regulations precludes an institution from choosing to do so. Likewise, nothing in these regulations precludes an institution from offering to provide attorney-advisors or non-attorney advisors to the parties, though § 106.46(e)(2) ensures that the parties retain the right to select their own advisor of choice and decline the institution's offer.

In response to comments suggesting that § 106.46(e)(2) weakens a party's ability to be represented by counsel, the Department notes that § 106.46(e)(2)—similar to § 106.45(b)(5)(iv) of the 2020 amendments—specifically allows a party to choose an attorney as their advisor. In addition, although § 106.46 allows an institution to establish restrictions regarding the extent to which the advisor may participate in the grievance proceedings, restrictions on advocates are a common and accepted part of adversarial proceedings, and are necessary to ensure orderly and efficient functioning of such proceedings. The Department also notes that any such restrictions must apply equally to the parties and thus will not disproportionately impair the role of either party's advisor. The Department notes that an institution must not limit the presence of the advisor for a complainant or respondent in any meeting or proceeding. Further, the institution's grievance procedures must comply with § 106.46, which requires an institution to permit certain levels of participation by advisors (*e.g.,* requirements related to questioning by an advisor in a live hearing under § 106.46(f)(1)(ii)(B), if an institution employs that process). The Department disagrees that § 106.46(e)(2) suggests that the advisor of choice must be an attorney, given that the language expressly states that the advisor is not required to be an attorney.

In response to the comment asking the Department to provide the right to counsel through § 106.6(g), the Department wishes to clarify that the phrase ''authorized legal representative'' in § 106.6(g) does not refer to legal counsel. Rather, it refers to an individual who is legally authorized to act on behalf of certain youth, such as

youth in out-of-home care, but is not necessarily deemed a parent or guardian. *See* discussion of § 106.6(g).

In response to questions regarding whether a confidential employee may serve as an advisor, the Department wishes to clarify that a party may choose a confidential employee to serve as their advisor of choice under § 106.46(e)(2); however, an institution may not appoint or otherwise require a confidential employee to serve as the postsecondary institution's advisor of choice to ask questions on behalf of a party when the party lacks their own advisor of choice. The Department has revised § 106.46(f)(1)(ii)(B) to state that, when a postsecondary institution is required to appoint an advisor to ask questions on behalf of a party for the purpose of conducting questioning at a live hearing, a postsecondary institution may not appoint a confidential employee. Requiring a confidential employee to serve as an advisor may jeopardize that employee's ability to serve as a confidential employee and could risk disclosing communications that would otherwise be protected from disclosure under § 106.45(b)(7)(i). Although these concerns may also be present if a party chooses a confidential employee to serve as their advisor of choice, preserving a party's choice of advisor is important enough to accept these concerns when a party has voluntarily chosen a confidential employee as their advisor. Further, a party's choice of a confidential employee as their advisor suggests that the party is not concerned with the confidential employee's ability to serve as an advisor or with any risk of that employee disclosing confidential communications.

Given the importance of preserving a party's choice of an advisor, the Department is not prohibiting a party from selecting an advisor who has served or who may serve as a witness in the grievance proceedings. This position is consistent with the position expressed by the Department in the preamble to the 2020 amendments, in which the Department acknowledged the potential complications of a witness serving as an advisor but believed that it would be inappropriate to preclude a party from selecting an advisor who is also a witness. *See* 85 FR 30299. The Department maintains, as stated in the preamble to the 2020 amendments, a decisionmaker may consider any conflicts of interest as part of weighing the credibility and persuasiveness of the advisor-witness's testimony. *See id.* The decisionmaker may also consider, as part of the requirement to assess witness credibility under § 106.46(f)(1), whether the witness was exposed to any information in their role as advisor that may have influenced their witness testimony. Institutions may wish to advise parties on the potential complications of selecting an advisor who might be called as a witness.

It is not necessary or appropriate to place other restrictions on who may serve as a party's advisor, such as a prohibition on an advisor who has academic or professional authority over another party. The Department is not limiting the party's right to select an advisor with whom the party feels most comfortable and who the party believes will best assist them during the grievance procedures. The Department does not view an advisor with authority over another party as jeopardizing the reliability of the evidence presented or the integrity of the proceedings and the outcome. The Department notes that § 106.46(e)(2) permits an institution to place equal restrictions on the advisors' participation in the proceedings, and that § 106.71 prohibits retaliation against anyone who has made a complaint, testified, assisted, or participated or refused to participate in an investigation, proceeding, or hearing under § 106.45, and if applicable § 106.46. The Department declines to require institutions to mandate advisor training, as this could limit the parties' ability to select an advisor of their choice based on whether the advisor has received, or is able to receive, such training. These final regulations, however, do not preclude a recipient from providing training for advisors.

Regarding commenters' requests to require the institution to accommodate the advisor's availability, the Department notes that, under § 106.46(e)(5), an institution must allow for the reasonable extension of timeframes on a case-by-case basis for good cause, while remaining mindful of its obligation to meet its own reasonably prompt timeframes.

Changes: The Department has clarified in § 106.46(f)(1)(ii)(B) that if a postsecondary institution chooses to use a live hearing, it may allow the questions proposed by the party for other parties and witnesses to be asked by the decisionmaker or by the party's advisor, and that in those instances in which a postsecondary institution is required to appoint an advisor to ask questions on behalf of a party during advisor-conducted questioning, a postsecondary institution may not appoint a confidential employee to be the advisor.

Restrictions on Advisor's Participation

Comments: Some commenters urged the Department to remove the language permitting the recipient to establish restrictions on the extent to which the advisor may participate or to restrict the limitations that recipients may place on advisors. One commenter asked the Department to require that an advisor be able to actively participate in proceedings as much as reasonably practicable. Another commenter asked the Department to clarify the extent to which a party may delegate certain functions or communications to their advisor, and some commenters requested that an advisor be allowed to attend a hearing in the absence of a party and present evidence on that party's behalf.

Discussion: Consistent with the Department's position in the preamble to the 2020 amendments, *see* 85 FR 30298, the Department declines to remove the discretion of a postsecondary institution to restrict an advisor's participation so as not to unnecessarily limit an institution's flexibility to conduct its grievance procedures that both comply with §§ 106.45 and 106.46 and, in the institution's judgment, best serve the needs and interests of the institution and its educational community. If, however, a postsecondary institution permits questioning by an advisor at a live hearing, under § 106.46(f)(1)(ii)(B), the institution must allow the party's advisor of choice to conduct the questioning. The final regulations do not specify what types of restrictions on advisor participation may be appropriate or what types of functions the advisor may conduct, as the Department views these determinations as best left to the discretion of the postsecondary institution.

In response to a comment about whether a party's advisor can attend a live hearing in lieu of the party, the Department notes that if a postsecondary institution chooses to conduct a live hearing with questioning by an advisor, each party has a right to have their advisor ask relevant and not otherwise impermissible questions and follow-up questions of any party or witness. § 106.46(f)(1)(ii)(B). A party retains their right to have their advisor ask questions at the live hearing even if the party chooses not to appear at the hearing. If a party refuses to respond to relevant and not otherwise impermissible questions by not attending the hearing, however, under § 106.46(f)(4), a decisionmaker may choose to place less or no weight on the statements made by that party. The

decisionmaker must not, however, draw an inference about whether sex-based harassment occurred based solely on a party's refusal to respond. *See* § 106.46(f)(4). The Department notes that the parties have the right to request that the live hearing be held with the parties present in separate locations, and the postsecondary institution must do so upon the party's request. *See* § 106.46(g) and the discussions of § 106.46(f) and (g) of this preamble.

Changes: None.

6. Section 106.46(e)(3) Other Persons Present at Proceedings

Comments: Some commenters expressed general support for § 106.46(e)(3) and encouraged postsecondary institutions to permit parties to have additional people present as support. Other commenters opposed § 106.46(e)(3) for excluding parents from disciplinary proceedings at postsecondary institutions. Some commenters stated that the need for parental presence is often stronger for college students, many of whom are legally dependent on their parents until around the time they arrive at college. In response to the statement in the July 2022 NPRM that college students are more likely to live alone and be independent than younger students, and that parents are less likely to be able to exercise legal rights on their behalf, one commenter stated, without providing further detail, that these assertions are not true for many college students.

Other commenters urged the Department to allow parties to have both an advisor and a support person. Some commenters asserted that because § 106.46(e)(2) permits one advisor, college students need to choose between legal representation (who can help with legal and technical aspects but is essentially a stranger) and the emotional support of a family member or close friend.

Some commenters expressed support for applying § 106.46(e)(3) to complaints under § 106.45. Commenters stated that many elementary and secondary students would benefit from a support person other than a parent or advisor. One commenter asserted that in most sex discrimination investigations other than those involving sex-based harassment, students are faced with the intimidating situation of challenging decisions made by their school or its officials.

By contrast, another commenter urged the Department to prohibit postsecondary institutions from permitting anyone other than parties and their advisors to attend sex-based harassment proceedings, noting concerns with a complainant sharing sensitive information in front of a respondent's parent, a journalist, or another respondent who was accused by the same complainant.

Some commenters expressed concern that parties will interpret § 106.46(e)(3) as conferring the right to have persons other than their advisor present at meetings and proceedings, noting that the presence of other individuals will generally violate FERPA and proposed § 106.44(j) unless the presence of that individual is required by Title IX or by law. Alternatively, the commenters asked the Department to make clear that a postsecondary institution complies with § 106.46(e)(3) by allowing only additional individuals whose presence is legally required.

Discussion: The Department appreciates the range of opinions expressed by commenters regarding the postsecondary institution's discretion to allow parties to have persons other than their advisor present at any meeting or proceeding, provided that the institution provides the same opportunities to the parties.

The Department appreciates the opportunity to clarify that § 106.44(j) does not prohibit a postsecondary institution from allowing parties to have persons other than the parties' advisor present at any meeting or proceeding because the exception at § 106.44(j)(3) permits disclosures of personally identifiable information to carry out the purposes of Title IX and these final regulations, including action taken to address conduct that reasonably may constitute sex discrimination. Section 106.44(j)(3) permits an institution to exercise its discretion under § 106.46(e)(3) to allow the parties to have persons other than their advisor attend any meeting or proceeding.

The Department also clarifies that, as some commenters noted, § 106.46(e)(3) must be interpreted consistent with a postsecondary institution's obligations under FERPA. If the presence of persons other than the party's advisor means that an institution is unable to comply with FERPA, the institution is not permitted to exercise its discretion under § 106.46(e)(3) to allow persons other than the parties' advisors to attend meetings or proceedings. The GEPA override, as stated in § 106.6(e), is not applicable to permit the presence of an individual other than the party's advisor whose presence would violate FERPA. Because § 106.46(e)(3) does not require an institution to allow the presence of persons other than the party's advisor, there is no direct conflict between Title IX and FERPA: an institution can comply with its obligations under both Title IX and FERPA by not permitting the presence of an individual other than the party's advisor when the presence would violate FERPA. *See* discussion of § 106.6(e). If a party has a constitutional right to the presence of a particular individual at meetings or proceedings, the constitutional override would apply to permit the presence of that individual. The Department also notes that an institution would be able to allow persons other than the parties' advisors to attend meetings or proceedings and still comply with FERPA if any student party, witness, or other participant whose personally identifiable information is subject to disclosure provides prior written consent.

In addition, a party may be accompanied by a union representative if the postsecondary institution chooses to provide the parties with the opportunity to have persons other than the advisor of the parties' choice present during any meeting or proceeding, provided that the union representative's presence does not conflict with FERPA. Further, as noted above, if any student party, witness, or other participant whose personally identifiable information is subject to disclosure provides prior written consent to permit the presence of persons other than the parties' advisors (*e.g.,* a union representative), their presence will not violate FERPA.

In addition, there are certain situations in which a postsecondary institution may be required to permit a party to have another person, in addition to an advisor, present during any meeting or proceeding to comply with another law. Under the ADA and Section 504, a postsecondary institution must ensure effective communication for persons with disabilities through the provision of auxiliary aids and services (*e.g.,* providing a sign language interpreter for a party who is deaf or hard of hearing) and by making reasonable modifications to policies, practices, and procedures to avoid discrimination based on disability. A postsecondary institution may need to provide language assistance services under Title VI, such as translations or interpretation for persons with limited English proficiency. In these situations, a postsecondary institution must provide the parties with the same opportunities to have necessary support persons to overcome language- or disability-based barriers to participation, although this may result in only one party (*e.g.,* the party with a disability) having another person present. In situations in which the presence of a person (other than an

advisor) may conflict with FERPA but is necessary to comply with certain antidiscrimination statutes, including Title VI, the ADA, and Section 504, the override provision in GEPA, as set forth in 20 U.S.C. 1221(d), would apply to permit the other person to attend a meeting or proceeding to ensure the party can engage fully in the grievance procedures.[61] The Department does not believe that it is necessary to revise § 106.46(e)(3) to reflect that the requirements of other antidiscrimination laws may result in only one party being permitted to have a support person.

In response to concerns about the potential exclusion of parents from disciplinary proceedings at postsecondary institutions, the Department reiterates that § 106.6(g) prohibits the Title IX regulations from being read in derogation of any legal right of a parent, guardian, or other authorized legal representative to act on behalf of a party, and that nothing in the regulations prohibits a student from choosing a parent as their advisor. As noted in the discussion of § 106.6(g) in this preamble, a parent or guardian would not automatically be eligible to attend a proceeding with a postsecondary student; because postsecondary students generally are older than elementary school and secondary school students, parents and guardians typically do not have the same legal authority to exercise rights on behalf of postsecondary students. Section 106.46(e)(3) gives a postsecondary institution the discretion to permit parties to have persons other than the party's advisor—such as the party's parent or guardian—attend any meeting or proceeding; however, a recipient must not permit a parent or guardian of a postsecondary student to attend a meeting or proceeding when their presence would violate FERPA.

The Department acknowledges the benefits of a support person (other than an advisor). The Department also acknowledges the privacy concerns, potential chilling effect, and possible scheduling challenges associated with the presence of additional individuals. The Department continues to believe that postsecondary students are more likely to be independent and that their parents are less likely to be able to exercise legal rights on their behalf. The Department maintains the position, as stated in the preamble to the 2020 amendments, that the sensitivity and high stakes of the sex-based harassment grievance procedures weigh in favor of protecting the parties' privacy to the extent feasible (unless otherwise required by law). Thus, the Department declines to require postsecondary institutions to allow parties to be accompanied to a meeting or proceeding by persons other than the parties' advisors or those whose presence is legally required, as described above. *See* 85 FR 30339. The Department also declines to extend § 106.46(e)(3) to complaints under § 106.45 for similar reasons to the decision not to extend § 106.46(e)(2)'s right to an advisor of choice to complaints under § 106.45. As explained in greater detail in the discussion of § 106.46(e)(2), in general, postsecondary students are differently situated from other parties to grievance procedures, and postsecondary students who are participating in grievance procedures for sex-based harassment complaints are differently situated from those participating in grievance procedures for non-sex-based harassment complaints. The Department also notes that in proceedings involving an allegation of dating violence, domestic violence, sexual assault, or stalking, postsecondary institutions are separately required by the Clery Act to provide the parties with the same opportunity to have others present at any disciplinary proceeding. *See* 34 CFR 668.46(k)(2)(iii).

It is not necessary to modify § 106.46(e)(3) to specify a limit on the number of persons who may accompany a party to a meeting or proceeding or to require attendees to sign a confidentiality agreement. As noted above, § 106.46(e)(3) must be interpreted consistent with a postsecondary institution's obligations under FERPA so an institution may not permit the presence of a person other than the party's advisor when the presence of that person would violate FERPA. In addition, § 106.45(b)(5) already requires a recipient to take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient's grievance procedures, and reasonable steps could include a confidentiality agreement if a recipient concludes such an agreement would be appropriate.

Changes: None.

7. Section 106.46(e)(4) Expert Witnesses

Comments: Commenters offered a variety of views on § 106.46(e)(4). One commenter supported the provision for giving postsecondary institutions the discretion to decide whether to allow expert witnesses, while another commenter urged the Department to prohibit expert witnesses and instead ensure decisionmakers are trained on topics on which expert witnesses might often provide testimony. The commenter identified drug and alcohol incapacitation as areas in which expert witnesses might provide testimony. Some commenters stated that expert witnesses cannot provide case-specific information, are not usually used in educational adjudications, and would unfairly tip the scales in favor of parties who can afford them.

Several commenters opposed § 106.46(e)(4) for eliminating the requirement in the 2020 amendments that a recipient allow all parties to present expert testimony. Commenters also criticized § 106.46(e)(4) for, they asserted, limiting the scope of relevant evidence, restricting a student's right to present claims or defenses using evidence of their choice, and eroding protections grounded in fairness principles and case law. Commenters stated that depriving parties of their own expert witnesses could lead to errors or unfair outcomes.

Some commenters disagreed with the Department's statement in the July 2022 NPRM that postsecondary institutions are in the best position to decide whether expert testimony will be helpful.

One commenter expressed concern that the Department appeared to discourage expert witnesses in the July 2022 NPRM. Another commenter criticized § 106.46(e)(4) for failing to specify when expert witnesses would be necessary or helpful. The commenter also asserted that § 106.46(e)(4) could harm complainants because complainants sometimes rely on experts and because unfair institutional processes can give rise to litigation and reversals, which drag out cases and deny closure. Some commenters requested that § 106.46(e)(4) be extended to provide a recipient the discretion to permit character witnesses.

Discussion: The Department appreciates the range of views expressed by commenters, including concerns about both allowing and excluding expert testimony. Although the 2020 amendments require a recipient to provide an equal opportunity for the parties to present fact and expert witnesses, we maintain our position expressed in the July 2022 NPRM, *see* 87 FR 41497, that the Department is neither encouraging nor discouraging the use of expert witnesses in an investigation of a sex-based harassment

[61] *See* 20 U.S.C. 1221(d) (''Nothing in this chapter shall be construed to affect the applicability of title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 *et seq.*], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 *et seq.*], the Age Discrimination Act [42 U.S.C. 6101 *et seq.*], or other statutes prohibiting discrimination, to any applicable program.'').

complaint involving a student at a postsecondary institution. The Department agrees with the views expressed by commenters that expert witnesses may, in certain cases, unnecessarily prolong the grievance procedures and are not an essential component in all administrative proceedings. Further, because expert witnesses would not have observed the alleged conduct, their testimony may not be necessary or helpful to the institution in determining whether sex-based harassment occurred. *See* 87 FR 41497.

The Department, however, acknowledges that there may be specific circumstances in which an institution believes expert witnesses could provide helpful information. The Department declines to identify instances in which expert witnesses will be necessary or helpful because this decision should take into account the facts and circumstances of a particular complaint and be left to the discretion of the institution. Institutions are in the best position to identify whether a particular case might benefit from expert witnesses and to balance the interests of promptness, fairness to the parties, and accuracy of adjudications in each case. Parties may explain to the institution why they believe that expert testimony will be helpful in their case. The Department disagrees that giving institutions the discretion to decide whether to permit experts will prolong the grievance procedures by rendering the procedures unfair. A postsecondary institution must exercise its discretion regarding expert witnesses in a manner that complies with these Title IX regulations, including the obligations to objectively evaluate the relevant and not otherwise impermissible evidence, treat the parties equitably, and use investigators and decisionmakers who are free from bias or conflicts of interest. The Department emphasizes that parties continue to have an equal opportunity to present fact witnesses and other inculpatory and exculpatory evidence that are relevant and not otherwise impermissible under § 106.45(f)(2), and parties also have the opportunity under § 106.46(i)(1) to appeal from a determination whether sex-based harassment occurred on several bases, including on the basis that the investigator or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome.

The Department understands the concern expressed by some commenters that expert witnesses confer an advantage on the parties who can afford them. The Department again emphasizes that the financial resources of any party must not affect a recipient's compliance with §§ 106.45 and 106.46, including the obligations to objectively evaluate the relevant and not otherwise impermissible evidence, treat complainants and respondents equitably, and use investigators and decisionmakers who are free from bias or conflicts of interest.

In response to a commenter's request to prohibit expert witnesses altogether and to instead ensure that decisionmakers are adequately trained on certain topics that might be raised by the parties during the grievance procedures, the Department has determined that § 106.8(d) in these final regulations strikes the appropriate balance between requiring training on topics that are necessary to promote a recipient's compliance with these regulations—such as the scope of prohibited sex discrimination, the meaning of relevance, and the requirements of the recipient's grievance procedures—while leaving flexibility to recipients to choose the content and substance of any additional training topics.

In response to the commenters' request to give a recipient discretion to allow character witnesses, the Department notes that the parties have an equal opportunity to present relevant and not otherwise impermissible evidence (§ 106.45(f)(2)), and that recipients must objectively evaluate relevant and not otherwise impermissible evidence (§ 106.45(b)(6)). Section 106.45(f)(2) permits character evidence, including character witnesses, that present relevant and not otherwise impermissible evidence. The requirement that evidence be ''relevant,'' as defined by § 106.2, means that a party's ability to present character evidence (and a recipient's ability to consider such evidence) is limited to evidence that will aid the decisionmaker in determining whether the alleged sex discrimination occurred. Whether a character witness is relevant will depend on the facts and circumstances of a particular complaint.

Changes: None.

8. Section 106.46(e)(5) Timeframes

Comments related to both timeframe provisions, §§ 106.45(b)(4) and 106.46(e)(5), are discussed together in the discussion of § 106.45(b)(4) in this preamble.

9. Section 106.46(e)(6) Access to Relevant and Not Otherwise Impermissible Evidence

§ 106.46(e)(6)(i): Access to a Written Investigative Report or to the Relevant and Not Otherwise Impermissible Evidence

Comments: Many commenters expressed support for § 106.46(e)(6) for ensuring that parties are able to access relevant evidence while also protecting privacy by excluding impermissible evidence and requiring steps to prevent unauthorized disclosures. Several commenters expressed support for the additional flexibility for postsecondary institutions to determine the manner for sharing information with the parties.

Some commenters specifically supported the shift from ''directly related'' in § 106.45(b)(5)(vi) of the 2020 amendments to ''relevant'' in proposed § 106.46(e)(6)(i), while other commenters expressed concern or confusion about the use of ''relevant.'' Some commenters were concerned that a recipient would have too much discretion in determining relevance, and that parties would not have the opportunity to explain why certain evidence is relevant because they would not know what evidence was excluded. Some commenters urged the Department to retain § 106.45(b)(5)(vi) of the 2020 amendments.

Some commenters urged the Department to require a recipient to provide access to both the relevant evidence and to an investigative report, as required by the 2020 amendments at § 106.45(b)(5)(vi)–(vii). One commenter noted that it is standard practice for postsecondary institutions to create investigative reports for civil rights investigations, and that postsecondary institutions have become accustomed to creating written investigative reports both prior to and in response to the 2020 amendments. Other commenters criticized § 106.46(e)(6)(i) for purportedly providing flexibility and reducing the burden to postsecondary institutions while actually imposing the same burdens as the 2020 amendments.

Some commenters said that limiting access to witness testimony would hinder a respondent's ability to file a lawsuit to protect their civil rights, though the commenters did not explain the basis for their concern. One commenter objected to the exclusion of ''otherwise impermissible evidence'' from the evidence shared with respondents.

Several commenters expressed concern that the underlying evidence would, in some instances, only be available upon request. Some

commenters expressed concern that an investigative report would not include all important information or would reflect the investigator's bias. Other commenters noted that the risk of unfairness is increased if the investigator creating the investigative summary is also the ultimate decisionmaker. Some commenters recommended that the parties have the opportunity to respond to draft investigative reports or provide input on the evidence to be included in the investigative report.

Other commenters asked the Department to modify § 106.46(e)(6)(i) to align with the Clery Act.

Some commenters recommended that § 106.46(e)(6)(i) require (rather than only permit) institutions to provide the parties with an organized, synthesized investigative report to help the parties understand and therefore respond appropriately to the evidence. One commenter suggested that § 106.46(e)(6) require documentary evidence to be attached to the investigative report, and the commenter stated that the regulations do not explain how investigators should share oral evidence (*e.g.,* a recording or transcript of investigative interviews) with the parties.

Discussion: Section 106.46(e)(6)(i) requires a postsecondary institution to provide an equal opportunity to access the relevant and not otherwise impermissible evidence by providing access to this evidence (''evidence option''), or by providing access to the same written investigative report that accurately summarizes this evidence (''investigative report option''). If the postsecondary institution initially chooses the investigative report option and then a party requests access to the evidence, the institution is required to provide all parties with an equal opportunity to access the underlying relevant and not otherwise impermissible evidence. Section 106.46(e)(6) requires an institution to provide the parties and their advisors with access to the underlying evidence or the investigative report, but does not require an institution to give the parties or their advisors a physical or electronic copy of these materials.

The 2020 amendments distinguish between evidence that is ''directly related'' to the allegations, to which the recipient must provide the parties with access (§ 106.45(b)(5)(vi)), and ''relevant'' evidence, which the recipient must evaluate (§ 106.45(b)(1)(ii)), include in the investigative report (§ 106.45(b)(5)(vii)), and permit questions about (§ 106.45(b)(6)). The preamble to the 2020 amendments explained that the universe of evidence ''directly related'' to a complaint may sometimes be larger than the universe of evidence ''relevant'' to a complaint. 85 FR 30304.

OCR received feedback during the June 2021 Title IX Public Hearing that the distinction between ''directly related'' and ''relevant'' is confusing and not well-delineated. In the July 2022 NPRM, the Department proposed merging these standards by defining ''relevant'' in § 106.2 as evidence ''related to the allegations of sex discrimination'' and ''evidence that may aid a decisionmaker in determining whether the alleged sex discrimination occurred.'' 87 FR 41419. Despite the change in terminology from ''directly related'' to ''relevant'' to describe the scope of evidence to which the parties must receive access, the Department views these final regulations as requiring access to a similar scope of evidence as the 2020 amendments with one exception.

Specifically, the 2020 amendments contemplate that evidence regarding a complainant's sexual predisposition or prior sexual behavior may be ''directly related'' to an allegation, but that such evidence is not ''relevant'' unless the evidence is offered to prove that someone other than the respondent committed the conduct alleged or the evidence concerns specific incidents of the complainant's prior sexual behavior with respect to the respondent and the evidence is offered to prove consent. 85 FR 30428; *see also* 34 CFR 106.45(b)(6)(i), (ii).[62] Thus, the 2020 amendments give parties the right to inspect and review all evidence regarding a complainant's sexual predisposition or prior sexual behavior that is ''directly related'' to the allegations, even though only evidence that falls into one of the two exceptions is deemed ''relevant'' and can be used in the investigative report and at the hearing. *See* 85 FR 30304, 30428; 34 CFR 106.45(b)(6)(i), (ii). The Department no longer agrees with this approach and maintains it is inappropriate to broadly allow parties to review evidence regarding a complainant's sexual interests or prior sexual conduct. Thus, these final regulations do not permit the parties to have any access to evidence relating to the complainant's sexual interests or prior sexual conduct unless evidence about the complainant's prior sexual conduct falls within one of the two narrow circumstances in § 106.45(b)(7)(iii) in that it (1) is offered to prove that someone other than the respondent committed the alleged conduct or (2) is evidence about the specific incidents of the complainant's prior sexual conduct with the respondent and is offered to prove consent to the alleged sex-based harassment.

The Department disagrees that the relevance standard gives too much discretion to recipients. The 2020 amendments use a relevance standard in various provisions without defining the term, except for the clarifications in the preamble to the 2020 amendments that ''relevant'' should be interpreted using its plain and ordinary meaning and that laypeople can make relevance determinations based on logic and common sense. *See* 85 FR 30304, 30320. Adding a definition of ''relevant'' in § 106.2 of these final regulations appropriately limits the discretion that recipients may exercise in determining the relevance of evidence. The Department appreciates the opportunity to clarify that a decisionmaker cannot rely on evidence to which the parties were not given access. Under § 106.46(e)(6), the parties must have an equal opportunity to access evidence that is relevant to the allegations and not otherwise impermissible, and under § 106.46(h)(1)(iii), the written determination whether sex-based harassment occurred must include the decisionmaker's evaluation of the relevant and not otherwise impermissible evidence. The scope of evidence that the decisionmaker must evaluate and that the parties must have an equal opportunity to access are coextensive.

Postsecondary institutions have discretion under § 106.46(e)(6)(i) to decide whether to provide the parties with access to the relevant and not otherwise impermissible evidence by providing access to the actual relevant and not otherwise impermissible evidence or by providing access to a written investigative report that accurately summarizes the relevant and not otherwise impermissible evidence. If a postsecondary institution provides access to an investigative report, it must then provide access to the underlying evidence if requested by one or more parties. As the Department noted in the July 2022 NPRM, *see* 87 FR 41500, institutions vary greatly in terms of size, resources, and expertise, and complaints of sex-based harassment also

[62] As noted above in the discussion of § 106.45(b)(7)(iii), the Department views the term ''sexual interests'' as more appropriate than the term ''sexual predisposition,'' which the Department views as an outdated phrase that may conjure the type of assumptions that the Department seeks to prohibit. The Department uses the term ''sexual predisposition'' in this discussion of § 106.46(e)(6) only in the context of referencing the requirements under the 2020 amendments.

vary greatly in terms of the nature of the conduct alleged, the volume and format of the evidence, and in other ways. Although an institution has the discretion to decide whether to provide access to the underlying evidence or the investigative report (subject to the requirement to provide access to the underlying evidence if requested by a party), the institution must articulate in its written grievance procedures under § 106.45(a)(1) consistent principles for determining whether and when it will initially provide access to the underlying evidence or an investigative report. The Department has added § 106.45(b)(8) to the final regulations to clarify that a recipient's grievance procedures must articulate consistent principles for how the recipient will determine which procedures apply when a recipient chooses to adopt grievance procedures that apply to the resolution of some, but not all, complaints.

The Department understands that some commenters would like the Department to continue to require recipients to provide the parties with access to both an investigative report and the underlying evidence. Although there may be different benefits for the parties associated with an investigative report or with the evidence itself, the Department continues to believe that either option under § 106.46(e)(6) enables the parties to access the evidence that is relevant to the allegations of sex-based harassment. Either option enables the parties to meaningfully prepare arguments, contest the relevance of evidence, and present additional evidence for consideration. Requiring an institution to provide access to the same universe of evidence in two different formats at the outset is not necessary for ensuring equitable and effective grievance procedures and may increase costs, burdens, and delays without providing offsetting benefits to the parties. The Department accordingly declines to require a postsecondary institution to provide the parties with access to an investigative report in cases in which the institution gives the parties access to the underlying evidence. In response to comments noting that institutions may ultimately provide access to the evidence in both formats, which will not reduce the burden, the Department notes that an institution may wish to consider the likelihood that a party will request access to the underlying evidence or the preference to create an investigative report to assist the decisionmaker in deciding how to exercise a recipient's discretion under § 106.46(e)(6)(i). An institution is permitted to decide how to provide access to the evidence on a case-by-case basis in accordance with the consistent principles set forth in the institution's grievance procedures.

Nothing in these regulations prohibits postsecondary institutions from providing the parties with access to the underlying evidence instead of or in addition to access to an investigative report. As noted above, there may be different benefits for the parties associated with providing access to a synthesized investigative report and access to the underlying evidence, and institutions are permitted to provide the parties and their advisors with access to both an investigative report and the underlying evidence.

These regulations do not prescribe a particular manner for sharing oral evidence, nor do these regulations require institutions to attach documentary evidence to the investigative report. Beyond the requirement to provide an equal opportunity to access the relevant and not otherwise impermissible evidence, § 106.46(e)(6) does not impose specific requirements on the manner of providing access to the investigative report or the underlying evidence to the parties. *See* 87 FR 41500. As noted above, § 106.46(e)(6) does not require an institution to give the parties a physical or electronic copy of the evidence or the investigative report. These final regulations, however, require the institution to provide the parties with an audio or audiovisual recording or transcript of the questioning of parties and witnesses as part of the process for assessing credibility under § 106.46(f)(1)(i)(C) (if the institution holds individual meetings instead of a live hearing) and § 106.46(g) (if the institution holds a live hearing). To avoid the impression that an institution must provide a copy of the investigative report, the Department has revised § 106.46(e)(6)(i) to replace the phrase ''[i]f the postsecondary institution provides an investigative report'' with the phrase ''[i]f the postsecondary institution provides access to an investigative report.''

Unlike § 106.45(f)(4), which permits a recipient to provide access to an accurate description of the evidence to the parties that may be oral, § 106.46(e)(6)(i) requires a postsecondary institution that chooses the investigative report option to provide access to a written investigative report. As noted by a commenter, postsecondary institutions are accustomed to creating written investigative reports. The Department views written investigative reports as the more appropriate alternative to providing the underlying evidence for complaints governed by § 106.46, which are more likely than complaints governed only by § 106.45 to involve complex investigations with voluminous evidence, more interviews, participation of advisors, and possible involvement of expert witnesses.

Under the investigative report option, the postsecondary institution must provide an equal opportunity to access the underlying relevant and not otherwise impermissible evidence to all parties if one party makes such a request. In response to concerns about the risk of incomplete or biased investigative reports, the Department notes that an institution violates § 106.46(e)(6)(i) by providing parties with access to an investigative report that fails to accurately summarize the relevant and not otherwise impermissible evidence.[63] Further, the parties retain the right to access the underlying evidence by requesting such access. No party will be denied access to the underlying evidence, even if the institution chooses to provide the parties with access to an investigative report, because § 106.46(e)(6)(i) allows either party to request that the parties have access to the underlying evidence. The Department disagrees that the investigative report option will give an advantage to the parties whose advisors are familiar with the Title IX process and know how to request the underlying evidence. As noted in the following section of the preamble, an institution cannot choose to initially provide access to the evidence to one party and access to an investigative report to the other party or parties. In addition, the Department has revised § 106.46(c)(2)(iii) to specifically require postsecondary institutions to inform parties that they are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence or an investigative report, and, if the institution provides access to an investigative report, that they are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party. The final regulations thus put parties on notice of this right.

The Department disagrees that § 106.46(e)(6)(i) is contrary to due process, fairness, or transparency. The Department also disagrees that § 106.46(e)(6)(i) limits a respondent's

[63] For a discussion of the Department's authority to enforce compliance with Title IX, see the discussion of OCR Enforcement (Section VII).

ability to file a lawsuit to protect their civil rights. While some commenters cited cases involving the importance of access to the evidence, § 106.46(e)(6)(i) is consistent with such case law because § 106.46(e)(6)(i) requires a postsecondary institution to provide access to the relevant and not otherwise impermissible evidence. In all cases under § 106.46, the parties retain the right to access the underlying relevant and not otherwise impermissible evidence (*see* 87 FR 41500), which is the same scope of evidence on which the decisionmaker can rely in reaching their determination whether sex-based harassment occurred.

In response to concerns regarding bias by the investigator or decisionmaker, the Department notes that § 106.45(b)(2) requires that any person designated as an investigator or decisionmaker not have a conflict of interest or bias, and bias is one of the grounds for appeal under § 106.46(i)(1)(iii). The Department also notes that compliance with the investigative report option of § 106.46(e)(6)(i) requires the investigative report to provide an accurate summary of the evidence.

The Department declines to include a provision permitting the parties the opportunity to respond to or comment upon draft investigative reports because the time needed to review and respond to the draft report will unnecessarily prolong the grievance procedures and impede a prompt resolution to the case. The Department emphasizes that the parties have an opportunity to review and respond to the investigative report under § 106.46(e)(6)(ii), as discussed below. The Department notes that the parties have the opportunity to provide input on the evidence to be included in the investigative report through their right to present witnesses and other evidence in connection with the investigation (§ 106.45(f)(2)).

In response to the request to modify § 106.46(e)(6)(i) to track the Clery Act, the Department notes that there is no conflict between § 106.46(e)(6)(i) and the Clery Act regulations at 34 CFR 668.46(k)(3)(i)(B)(3), which requires an institution to ''provide[ ] timely and equal access to the accuser, the accused, and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings.'' Recipients that are subject to these final Title IX regulations are able to comply with these final Title IX regulations as well as the Department's regulations implementing the Clery Act, including 34 CFR 668.46(k)(3)(i)(B)(3). These final Title IX regulations do not change, affect, or alter any rights, obligations, or responsibilities under the Clery Act.

In response to comments that a detailed investigative report would help individuals with cognitive disabilities, the Department notes that Section 504 and the ADA prohibit discrimination against individuals with disabilities, and relatedly § 106.8(e) states that the Title IX Coordinator may consult, as appropriate, with the individual or office that the recipient has designated to provide support to students with disabilities.

Changes: The Department has revised § 106.46(e)(6)(i) to replace the phrase ''[i]f the postsecondary institution provides an investigative report'' with the phrase ''[i]f the postsecondary institution provides access to an investigative report.'' As discussed below, the Department has revised § 106.46(e)(6) and § 106.46(e)(6)(i) to refer to ''an equal opportunity to access'' the evidence rather than ''equitable access'' to the evidence.

§ 106.46(e)(6)(i): Equal Opportunity To Access Evidence

Comments: Some commenters supported the use of the term ''equitable access'' in proposed § 106.46(e)(6)(i) and emphasized that the Department should clarify what the term means and how it applies. Multiple commenters expressed concern that the phrase ''equitable access'' in proposed § 106.46(e)(6)(i) is more open to interpretation than the phrase ''equal opportunity'' in § 106.45(b)(5)(vi) of the 2020 amendments. One commenter asked the Department to require recipients to provide the parties with equal, reasonable, and continuous access to the evidence, while another commenter expressed concern that institutions could interpret ''equitable'' as permitting access to the evidence in an equal but inadequate manner. One commenter suggested modifying proposed § 106.46(e)(6)(i) to clarify that ''equitable access'' refers to the manner and mode of delivery of the evidence, not the scope of the evidence that is accessible. Other commenters expressed concern that proposed § 106.46(e)(6) provides too much discretion to the Title IX Coordinator and the recipient to exclude evidence if it is ''equitable'' to do so. Some commenters recommended that the Department adopt the language from the Clery Act of providing ''timely and equal access'' to the evidence ''to the accuser, accused, and appropriate officials'' rather than the ''equitable access'' language of proposed § 106.46(e)(6)(i).

Discussion: In response to comments about the meaning of ''equitable'' and how it differs from ''equal'' as used in the 2020 amendments, other parts of the proposed regulations, and the Clery Act, the Department has revised § 106.46(e)(6) to require a postsecondary institution to provide an ''equal opportunity'' to access the relevant and not otherwise impermissible evidence. The Department emphasizes that this change from ''equitable'' in proposed § 106.46(e)(6) to ''equal opportunity'' in § 106.46(e)(6) of these final regulations does not substantively change the institution's obligations or the parties' rights related to access to the evidence. Under § 106.46(e)(6), an equal opportunity to review the evidence requires a postsecondary institution to provide all parties with access to the same written investigative report or to provide them with access to the underlying evidence—the institution cannot choose to provide access to the evidence to one party and access to an investigative report to the other party or parties, nor can the institution choose to provide different versions of an investigative report to each party. A postsecondary institution has the discretion to determine the mode of providing access to the investigative report or to the underlying evidence, such as electronic copies, physical copies, or inspection of the institution's copy; however, the institution must exercise this discretion in a manner that ensures that the parties have an equal opportunity to access the evidence. The requirement to provide an equal opportunity to access the evidence means that the parties must have the same opportunity to access the evidence, but it does not mean that an institution must treat the parties in an identical manner regarding the mode of accessing the evidence. A postsecondary institution may need to provide a particular mode of access through auxiliary aids and services to a party with a disability to ensure effective communication, which would not be applicable to the other party. Similarly, for persons with limited English proficiency, consistent with Title VI, a postsecondary institution may need to provide language assistance services to only one party. An institution must also recognize any extenuating circumstances (*e.g.,* one party is studying abroad) that affect a party's ability to access the evidence in a particular manner. The Department acknowledges that these final regulations use ''equitably'' in §§ 106.44(f)(1)(i) and 106.45(b)(1). The preamble for § 106.45(b)(1) explains the Department's reasoning for retaining ''equitably'' in those provisions.

Beyond the requirement to provide an equal opportunity to access the relevant and not otherwise impermissible evidence, § 106.46(e)(6) does not impose specific requirements on the manner of providing access to the investigative report or the underlying evidence to the parties. As the Department noted in the July 2022 NPRM, *see* 87 FR 41500, a postsecondary institution has the discretion to determine how to provide this information, subject to § 106.46(e)(6)(ii)'s requirement that the parties and advisors have a meaningful opportunity to review it and § 106.46(e)(6)(iii)'s requirement that the institution take reasonable steps to prevent its unauthorized disclosure. Under § 106.46(a), a postsecondary institution must have written grievance procedures that incorporate the requirements of §§ 106.45 and 106.46, including § 106.46(e)(6). Therefore, an institution cannot decide ad hoc how to provide an equal opportunity to access the evidence that is relevant and not otherwise impermissible. To comply with § 106.45(b)(8), an institution's grievance procedures could explain that the recipient will consider the roles of the parties, the nature of the conduct alleged, and the severity of the potential sanctions. An institution is permitted to decide how to provide access to the evidence on a case-by-case basis in accordance with the consistent principles set forth in the institution's grievance procedures.

The Department declines to modify § 106.46(e)(6) to state that institutions must provide the parties with reasonable and continuous access to the evidence. Section 106.46(e)(6) sets forth detailed requirements for the disclosure of evidence that will ensure access is reasonable. Requiring continuous access to the evidence would be unworkable and unduly burdensome and could significantly delay resolution of the case. The Department notes that the parties must have the opportunity to review the evidence prior to the determination (and prior to the live hearing, if one is conducted).

The Department disagrees that § 106.46(e)(6) provides too much discretion to the Title IX Coordinator to exclude evidence or provide access to evidence in an equal but inadequate manner because § 106.46(e)(6)(ii) requires postsecondary institution to give the parties a ''reasonable opportunity to review'' the relevant and not otherwise impermissible evidence. The regulations make clear that an equal opportunity to access the evidence refers to how the institution is providing access to the evidence, rather than the scope of the evidence, because § 106.46(e)(6) refers to access to the ''relevant and not otherwise impermissible evidence'' to describe the scope. In addition, § 106.45(b)(6) requires an objective evaluation of all evidence that is relevant, consistent with the definition of ''relevant'' in § 106.2, and not otherwise impermissible, including both inculpatory and exculpatory evidence. The Department also declines to modify § 106.46(e)(6) to adopt the language in the Clery Act. The Department interprets the evidentiary requirements in these final regulations as consistent with those in the Clery Act.

Section 106.46(e)(6)(i), which specifies that the postsecondary institution must provide each party and the party's advisor with an equal opportunity to access the evidence that is relevant to the allegations of sex-based harassment and not otherwise impermissible, consistent with §§ 106.2 and 106.45(b)(7), does not require a party to be present for their advisor to access the evidence. However, the Department declines to further revise the regulatory text because § 106.46(e)(6)(i) is sufficiently clear on this point.

Changes: The Department has revised §§ 106.46(e)(6) and (6)(i) to refer to ''an equal opportunity to access'' the evidence rather than ''equitable access'' to the evidence. As noted above, the Department has revised § 106.46(e)(6)(i) to replace the phrase ''[i]f the postsecondary institution provides an investigative report'' with the phrase ''[i]f the postsecondary institution provides access to an investigative report.''

§ 106.46(e)(6)(ii): Reasonable Opportunity To Review and Respond to Evidence

Comments: Multiple commenters expressed support for the more flexible approach in § 106.46(e)(6)(ii) and the removal of the ten-day timeframes and other procedural requirements from the 2020 amendments related to reviewing and responding to evidence before a decision is rendered. Some commenters noted that this proposed approach would expedite the adjudication process, which would benefit all parties and enable investigations even when a party would soon be graduating. Some commenters noted that the prior approach under the 2020 amendments at times conflicted with State laws and collective bargaining agreements. One commenter asserted that investigations that would previously take ten days now take up to three months under the 2020 amendments and proposed § 106.46(e)(6)(ii) would remedy this problem.

Other commenters expressed concern that the phrase ''reasonable opportunity'' is vague, would undermine the predictability of the timeframes, and would cause recipients to impose insufficient timeframes to promptly resolve complaints, to the detriment of parties' rights to fundamental fairness. Another commenter noted that because reviewing evidence can re-traumatize a complainant, providing insufficient time would be especially harmful. Some commenters recommended that parties and their advisors should have access to evidence ten days before any hearing and that requests to reschedule a hearing be accommodated.

Some commenters expressed concern that allowing a respondent to review the evidence against them and to respond to that evidence only at a live hearing, and not in advance, would inhibit the respondent's ability to prepare their response and the recipient's ability to determine responsibility. One commenter expressed concern that § 106.46(e)(6)(ii) provides too much discretion to a recipient to determine whether respondents can respond to evidence in a live hearing versus in another format.

Discussion: The Department maintains that a postsecondary institution must provide parties with a reasonable opportunity to review and respond to the evidence or the investigative report before determining whether sex-based harassment has occurred. *See* 87 FR 41501. Reasonableness is a well understood concept, and setting a reasonableness standard in this context better supports prompt and equitable grievance procedures, whereas specific timeframes do not necessarily accomplish either objective because they may be unreasonably long in some circumstances or unreasonably short in others. In exercising their discretion to determine reasonableness, postsecondary institutions must ensure that the parties are able to meaningfully review and respond to the evidence or the investigative report. The nature and volume of evidence varies greatly based on the allegations in a complaint, and a reasonable timeframe accommodates this variation. 87 FR 41501. Parties may need more time to meaningfully review hundreds of pages of evidence and dozens of witness statements than they would need to review a much smaller evidentiary file. If a postsecondary institution provides the parties with access to an investigative report and then subsequently provides the parties

with access to the underlying evidence in response to a party's request for the underlying evidence, the parties must have a reasonable opportunity to review and respond to the underlying evidence as well. It is the Department's view that preventing the parties from reviewing and responding to the evidence to which the institution provided access would not comply with § 106.46(e)(6)(ii)'s requirement for a reasonable opportunity to review and respond to the evidence.

A reasonable opportunity to review and respond also accommodates particular circumstances that the parties may be facing that may interfere with their ability to review and respond in a brief period. The Department further notes that § 106.46(e)(5) requires a postsecondary institution to allow for the reasonable extension of timeframes for good cause.

The Department appreciates the opportunity to clarify that § 106.46(e)(6)(ii) requires a postsecondary institution to provide the reasonable opportunity to review the evidence or the investigative report before a hearing so that the parties are not inhibited in their ability to prepare a response. At the same time, those institutions have discretion to allow the party to respond before a hearing, during a hearing, or both. Allowing institutions to choose the manner in which the parties respond to the evidence or the investigative report enables the institution to take into account the complexity of the evidence, the likelihood that the parties will need additional time to formulate a response, the resources of the institution, and other factors. The Department also notes that, if an institution concludes that an additional response from the parties would be helpful to address issues raised at the hearing, the institution may allow the parties to submit statements or otherwise respond to evidence after the conclusion of the hearing. In this situation, the institution would need to allow the other party or parties to have an opportunity to review and respond to any additional evidence provided in a party's post-hearing submission.

Under § 106.46(i), parties have the right to appeal from a determination whether sex-based harassment occurred based on a procedural irregularity that would change the outcome; new evidence that would change the outcome and that was not reasonably available when the determination was made; and conflict of interest or bias by the Title IX Coordinator, investigator, or decisionmaker that would change the outcome. Depending on the specific circumstances, a party may be able to appeal an institution's failure to comply with § 106.46(e)(6) under one or more of the appeal bases. In addition, anyone who believes that a recipient has failed to comply with Title IX may file a complaint with OCR, which OCR would evaluate and, if appropriate, investigate and resolve consistent with these regulations. For a discussion of the Department's authority to enforce compliance with Title IX, see the discussion of OCR Enforcement (Section VII).

Changes: The Department has changed ''as provided under'' to ''described in'' for clarity. The Department has also added ''or the investigative report'' to clarify that § 106.46(e)(6)(ii) requires a postsecondary institution to provide the parties with a reasonable opportunity to review and respond under the evidence option or the investigative report option.

§ 106.46(e)(6)(iii): Unauthorized Disclosures

Comments: Multiple commenters supported § 106.46(e)(6)(iii) and its protection against unauthorized disclosures and protection of student privacy. Commenters asked for clarification of the phrases ''unauthorized disclosure'' and ''reasonable steps.'' One commenter recommended moving § 106.46(e)(6)(iii) to § 106.45 because privacy should concern all recipients, not just postsecondary institutions. The commenter urged the Department to modify § 106.46(e)(6)(iii) to require a recipient to penalize unauthorized disclosures; however, the commenter also expressed concern that § 106.46(e)(6)(iii) does not state how a party or their advisor can use information obtained during the grievance procedures in a related legal proceeding.

Some commenters expressed concerns that the prohibition on unauthorized disclosures interferes with free speech rights, describing it as a ''gag order'' or prior restraint that could only be consistent with the First Amendment if it satisfied strict scrutiny. Some commenters expressed concern that § 106.46(e)(6)(iii) would prevent students from seeking support of friends and family. Commenters also expressed concern that § 106.46(e)(6)(iii) would prevent students and faculty from being able to publicly criticize their institution for its handling of a complaint. Some commenters noted that § 106.45(b)(5) contains exceptions permitting disclosure that § 106.46(e)(6)(iii) does not, but that it would be difficult to revise § 106.46(e)(6)(iii) to include examples of authorized disclosure of protected speech. Another commenter asked the Department to clarify that, under § 106.46(e)(6)(iii), journalists would not be disciplined for reporting on Title IX proceedings or compelled to reveal confidential sources.

Discussion: The Department agrees that unauthorized disclosures should be addressed under all grievance procedures and has added an analogous provision at § 106.45(f)(4)(iii). Unauthorized disclosure of sensitive information could compromise the fairness of grievance procedures by deterring participation, impairing the reliability of witness testimony, causing fear of retaliation, and other consequences. *See* 87 FR 41501.

Postsecondary institutions must take reasonable steps to protect against the parties' and their advisors' unauthorized disclosure of evidence and information obtained solely through the sex-based harassment grievance procedures. Parties and witnesses are less likely to participate in the grievance procedures—or less likely to participate fully and openly—if they fear that any relevant and not impermissible information that is provided, including sensitive information from their education records, can be widely shared with the campus community or posted online. Section 106.46(e)(6)(iii) promotes trust and participation in the equitable resolution of sex-based harassment complaints by limiting the parties' and advisors' ability to disclose information and evidence gained solely through the sex-based harassment grievance procedures. The limitation on disclosing information in § 106.46(e)(6)(iii) is accordingly necessary to ''effectuate the provisions'' of Title IX, *see* 20 U.S.C. 1682, because the limitation ensures that recipients have grievance procedures that provide for an effective response to allegations of discrimination so that recipients' education programs and activities can be free from discrimination on the basis of sex, *see* 20 U.S.C. 1681.

Due to the sensitive nature of the evidence and information, the Department anticipates that most disclosures by the parties or advisors of evidence or information obtained solely through the sex-based harassment grievance procedures will not be authorized. Section 106.45(b)(5) prohibits a recipient from taking any steps to protect privacy that restrict the parties' ability to gather evidence; consult with their family members, confidential resources, or advisors; or otherwise prepare for or participate in the grievance procedures. Accordingly, authorized disclosures for purposes of

§ 106.46(e)(6)(iii) include those disclosures that are permitted under § 106.45(b)(5). In addition, consistent with § 106.46(e)(6)(iii), institutions may authorize narrow disclosures to particular individuals or of particular pieces of evidence, depending on the circumstances. The final regulations do not impose specific requirements because this is an appropriate area for postsecondary institutions to exercise discretion depending on the circumstances. To prevent the unauthorized disclosure of this information, institutions must ensure that parties and their advisors are aware of any types of disclosures that are permissible (including disclosures that are authorized by the institution, authorized by other laws, or consented to by the parties), as well as the types of disclosures that parties and their advisors are prohibited from making by the institution or other laws. When exercising its discretion to authorize certain disclosures, the institution must satisfy its obligation under § 106.45(b)(5) to take reasonable steps to protect the privacy of the parties and witnesses. Reasonable steps may include, but are not limited to, policies that protect sensitive evidence and software that restricts further distribution of evidence beyond those who need access in the grievance procedure. A postsecondary institution that authorizes the parties to make widespread disclosures of information obtained solely through the grievance procedures would likely violate § 106.45(b)(5) by failing to take reasonable steps to protect privacy. Comments related to nondisclosure agreements are addressed in § 106.45(b)(5).

Section 106.46(e)(6)(iii) is narrowly framed to address privacy concerns related to information and evidence obtained solely through the grievance procedures, including through the institution's sharing of an investigative report or underlying evidence under § 106.46(e)(6)(i), whereas § 106.45(b)(5) more broadly requires a recipient to take reasonable steps to protect the parties' and witnesses' privacy during the pendency of a recipient's grievance procedures. The Department recognizes that, depending on the particular circumstances of the case, these two provisions may overlap in the types of reasonable steps needed to comply with these provisions. The Department does not view §§ 106.45(b)(5) and 106.46(e)(6)(iii) as conflicting. For example, in response to an inquiry about a party's ability to seek the support of friends and family, the Department notes that § 106.45(b)(5) prohibits a recipient from taking steps to protect privacy that restrict a party's ability to consult with family members, and therefore disclosures to family members would be authorized under § 106.46(e)(6)(iii). Neither §§ 106.45(b)(5) nor 106.46(e)(6)(iii) necessarily prohibits a party from seeking support from friends. Section 106.46(e)(6)(iii), however, does prohibit a party from disclosing information and evidence with friends that the party obtained solely through the sex-based harassment grievance procedures, unless the postsecondary institution has appropriately exercised its discretion under § 106.46(e)(6)(iii) to expressly authorize such a disclosure, the institution complies with its obligation under § 106.45(b)(5) to take reasonable steps to protect the privacy of the parties and witnesses, and the disclosure does not violate any applicable laws.

Section 106.46(e)(6)(iii) requires institutions to address unauthorized disclosures, which may include penalizing unauthorized disclosures. The Department declines, however, to require institutions to penalize unauthorized disclosures because the institution should take into account the specific circumstances of the unauthorized disclosure when determining how to respond.

The Department expects postsecondary institutions to implement this provision consistent with the First Amendment and consistent with § 106.6(d), and nothing in this provision prevents recipients from doing so. The Department also notes that § 106.46(e)(6)(iii) is limited to information and evidence obtained solely through the sex-based harassment grievance procedures; this provision does not limit disclosures, including public criticism of the institution's handling of a complaint, based on information learned through other means, such as personal experience. Section 106.46(e)(6)(iii) requires a postsecondary institution to prevent and address unauthorized disclosures by parties and their advisors; § 106.46(e)(6)(iii) does not impose any restrictions on journalists.

The Department recognizes that parties may need to disclose information obtained solely through the grievance procedures as part of exercising their legal rights, including the right to file an OCR complaint and the right to initiate (or defend against) a related legal proceeding. The Department does not intend to limit the exercise of these rights and does not view § 106.46(e)(6)(iii) as prohibiting parties from disclosing information obtained solely during the sex-based harassment grievance procedures in related administrative or judicial proceedings. The Department has revised § 106.46(e)(6)(iii) to make clear that disclosures of such information and evidence for purposes of administrative proceedings or litigation related to the complaint of sex-based harassment are authorized.

Changes: The Department has added a sentence to § 106.46(e)(6)(iii) to clarify that, for purposes of this paragraph, disclosures of information and evidence for purposes of administrative proceedings or litigation related to the complaint of sex-based harassment are authorized. As previously discussed, the Department agrees that unauthorized disclosures should be addressed under all grievance procedures and has added a provision analogous to § 106.46(e)(6)(iii) at § 106.45(f)(4)(iii).

§ 106.46(e)(6) and FERPA

Comments: Several commenters sought confirmation that the proposed regulations do not conflict with, or abridge, FERPA. Some commenters requested clarification that disciplinary records are ''education records'' under FERPA and of whether parties can access Title IX evidentiary files in the event of litigation.

Discussion: The Department appreciates the opportunity to clarify the interaction between FERPA and the Title IX regulatory provisions that permit or require the recipient's disclosure of evidence. FERPA and its implementing regulations define ''education records'' as, with certain exceptions, records that are directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution.[64] Under FERPA, a parent or eligible student has the right to inspect and review education records related to the student under certain circumstances.[65] In the context of disciplinary proceedings, the Department has historically recognized, and the Sixth Circuit has affirmed, that student disciplinary records are education records as defined in FERPA and that such records may only be disclosed with the prior written consent of the parent or eligible student or under one of the enumerated exceptions to

[64] 20 U.S.C. 1232g(a)(4); 34 CFR 99.3.

[65] 20 U.S.C. 1232g(a)(1); 34 CFR part 99, subpart B. FERPA's implementing regulations define an ''eligible student'' as a student who has reached 18 years of age or is attending an institution of postsecondary education. 34 CFR 99.3.

FERPA's general consent requirement.[66] These final Title IX regulations, at § 106.46(e)(6), require a postsecondary institution to provide the parties with access to the evidence that is relevant to the allegations of sex-based harassment and not otherwise impermissible.

The Department acknowledges that certain evidence that is relevant to the allegations may not necessarily be directly related to all parties for purposes of FERPA. To the extent that these Title IX regulations require disclosure of information from education records to the parties (or their parents, guardians, authorized legal representatives, or advisors) that would not comply with FERPA, the GEPA override applies—as well as the constitutional override in certain circumstances—and requires disclosure of evidence under § 106.46(e)(6) to the parties and their advisors.[67]

Consistent with the approach in the 2020 amendments, *see* 85 FR 30306, the Department maintains the requirement for a postsecondary institution to provide the parties and their advisors with an equal opportunity to access the evidence, rather than providing access only to the parties and permitting the parties to choose whether to share with their advisors. It is sensible and efficient to provide access to the evidence to the advisors, given that a party who exercises their right to choose an advisor is making the decision to receive assistance from that advisor during the grievance procedures. The Department notes that, under FERPA, an eligible student can consent to the disclosure of their own education records. To the extent that the relevant evidence consists of education records that are not directly related to that student, the student would be unable to consent to the disclosure of that information. In such circumstances, however, a GEPA override of FERPA would permit a postsecondary institution to share evidence with the parties' advisors of choice, in the same manner that the Constitutional override permits sharing evidence with the party. 20 U.S.C. 1221(d).

The Department reiterates that, under § 106.46(e)(6)(iii), a postsecondary institution must take reasonable steps to prevent and address parties' and their advisors' unauthorized disclosures of information and evidence obtained solely through the sex-based harassment grievance procedures. These steps may include restrictions on the parties' and advisors' use of the information and evidence, including limitations on their ability to redisclose the information and limitations on their ability to receive physical copies of the information. FERPA does not limit an eligible student's use or redisclosure of their own education records or personally identifiable information contained therein. In addition, final § 106.46(e)(6)(iii) expressly authorizes parties (and their advisors) to disclose information and evidence obtained through the grievance procedures for purposes of administrative proceedings or litigation related to the complaint of sex-based harassment.

Changes: None.

10. Section 106.46(f) Evaluating Allegations and Assessing Credibility

§ 106.46(f)(1): Process for Questioning Parties and Witnesses

General Support and Opposition

Comments: A number of commenters supported the proposed removal of the requirement for live hearings with advisor-conducted cross-examination, noting that meetings during which the decisionmaker asks questions can produce fair and accurate outcomes. Other commenters opposed eliminating the requirement for live hearings with advisor-conducted cross-examination because they were concerned about the risk of bias and conflicts of interest. Some commenters generally stated men were already outnumbered by women at postsecondary institutions, but did not cite specific data or studies, and were concerned that removing the requirement for live hearings with advisor-conducted cross-examination would negatively impact men's access to education.

Discussion: The Department appreciates the variety of views expressed regarding proposed § 106.46(f). As explained in more detail below, after carefully considering the views of the commenters, the Department maintains the position that as part of the grievance procedure requirements in § 106.46, all postsecondary institutions must be required to provide a live-questioning process that enables the decisionmaker to assess the credibility of parties and witnesses if credibility is in dispute and relevant to evaluating one or more allegations of sex-based harassment. The live-questioning process must be provided either through (1) individual meetings with the investigator or decisionmaker, who will ask initial and follow-up questions proposed by the parties, as well as the investigator's or decisionmaker's own questions, if any, or (2) a live hearing with questions, including questions proposed by the parties, asked by the decisionmaker or the party's advisor. The Department has determined that this approach is equitable and provides the parties with a meaningful opportunity to be heard and respond to the allegations, while appropriately taking into account the diversity of postsecondary institutions in terms of size, type, administrative structure, location, and educational community.

In response to commenters who were concerned about the risk of bias if live hearings with advisor-conducted cross-examination were no longer required, the Department notes that final § 106.45(b)(2) prohibits any Title IX Coordinator, investigator, or decisionmaker from having a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. In addition, final § 106.8(d)(2) requires all investigators, decisionmakers, and other individuals responsible for implementing a postsecondary institution's grievance procedures to be trained on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. Section 106.46(f)(1) also ensures that, no matter which live-questioning process is used, each party has an opportunity to have their relevant and not otherwise impermissible questions asked, either by an investigator or decisionmaker or by their advisor. The investigator or decisionmaker also must consider all relevant and not otherwise impermissible evidence. *See* § 106.45(b)(6) and(7), (f)(3), (h)(1)(iii). Many of these requirements are consistent with the 2020 amendments.

Regarding commenter assertions that removing the requirement for live hearings with advisor-conducted cross-examination would negatively impact men's access to education, the Department notes that any person, regardless of sex, may be a complainant or a respondent, and thus permitting, but not requiring, a postsecondary institution to use live hearings with questioning by an advisor does not discriminate based on sex. In addition, the Title IX regulations at § 106.31(a) and (b)(4) require that a recipient carry out its grievance procedures in a nondiscriminatory manner and prohibit a recipient from discriminating against any party based on sex. Anyone, including a man, who believes that they have been discriminated against based

[66] *See* 73 FR 74832–33; *United States* v. *Miami Univ.,* 294 F.3d 797, 811–15 (6th Cir. 2002). The Department made the statement at 73 FR 74832–33 in response to concerns about impairing due process in student discipline cases in its FERPA rulemaking.

[67] The constitutional override is explained in greater detail in the discussion of § 106.6(e).

on sex may file a complaint with OCR, which OCR would evaluate and if appropriate investigate and resolve consistent with these regulations' requirement that a recipient carry out its grievance procedures in a nondiscriminatory manner.

Changes: All changes to § 106.46(f)(1) are described below.

Impact on Reporting

Comments: A number of commenters supported the proposed removal of the requirement for live hearings with advisor-conducted cross-examination because it chilled reporting of sex-based harassment. A group of commenters challenged the notion that a decrease in complaints was due solely to the live hearing with advisor-conducted cross-examination requirement in the 2020 amendments, asserting that the COVID–19 pandemic was also a factor. Other commenters stated that even if the decrease in complaints was due to concerns regarding live hearings with advisor-conducted cross-examination, this is not necessarily a concern because this requirement discouraged the filing of inaccurate or bad faith complaints.

Discussion: The Department agrees with commenters' assessment based on their experiences that the requirement for live hearings with advisor-conducted cross-examination may have chilled reporting of sex-based harassment. The Department acknowledges that the stakeholders who expressed this concern during the June 2021 Title IX Public Hearing, and the commenters who shared this concern during the public comment period, did not provide information definitively attributing the decrease to just that factor, to the exclusion of others which could have played a role, such as the COVID–19 pandemic. The Department previously explained that this concern, as shared by stakeholders during the June 2021 Title IX Public Hearing, was one of many factors considered by the Department in connection with this issue. 87 FR 41505. The Department maintains that individuals decline to report sex-based harassment for a variety of reasons and disagrees with the proposition that declining to report sex-based harassment necessarily means, as some commenters alleged, that additional complaints would have been unfounded or made in bad faith.

Changes: All changes to § 106.46(f)(1) are described below.

Flexibility, Costs, and Burdens

Comments: Some commenters, including postsecondary institutions, appreciated that permitting, but not requiring, live hearings with questioning by an advisor would provide a postsecondary institution the necessary flexibility to adjust its Title IX grievance procedures to its campus environment and resources while still assessing credibility in a live format. The commenters also stated that the requirement for live hearings with advisor-conducted cross-examination in the 2020 amendments required them to expend resources that could have been used for other things, including training for decisionmakers. Other commenters noted that postsecondary institutions have already incurred costs required to implement the requirement for live hearings with advisor-conducted cross-examination in the 2020 amendments and argued that there would be costs associated with eliminating this requirement.

A number of commenters supported giving postsecondary institutions the flexibility to use live hearings with questioning by an advisor or an alternative format for live questioning consistent with proposed § 106.46(f)(1). However, some other commenters were concerned that, if given a choice, many postsecondary institutions, regardless of resources, will opt for something other than a live hearing with questioning by an advisor. In those cases, the commenters argued, respondents' procedural protections would be subject to variations in State law and institutional requirements. Some commenters requested that the Department give postsecondary institutions additional flexibility by providing general guidance as opposed to the requirements in § 106.46(f)(1).

Discussion: The Department recognizes that some commenters, including postsecondary institutions that shared their experiences with implementation, viewed the requirement for live hearings with advisor-conducted cross-examination as burdensome and said it required them to expend resources that could have been spent on other things, including additional training for decisionmakers. The Department acknowledges that postsecondary institutions have already incurred costs to comply with the requirement for live hearings with advisor-conducted cross-examination under the 2020 amendments. The Department notes, however, that as some commenters shared, there are costs of maintaining the requirement, including hiring and retaining adequate staff, appropriately training any new staff, and paying for advisors if volunteer advisors are not available or if a postsecondary institution provides attorneys for parties without one when the other party is represented. The Department also understands that there may be costs associated with removing the requirement under the 2020 amendments for live hearings with advisor-conducted cross-examination, including potential costs of litigation and liability insurance as commenters mentioned. Under the final regulations, a postsecondary institution has the option to determine whether to use live hearings with questioning by an advisor or some other form of live questioning. When making this decision, each postsecondary institution may consider, among other things, the costs associated with eliminating or maintaining a requirement of a live hearing with advisor-conducted cross-examination, although the Department notes that postsecondary institutions that receive Federal financial assistance from the Department must comply with these final regulations regardless of their resources. For a detailed discussion of the costs and benefits of these final regulations, see the *Regulatory Impact Analysis* section of this preamble.

The Department acknowledges that once the final regulations go into effect, some postsecondary institutions may choose to provide another live-questioning process instead of a live hearing with questioning by an advisor for some or all types of sex-based harassment complaints. As explained in the section above on Due Process and Basic Fairness Considerations Specific to Questioning by an Advisor or Decisionmaker, the relevant case law does not obligate every postsecondary institution to hold a live hearing with questioning by an advisor to effectuate Title IX's nondiscrimination mandate. At the same time, nothing in the final regulations precludes a postsecondary institution from complying with applicable Federal or State case law or other sources of law regarding live hearings with questioning by an advisor. For additional discussion, see the section on Due Process and Basic Fairness Considerations Specific to Questioning by an Advisor or Decisionmaker. Title IX and these final regulations establish the procedures that the Department has determined are necessary to fully effectuate Title IX's nondiscrimination mandate, but States and institutions are free to provide additional procedures as long as they do not conflict with Title IX or these final regulations. The Department recognizes that this may result in some lack of uniformity among States, but that is to be expected when the Department, States, and institutions have overlapping and sometimes different interests.

Although the Department maintains that requiring live hearings with questioning by an advisor is not necessary to effectuate Title IX's nondiscrimination mandate in all cases, as explained in the July 2022 NPRM, the Department recognizes the importance of a postsecondary institution having procedures in place to assess credibility and to provide a meaningful opportunity to be heard. *See* 87 FR 41503. The Department has determined that it is consistent with Title IX for a postsecondary institution to determine, based on consideration of its administrative structure, resources, and applicable Federal, State, or local law that a live hearing with questioning by an advisor is appropriate, especially in light of the protections for the parties built into the live hearing requirements in § 106.46(g).

Regarding some commenters' requests for additional flexibility in the form of general guidance as opposed to the requirements in § 106.46(f)(1), the Department's view is that § 106.46(f)(1) appropriately balances the Department's goal to give postsecondary institutions additional flexibility while providing adequate structure and requirements to ensure that postsecondary institutions design procedures to assess credibility that provide a meaningful opportunity for the parties to respond.

Changes: All changes to § 106.46(f)(1) are described below.

Impact on the Parties

Comments: Some commenters viewed cross-examination as harmful and re-traumatizing for complainants and shared personal stories about undergoing cross-examination. Other commenters noted that the 2020 amendments permit the parties to participate in the live hearing from separate locations upon request and do not permit the parties to personally cross-examine each other. Some commenters shared personal stories of how the lack of cross-examination impacted respondents.

Some commenters asserted that cross-examination is beneficial for both parties because assessing credibility impacts both parties, ensures both parties receive all of the rights to which they are entitled, and produces reliable outcomes.

Discussion: The Department agrees that it is important to consider the impact that live hearings with advisor-conducted cross-examination has on the parties in addition to the impact they have on postsecondary institutions. The Department acknowledges that some commenters viewed cross-examination as harmful and re-traumatizing for complainants and appreciates the personal stories commenters shared about undergoing cross-examination. The Department recognizes other commenters noted that the 2020 amendments addressed the potential harm of cross-examination by permitting the parties to participate in the live hearing from separate locations upon request and by not permitting the parties to personally cross-examine each other. The Department also appreciates the commenters who shared personal stories of how lack of cross-examination impacted respondents. The Department acknowledges commenters who viewed cross-examination as beneficial for both parties because assessing credibility impacts both parties and commenters who asserted that cross-examination equitably ensures both parties receive all of the rights to which they are entitled and produces reliable outcomes. The Department's view is that permitting, but not requiring, postsecondary institutions to hold a live hearing with questioning by an advisor appropriately balances the needs of both parties and enables a postsecondary institution to take into consideration the impact that questioning by an advisor may have on the parties, including potential harms and benefits, when determining what procedures to use to assess credibility.

The Department agrees with commenters that, to ensure all participants have confidence in the process, Title IX requires grievance procedures that treat the parties equitably and produce reliable outcomes, but disagrees that requiring live hearings with questioning by an advisor is the only way to accomplish these goals. As explained in greater detail below, the Department has determined that requiring live questioning with the opportunity for a party to propose questions to be asked of the other party and witnesses, while giving postsecondary institutions discretion as to the live questioning format, ensures that postsecondary institutions can fully effectuate Title IX's nondiscrimination mandate while providing the parties with a meaningful opportunity to be heard and respond. The Department also notes that, in addition to the live questioning requirement in § 106.46(f)(1), the final regulations include a number of additional procedural protections to ensure a fair process and reliable outcomes, including, but not limited to, requiring that the parties be treated equitably (§ 106.45(b)(1)); prohibiting a Title IX Coordinator, investigator, or decisionmaker from having a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent (§ 106.45(b)(2)); requiring a presumption that the respondent is not responsible for the alleged sex discrimination until a determination is made at the conclusion of the recipient's grievance procedures for complaints of sex discrimination (§ 106.45(b)(3)); requiring an objective evaluation of all evidence that is relevant and not otherwise impermissible (§ 106.45(b)(6)); requiring an equal opportunity to access either the relevant and not otherwise impermissible evidence, or the same written investigative report that accurately summarizes this evidence and requiring an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of either party if the postsecondary institution provides access to an investigative report (§ 106.46(e)(6)(i)); and providing for appeal rights (§ 106.46(i)).

Changes: All changes to § 106.46(f)(1) are described below.

Due Process and Fairness Considerations Generally

Comments: Some commenters generally asserted that the 2020 amendments improperly impose a requirement on all postsecondary institutions that was created by a single court and that advisor-conducted cross-examination is not required by Title IX, due process, or fundamental fairness. On the other hand, a number of commenters generally asserted that due process, fairness, and accuracy require advisor-conducted cross-examination and urged the Department to maintain the requirement from the 2020 amendments.

Discussion: The Department appreciates the variety of views expressed by the commenters regarding whether due process and basic fairness require live hearings with questioning by an advisor for all complaints of sex-based harassment involving a student complainant or student respondent at a postsecondary institution. The Department reiterates that, as discussed in the preambles to the 2020 amendments and the July 2022 NPRM, while the Supreme Court has not ruled on what procedures satisfy due process under the U.S. Constitution in the specific context of a Title IX sexual harassment grievance process held by a postsecondary institution, and the Federal appellate courts that have considered this particular issue in recent years have taken different approaches, 85 FR 30327; 87 FR 41504,

these final regulations satisfy fundamental due process rights of notice and opportunity to be heard, while balancing the parties' interests, consistent with Supreme Court case law to date. The Department has previously stated that what constitutes a meaningful opportunity to be heard may depend on specific circumstances. 85 FR 30327; 87 FR 41504. And as the Department stated in the preamble to the 2020 amendments, and as is evident from the comments and discussed further below, Federal and State courts are split on the specific issue of whether due process or basic fairness requires live advisor-conducted cross-examination in sex-based harassment complaints at the postsecondary level. *See* 85 FR 30329.

As discussed further in the section above on Due Process and Basic Fairness Considerations Specific to Live Questioning by an Advisor or Decisionmaker, after carefully considering the comments and the case law, the Department maintains the position from the July 2022 NPRM that neither Title IX nor due process or basic fairness require postsecondary institutions to hold a live hearing with questioning by an advisor in all cases. *See* 87 FR 41505. The Department has determined that the procedures in the final regulations at § 106.46(f)(1), which incorporate the revisions made in response to commenters' concerns and suggestions, appropriately protect the rights of all parties to have a meaningful opportunity to be heard and respond, including the ability to probe the credibility of parties and witnesses; and also protect the postsecondary institution's interest in helping the decisionmaker seek the truth and make a reliable determination, while minimizing any chilling effects on reporting of sex-based harassment and on full participation of parties and witnesses in the grievance procedures.

Changes: All changes to § 106.46(f)(1) are described below.

Mathews Balancing Test

Comments: One commenter was concerned that the Department acknowledged a due process framework was relevant but did not conduct a *Mathews*-type analysis to determine whether to revoke the live hearing with advisor-conducted cross-examination requirement in the 2020 amendments. Other commenters noted that the interests at stake for respondents are substantial and asserted that cross-examination may in certain circumstances help ensure the outcome of a grievance proceeding is accurate.

Discussion: In *Mathews,* the Supreme Court held that determining the adequacy of pre-deprivation due process procedures involves a balancing test that considers the private interest of the affected individual, the risk of erroneous deprivation and benefit of additional procedures, and the government's interest, including the burden and cost of providing additional procedures. 424 U.S. at 335, 349. The Department rejects one commenter's assertion that the Department did not conduct a *Mathews*-type analysis, including considering the lasting impact of a sex-based harassment accusation on a respondent, when determining whether to remove the requirement for live hearings with advisor-conducted cross-examination and that the Department only considered the burdens expressed by unspecified stakeholders. As explained in the July 2022 NPRM, the Department considered the issue and reweighed the factors after receiving feedback from a wide variety of stakeholders regarding the implementation of the live hearing and advisor-conducted cross-examination requirement in the 2020 amendments. *See* 87 FR 41505. The Department notes that many of these stakeholders expressed their views in live and written comments as part of the June 2021 Title IX Public Hearing. A transcript of the hearing and corresponding written comments received are publicly available, and the Department considered the hearing and comments in proposing and adopting these final regulations.[68] Additional information regarding the stakeholders who participated in the public hearing is available in the July 2022 NPRM. *See* 87 FR 41395. For additional discussion of *Mathews* and the Department's grievance procedure requirements, see the subsections on the Department's methods for determining what process is due and identifying relevant interests in Framework for Grievance Procedures for Complaints of Sex Discrimination (Section II.C).

As detailed in the discussion of proposed § 106.46(f) in the July 2022 NPRM, the Department considered a number of factors in determining whether to maintain the requirement for live hearings with advisor-conducted cross-examination, consistent with a *Mathews*-type analysis. *See* 87 FR 41505–06. In addition to the impact on respondents, these included the impact of the requirement on reporting of sex-based harassment and parties' willingness to participate in Title IX grievance procedures in light of a postsecondary institution's obligations to operate its education program or activity free from sex discrimination; the goal of ensuring that Title IX grievance procedures are prompt and equitable and provide the parties, including the respondent, with a meaningful opportunity to be heard and respond and are designed to produce reliable outcomes; and the potential financial and administrative burden that the requirement would place on postsecondary institutions.

In light of these factors and after carefully considering the comments received in response to the July 2022 NPRM, the Department determined that the grievance procedure requirements in § 106.46 will include a live-questioning process that enables the decisionmaker to assess credibility of parties and witnesses to the extent credibility is both in dispute and relevant to one or more allegations of sex-based harassment. To provide postsecondary institutions with necessary flexibility while protecting the interests of the parties and ensuring reliable outcomes, the Department concluded that this live questioning, including questions and follow-up questions proposed by the parties, could occur in individual meetings with the investigator or decisionmaker, or in a live hearing with questions asked by the decisionmaker or the party's advisor.

The Department agrees with commenters who noted that the interests at stake for respondents are substantial, and hence that the Department must ensure that procedures to protect their interests are carefully tailored. The Department's procedures accordingly allow for live questioning, including questions proposed by respondents themselves but asked by the decisionmaker or an advisor. The Department also agrees with commenters who asserted that live questioning by an advisor may in certain circumstances help ensure the outcome of a grievance proceeding is accurate, as well as those commenters who, as noted above, expressed concern or shared personal stories that live questioning by an advisor can re-traumatize a complainant. Both of these concerns are relevant to the second *Mathews* factor—the risk of erroneous deprivation and benefit of additional procedures—because both testing credibility and ensuring parties and witnesses are willing to participate in a proceeding help ensure that a decisionmaker has access to reliable information on which to base a decision. The Department maintains

[68] The transcript and written comments are available at *https://www2.ed.gov/about/offices/list/ocr/public-hearing.html* (last visited Mar. 12, 2024).

that the form of live questioning permissible under § 106.46(f)(i) appropriately balances these concerns by reducing the likelihood of re-traumatization while still allowing live questioning to occur. Finally, the Department agrees with the comments from recipients stating that, as noted above, resources now devoted to live, adversarial hearings can be directed toward other methods of implementing Title IX's nondiscrimination mandate and fairly adjudicating complaints, such as by providing training for employees. The Department therefore maintains that allowing recipients to eschew live, adversarial hearings if they conclude doing so is in their best interests appropriately accounts for the third *Mathews* factor, which is the government's interest, including the burden and cost of providing additional procedures.

Changes: All changes to § 106.46(f)(1) are described below.

Procedural Requirements for School Disciplinary Proceedings

Comments: Some commenters stated that although courts agree that due process requires some ability to meaningfully examine the credibility of witnesses in Title IX grievance procedures, courts have refused to require that a recipient permit the respondent or the respondent's representative to conduct the questioning and instead only require that a postsecondary institution have the opportunity to observe the complainant respond to live questioning.

One commenter disagreed that the cases cited by the Department supported the position that school disciplinary proceedings are not civil or criminal trials and therefore the parties are not entitled to the same rights. The commenter noted that the cases cited by the Department did not address discipline for sex-based harassment and were decided before *Davis* and OCR's subsequent interpretation that *Davis* required postsecondary institutions to adjudicate student-to-student sex-based harassment cases.

Some commenters argued that questioning of parties and witnesses should occur at a live hearing because they are akin to trials in the criminal justice system in which new information can be elicited. Some commenters said that some courts have required due process in other non-court settings that are analogous to Title IX grievance procedures.

Discussion: School disciplinary proceedings are not civil or criminal trials and therefore, contrary to commenters' assertions, disciplinary proceedings need not provide the same panoply of procedural requirements afforded parties in a civil trial or defendants in a criminal trial. As explained in the July 2022 NPRM and the preamble to the 2020 amendments, *see* 87 FR 41457; 85 FR 30052, courts have repeatedly made this point clear in cases analyzing what due process requires in school discipline proceedings, including cases decided post-*Davis* and involving allegations of sex-based harassment [69] and cases involving academic dishonesty [70] or unsatisfactory performance.[71] One commenter expressed concern that some of these cases did not involve Title IX; however, all of these cases provide useful guidance on what due process requires in an academic setting. Regardless of the fact that sex-based harassment grievance proceedings are not civil or criminal trials, the Department adheres to its view that basic principles of fairness require a live-questioning process that enables the decisionmaker to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex-based harassment. For additional discussion of this issue, see the section of this preamble on Grievance Procedures Appearing as Quasi-Judicial Proceedings.

In response to commenters who said that questioning of parties and witnesses should occur at a live hearing because live hearings are akin to trials in the criminal justice system in which new information can be elicited, the Department acknowledges that allegations of conduct that constitute sex-based harassment under Title IX may overlap with criminal offenses under State or other laws. Criminal trials and Title IX, however, serve distinct purposes. The purpose of Title IX is to address sex discrimination, including by ensuring that all students can access a recipient's education program or activity free from sex discrimination, while the purpose of the criminal justice system is to discipline and punish criminal conduct; the potential infringement on a person's liberty interest in the criminal context in the form of incarceration is much greater even than the admittedly significant consequence of a Title IX grievance procedure (*e.g.,* suspension, expulsion). In light of the different purposes served by Title IX and the criminal justice system and the differences in infringement on a person's liberty interest, it is appropriate for the final regulations to include requirements or permit processes that may not be permissible in the criminal justice system.

The Department agrees with commenters that consideration of due process is also appropriate in non-court settings. As explained in more detail in this section, the live questioning requirements in § 106.46(f)(1) provide appropriate due process protections, including a meaningful opportunity to respond, even though they do not require live hearings with questioning by an advisor. The Department also notes that recipients remain free to use live hearings, either with or without questioning by an advisor, when they think it appropriate under the circumstances or when they believe due process requires it, and compliance with the minimum requirements of Title IX in the final regulations does not relieve a recipient of any legal requirements it might otherwise have.

Changes: All changes to § 106.46(f)(1) are described below.

Due Process and Basic Fairness Considerations Specific to Live Questioning by an Advisor or Decisionmaker

Comments: One commenter stated that cross-examination does not need to occur in the form of advisor-conducted questioning, noting that the Sixth Circuit emphasized that such questioning only must occur ''in front of the fact-finder'' so that the postsecondary institution can conduct a credibility assessment.[72]

Other commenters noted some courts have held that due process requires advisor-conducted cross-examination. The commenters also stated that courts have recognized that postsecondary institutions have a legitimate interest in avoiding procedures that may subject a complainant to further harassment and advisor-conducted cross-examination provides the benefits of cross-examination without subjecting the complainant to further trauma. The commenters further explained that courts have held that basic fairness requires a live, meaningful, adversarial hearing and some method of cross-examination.

[69] *See, e.g., Univ. of Ark.-Fayetteville,* 974 F.3d at 868 (''There also would be costs and burdens associated with imposing on a university all of the formal procedural requirements of a common law criminal trial.''); *Haidak* v. *Univ. of Mass.-Amherst,* 933 F.3d 56, 69 (1st Cir. 2019) (''We also take seriously the admonition that student disciplinary proceedings need not mirror common law trials.'').

[70] *See Nash,* 812 F.2d at 664.

[71] *See Horowitz,* 435 U.S. at 86.

[72] The commenter cited *Baum,* 903 F.3d at 583.

Some commenters were concerned that postsecondary institutions will have difficulty complying with applicable Federal or State case law or State or local laws requiring live hearings with advisor-conducted cross-examination in specific circumstances. Some commenters asserted that the Department failed to adequately justify removing the 2020 amendments' requirement for live hearings with advisor-conducted cross-examination.

Discussion: The Department acknowledges that, as noted by commenters and discussed in the July 2022 NPRM, Federal and State courts have held, in both public and private postsecondary settings, that some method of live cross-examination is required by due process and basic fairness when a disciplinary charge rests on a witness's or complainant's credibility, but the decisions differ in terms of what specific method is necessary. *See* 87 FR 41505–07. In *Winnick* v. *Manning,* the court held that although unlimited cross-examination is not an essential element of due process in college discipline cases, it may be required when the resolution of the case turns on credibility assessments. 460 F.2d 545, 549–50 (2d Cir. 1972). In some cases involving postsecondary institutions with procedures that included a live hearing model, courts have held that some method of live questioning is required in certain circumstances but have stopped short of requiring that it be conducted by a party's advisor. In *Haidak* v. *University of Massachusetts-Amherst,* the court held that adversarial cross-examination was not required, and a postsecondary institution could satisfy due process by having a neutral school official pose probing questions in real time. 933 F.3d at 69–70. Relying on the holding in *Haidak,* the court in *Overdam* v. *Texas A&M University* held in a sexual assault case in which suspension was imposed that due process requires some opportunity for real-time questioning, even if only through a hearing panel, but does not require the questioning be done by the respondent's attorney. 43 F.4th 522, 529–30 (5th Cir. 2022). On the other hand, some courts have held that questioning by an advisor at a live hearing is required. In *University of Sciences,* the court held a university's contractual promises of fair and equitable treatment ''require[d] at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers.'' 961 F.3d at 215. And, responding to similar concerns about a university's procedures limiting a student's ability to challenge the credibility of witnesses, the court in *Baum* held that ''some form of cross-examination'' was necessary to satisfy due process in sexual misconduct cases that turn on party credibility. 903 F.3d at 581.[73]

Since the publication of the July 2022 NPRM, at least one court has taken an approach similar to § 106.46(f)(1) by giving private postsecondary institutions discretion to develop their own procedures for assessing credibility. In *Boermeester,* the California Supreme Court held that the common law doctrine of fair procedure requires notice of the charges and a reasonable opportunity to respond, but does not require private universities to provide respondents the opportunity to directly or indirectly cross-examine the complainant and other witnesses at a live hearing. 15 Cal.5th at 93. Instead, the court directed private postsecondary institutions to balance competing interests to craft the precise procedures necessary to afford a party with notice and an opportunity to respond. *Id.* at 90, 93.

It is also important to note that each court that has opined on the issue of whether and in what form cross-examination is required has reviewed the specific facts and circumstances to determine what process was required, including what other procedural protections, if any, were provided to the respondent and the potential burden on the postsecondary institution of requiring cross-examination at a live hearing. For example, in *Baum* the court noted that providing Doe with the opportunity for cross-examination would have cost little for the university because it already provided a hearing with cross-examination in all misconduct cases other than those involving sexual assault. 903 F.3d at 582. In *Nash,* the court upheld a procedure allowing the parties to ask questions of hearing participants through the non-voting chancellor of the Student Board of Ethical Relations, concluding that, although the opportunity to question witnesses directly would have been valuable, ''there was no denial of [the students'] constitutional rights to due process by their inability to question the adverse witnesses in the usual, adversarial manner.'' 812 F.2d at 663–64. In *Boermeester,* the court held fair process did not require a private university to conduct a live hearing with the respondent in attendance and with the respondent directly or indirectly cross-examining the complainant. 15 Cal.5th at 93. The court noted that the university provided the respondent with the opportunity to provide his version of events in an interview with the investigator, the opportunity to review evidence with his attorney-advisor, the opportunity to submit his own evidence and witnesses, the opportunity to respond to evidence during a hearing although he declined to attend in favor of responding to the evidence in writing, and the opportunity to appeal. *Id.* at 94–95.

In addition, similar to the Department's approach, courts have considered a variety of factors when determining what process is due in sexual misconduct cases. *See, e.g., Haidak,* 933 F.3d at 66 (noting the interests at stake in school disciplinary proceedings include the respondent's interest in completing their education and avoiding unfair or mistaken exclusion from the educational environment and the accompanying stigma; the school's interest in protecting itself and other students from students whose behavior violates the basic values of the school; and balancing the need for fair discipline against the need to allocate resources to educating students (citing *Gorman* v. *Univ. of R.I.,* 837 F.2d 7, 14 (1st Cir. 1988); *Goss,* 419 U.S. at 580, 583); *Boermeester,* 15 Cal.5th at 93 (explaining that, when designing the procedures necessary to provide a meaningful opportunity to respond, a private university must balance its own interest in a fair proceeding and completing an education; and the university's interest in maintaining a safe campus, encouraging students to report sexual misconduct, and encouraging witnesses to participate in the process without having to divert too many resources away from educating students).

Together, the cases discussed above recognize the diversity of interests at stake in sex-based harassment grievance procedures and the ways in which particular cases and particular

[73] Some commenters relied on *Doe* v. *Allee,* 30 Cal. App. 5th 1036, 1039 (Ct. App. 2019), for the holding that fundamental fairness requires, at a minimum, that the university provide a way for people accused of sexual misconduct to cross-examine witnesses, directly or indirectly, at a hearing where the witnesses appear in person or by other means. The Department notes that the California Supreme Court recently disapproved that holding in *Boermeester* v. *Carry,* 15 Cal.5th 72, 95 (Cal. 2023), *cert. denied,* 144 S. Ct. 497 (2023). In the absence of constitutional protections, courts generally have required that private school disciplinary procedures adhere to a fundamental or basic fairness standard. *See, e.g.,* Lisa Tenerowicz, *Student Misconduct at Private Colleges and Universities: A Roadmap for ''Fundamental Fairness'' in Disciplinary Proceedings,* 42 B.C. L. Rev. 653 (2001).

institutions may vary considerably from one to another. The courts' observations in these cases are consistent with the Department's own experience in enforcing Title IX across a broad range of recipients and with respect to many alleged forms of discrimination. As a result, the Department is persuaded that affording more discretion to recipients to develop processes for conducting grievance procedures is appropriate. Although the Department recognizes that these final regulations depart from the 2020 amendments with respect to the requirement of live hearings, the Department maintains—after reevaluating the relevant considerations, including case law post-dating the 2020 amendments, such as *Boermeester* and *Overdam*—that these final regulations will more appropriately respect the interests of both institutions and parties.

In response to concerns that postsecondary institutions will have difficulty complying with applicable Federal or State case law or State or local laws requiring live hearings with questioning by an advisor in specific circumstances, the Department notes that nothing in § 106.46(f)(1) or elsewhere in the final regulations precludes a postsecondary institution from choosing to use a live hearing with questioning by an advisor, either because it is required under applicable Federal or State case law or for any other reason, and the Department expects that some postsecondary institutions will choose to maintain the approach required under the 2020 amendments.

The Department did not fail to adequately justify removing the 2020 amendments' requirement for live hearings with advisor-conducted cross-examination. As an initial matter, and as the Department acknowledged in the preamble to the 2020 amendments, due process does not in all cases require the specific procedures that were included in the § 106.45 grievance process under the 2020 amendments, including the requirement for live hearings with advisor-conducted cross-examination. *See* 85 FR 30053 (''The Department acknowledges that constitutional due process does not require the specific procedures included in the § 106.45 grievance process.''). Those provisions were adopted as a matter of policy. The preamble to the 2020 amendments explained that the Department was prescribing this and other requirements in § 106.45 because the Department's view at the time was that the provisions were important to ensuring a fair process for both parties. *See id.* After reconsidering the issue, and for reasons discussed in detail above, the Department has decided to permit a live-questioning process while removing the requirement for live hearings with questioning by an advisor to be conducted in all circumstances. Throughout the July 2022 NPRM and this preamble, the Department provides the requisite reasons, discussion, and justification for the removal of the requirement in the 2020 amendments for live hearings with advisor-conducted cross-examination. *See, e.g.,* 87 FR 41503.

Changes: All changes to § 106.46(f)(1) are described below.

Scholarship on Cross-Examination

Comments: One commenter asserted that the scholarship the Department cited in support of the superiority of the inquisitorial approach to cross-examination was outdated because it was published before the 2020 amendments. The commenter also stated that the scholarship cited by the Department discussed approaches to cross-examination outside of Title IX and the school setting.

Discussion: The Department acknowledges that the scholarship on cross-examination discussed in the July 2022 NPRM, 87 FR 41507, was published prior to the 2020 amendments and involved approaches to cross-examination outside of the Title IX or school disciplinary context. The Department still maintains that such scholarship on the effectiveness of adversarial cross-examination is helpful to consider as one of a number of factors in finalizing these regulations. The Department recognizes that cross-examination can be an appropriate tool for seeking the truth, especially when conducted by an experienced attorney. However, the Department maintains the position that scholarship has not yet shown that cross-examination is the only way to produce reliable outcomes in sex-based harassment complaints involving students at postsecondary institutions. The Department notes that the court in *Haidak* took a similar position, stating that it was ''aware of no data proving which form of inquiry produces the more accurate result in the school disciplinary setting.'' 933 F.3d at 68. The court acknowledged that ''[c]onsiderable anecdotal experience suggests that cross-examination in the hands of an experienced trial lawyer is an effective tool,'' but it then observed that courts have generally found that a respondent has no right to legal counsel in school disciplinary proceedings, leading it to doubt whether—in the absence of such counsel—cross-examination would actually increase the probative value of hearings. *Id.* at 68–69. In addition, in *University of Arkansas-Fayetteville,* the court noted that ''[w]hile adversarial cross-examination, when employed by a skilled practitioner, can be an effective tool for discovering the truth, there are legitimate governmental interests in avoiding unfocused questioning and displays of acrimony by persons who are untrained in the practice of examining witnesses.'' 974 F.3d at 868 (internal citations omitted).[74]

Changes: All changes to § 106.46(f)(1) are described below.

Consideration of All Viewpoints

Comments: One commenter asserted that the Department did not consult with certain stakeholders before proposing to remove the requirement for live hearings with advisor-conducted cross-examination and that the Department failed to acknowledge previously stated positions of OCR leadership regarding cross-examination.

Discussion: The Department disagrees with the commenter's assertions. The July 2022 NPRM discussed the Department's consideration of all viewpoints, including the opportunity for stakeholders to provide input at the June 2021 Title IX Public Hearing and the Department's engagement with various stakeholders and other members of the public in developing the proposed regulations. 87 FR 41395–96. All of these stakeholders' views were considered in development of the July 2022 NPRM. The Department then considered more than 240,000 comments received on the July 2022 NPRM and that input was taken into account with respect to each issue addressed in these final regulations, including § 106.46(f)(1). Throughout this process, the Department has properly followed, and as described above exceeded, the requirements of the Administrative Procedure Act (APA) in promulgating these final regulations. *See Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania,* 140 S. Ct. 2367, 2385 (2020) (noting that the Court has ''repeatedly stated that the text of the APA provides the maximum procedural requirements that an agency must follow in order to promulgate a rule.'' (quotation marks omitted) (citations omitted)). Previously articulated views of Department officials are addressed in the discussion of Views of Assistant Secretary Lhamon (Section VII).

Changes: All changes to § 106.46(f)(1) are described below.

[74] As stated in *Haidak,* there is generally no right to counsel in disciplinary proceedings. 933 F.3d at 69.

Live-Questioning Process, Individual Meeting Logistics, Recordings of Meetings

Comments: Some commenters requested clarification regarding the logistics of live questioning and individual meetings, including how individual meetings with parties and witnesses would work in practice, the scope of the live-questioning process, and whether a postsecondary institution could choose to hold a live hearing without questioning by an advisor. Some commenters asked whether individual meetings may be held virtually and whether the individual meetings with parties and witnesses must occur at the same time or separate from investigative interviews. Some commenters asked the Department to clarify whether there was a limit on the number of individual meetings a postsecondary institution would be required to hold and expressed concern that the process could be time consuming and more cumbersome than a live hearing.

Some commenters asked the Department to clarify whether the parties could propose questions to ask of witnesses in addition to the other party and whether investigators or decisionmakers could conduct individual meetings and with whom. One commenter asked the Department whether a postsecondary institution that uses a panel of decisionmakers must have the entire panel of decisionmakers present for individual meetings, or whether one decisionmaker can represent the panel.

Some commenters stated that if a postsecondary institution used individual meetings instead of a live hearing and wanted to give the parties a meaningful opportunity to be heard, it must record the individual meetings and give opportunities to respond and ask follow-up questions until each party's statements were fully explored.

One commenter suggested that the Department prohibit credibility questions about a complainant's sexual history.

Some commenters said that a live hearing with advisor-conducted cross-examination is necessary because of the proposed limitations on a respondent's access to the evidentiary record and asked the Department to clarify whether the information gathered during individual meetings would be considered evidence that must be provided to the parties.

Some commenters suggested that the Department provide three options for assessing credibility: (1) live hearings with questioning by an advisor; (2) live hearings with questioning by the decisionmaker; and (3) another process that allows each party to suggest questions of the other party and witnesses to be asked by the investigator or decisionmaker, respond to the evidence by the other party, and have access to all information made available to the decisionmaker.

Discussion: Notwithstanding that the Department maintains the position that postsecondary institutions must be permitted, but not required, to use live hearings with advisor-conducted cross-examination, upon considering the commenters' concerns, suggestions, and requests for clarification, the Department has made several revisions to proposed § 106.46(f)(1) that are reflected in the final regulations. These revisions are designed to clarify the process for live questioning as well as to ensure that whatever live-questioning process a postsecondary institution chooses to use under § 106.46(f)(1) provides an adequate opportunity for the parties to be meaningfully heard and respond to the allegations.

Commenters raised several concerns about proposed § 106.46(f)(1), regarding how individual meetings with parties and witnesses would work in practice, the scope of the live-questioning process, and whether a postsecondary institution could choose to hold a live hearing without advisor-conducted cross-examination. The Department finds many of these concerns persuasive and is making the following changes and offering the following clarifications to address them, provide additional clarity, and ensure that the live-questioning process provides a meaningful opportunity for the decisionmaker to assess credibility and for the parties to respond.

First, the Department has revised the introductory language in proposed § 106.46(f)(1) to clarify that this provision covers a process that enables a decisionmaker to question a party or witness to assess a party's or witness's credibility and to more clearly set forth the manner in which such questioning must occur.

Second, the Department has revised and reorganized proposed § 106.46(f)(1) to add a new § 106.46(f)(1)(i) describing the process for live questioning when a postsecondary institution chooses not to conduct a live hearing. The revisions make clear that when a postsecondary institution chooses not to conduct a live hearing, the process for proposing and asking relevant and not otherwise impermissible questions and follow-up questions of parties and witnesses under §§ 106.2 and 106.45(b)(7) must allow the investigator or decisionmaker to ask such questions during individual meetings with a party or witness; must allow each party to propose such questions that the party wants asked of any party or witness and have those questions asked by the investigator or decisionmaker during one or more individual meetings, including follow-up meetings; and must provide each party with a recording or transcript of the individual meeting with enough time for the party to have a reasonable opportunity to propose follow-up questions. In response to a commenter's suggestion that the Department prohibit credibility questions about a complainant's sexual history, the Department notes that § 106.46(f)(1) requires that credibility questions comply with § 106.45(b)(7)(iii), which addresses evidence that relates to the complainant's sexual interests or prior sexual conduct.

Third, after considering commenters' concerns, the Department has determined that revisions are necessary to further guarantee that a respondent has a meaningful opportunity to respond even outside of a live hearing and better enable all parties to propose follow-up questions to be asked of parties and witnesses during individual meetings. To address this concern, the Department has added new § 106.46(f)(1)(i)(C), which as mentioned above, requires postsecondary institutions that choose not to hold a live hearing to provide each party with an audio or audiovisual recording or transcript of the individual meetings with enough time for the party to have a reasonable opportunity to propose follow-up questions. The Department acknowledges that providing a recording or transcript of a party's or witness's statement with an opportunity for follow-up questions based on that recording or transcript is not identical to the process of live questioning that may play out in a civil or criminal trial. The Department reiterates, however, that these regulations establish only the baseline procedures that recipients must follow. Any recipient that concludes that its constitutional obligations, other sources of authority, or other circumstances require additional procedural protections may provide for such protections.

Regarding individual meetings and the evidentiary record, the Department notes that in addition to receiving a recording or transcript of the individual meetings with parties and witnesses, the final regulations at § 106.46(e)(6)(i) require a postsecondary institution to provide an equal opportunity to access either the relevant and not otherwise impermissible evidence, or the same

written investigative report that accurately summarizes this evidence and to provide an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of either party if the postsecondary institution provides access to an investigative report. The information gathered at individual meetings with parties and witnesses would be part of the evidence or investigative report that accurately summarizes the evidence covered under the final regulations at § 106.46(e)(6)(i), and the final regulations at § 106.46(e)(6)(ii) require a postsecondary institution to provide the parties with a reasonable opportunity to review and respond to the evidence or investigative report prior to the determination whether sex-based harassment occurred. Therefore, the parties will have an opportunity to respond to the information gathered during the individual meetings with parties and witnesses as part of their opportunity to review and respond to the evidence or investigative report.

Fourth, in response to questions regarding the number of individual meetings, the revised language of § 106.46(f)(1)(i)(B) also clarifies that there may be one or more individual meetings, including follow-up meetings with the parties and witnesses, as needed to establish facts, assess credibility, and ask follow-up questions. It is not necessary to specify how many individual meetings must occur because the appropriate number will vary depending on the facts and circumstances of the case and the type and number of questions proposed by the parties, but the Department also does not anticipate that there would be an endless cycle of meetings. In addition, the Department notes that questions proposed by the parties to be asked of parties and witnesses must be relevant and not otherwise impermissible under §§ 106.2 and 106.45(b)(7) and may not be unclear or harassing under § 106.46(f)(3). Thus, if at some point the follow-up questions proposed by the party are duplicative of questions that have already been asked or are designed to harass as opposed to assess credibility or elicit relevant information, the postsecondary institution may decline to hold additional meetings to ask the questions. The Department accordingly maintains that §§ 106.2, 106.45(b)(7), and 106.46(f) will ensure that the questioning process is not overly long or burdensome.

Fifth, the July 2022 NPRM discussed questioning by the decisionmaker in individual meetings and also referred to the parties proposing questions to the investigator or decisionmaker to ask during individual meetings. *See, e.g.,* 87 FR 41503–09. The discussion referred to witnesses in some places, but not all places, which the Department understands created confusion regarding whether investigators or decisionmakers could conduct individual meetings and with whom. In response to commenters' requests for clarification, the revised language in § 106.46(f)(1) clarifies throughout that the individual meetings would be with meetings with parties and meetings with witnesses, as opposed to just parties. It also clarifies that the individual meetings may be conducted by the investigator, decisionmaker, or both, at the institution's discretion. *See* § 106.46(f)(1)(i)(B). The Department declines to specify whether a postsecondary institution that uses a panel of decisionmakers must have the entire panel of decisionmakers present for individual meetings, or whether one decisionmaker can represent the panel, because that is a determination best left to the postsecondary institution. Regardless of whether the investigator, decisionmaker, or both will attend the individual meetings with the parties and witnesses, the Department notes that under § 106.46(f)(3) the decisionmaker must determine before the question is posed whether a question proposed by the parties is relevant and not otherwise impermissible under §§ 106.2 and 106.45(b)(7) or unclear or harassing under § 106.46(f)(3), and the institution must ensure that the process it adopts under § 106.46(f)(1) enables a decisionmaker to adequately assess the credibility of parties and witnesses.

In response to comments regarding whether individual meetings may be held virtually, the Department clarifies that nothing in the final regulations precludes a recipient from conducting individual meetings with parties and witnesses virtually with technology enabling the decisionmaker or investigator and the party or witness to simultaneously see and hear one another.

In response to comments regarding the timing of individual meetings, the Department notes that a postsecondary institution has discretion to determine whether the individual meetings with parties and witnesses occur at the same time or separate from investigative interviews. The Department also clarifies that, as discussed above, the information gathered through these individual meetings would be part of the evidence or investigative report under the final regulations at § 106.46(e)(6)(i) to the extent the information is relevant and not otherwise impermissible, and thus the individual meetings would occur before the parties receive access to the evidence or investigative report.

Sixth, in response to confusion regarding whether a postsecondary institution that uses a live hearing would be required to allow questioning by an advisor, the Department has made additional revisions to proposed § 106.46(f)(1). The Department has reorganized § 106.46(f)(1) and added § 106.46(f)(1)(ii)(A) and (B), stating that when a postsecondary institution chooses to conduct a live hearing under § 106.46(g), the process must allow the decisionmaker to ask such relevant and not otherwise impermissible questions and follow-up questions of parties and witnesses, including questions challenging credibility, and either: (a) allow each party to propose such questions that the party wants asked of any party or witness and have those questions asked by the decisionmaker as long as they are not unclear or harassing, or (b) allow each party's advisor to ask any party or witness such questions as long as they are not unclear or harassing. The Department did not intend to require questioning by an advisor in live hearings, and the revised language makes clear that postsecondary institutions that use a live hearing may either permit the parties to propose questions to be asked of any party or witness by the decisionmaker or may permit questioning by an advisor of any party or witness.

Some commenters suggested that the Department provide three options for assessing credibility: (1) live hearings with questioning by an advisor; (2) live hearings with questioning by the decisionmaker; and (3) any process that allows each party to suggest questions of the other party and witnesses to be asked by the investigator or decisionmaker, respond to the evidence by the other party, and have access to all information made available to the decisionmaker. The Department notes that the changes made to § 106.46(f)(1) provide for each of these options.

Changes: All changes to § 106.46(f)(1) are described below.

Methods for Assessing Credibility

Comments: One commenter asked whether a postsecondary institution must use the same method for assessing credibility for each party or witness in a particular live hearing, and whether the same method of assessing credibility must be used for all live hearings held by a postsecondary institution.

Discussion: The Department clarifies that, as explained in the discussion of § 106.45(b)(8), a postsecondary institution is not required to use the same method of assessing credibility for all live hearings, but absent a party's need for a disability or language access accommodation or the provision of auxiliary aids or services, it must use the same method for assessing credibility for each party or witness within resolution of a particular complaint because grievance procedures must be fair and treat the parties equitably. The Department added § 106.45(b)(8) to clarify, for example, that a postsecondary institution may use a different method of assessing credibility at a live hearing for different sex-based harassment complaints, but the postsecondary institution must articulate consistent principles in its written grievance procedures for how it will determine which method of assessing credibility will apply (*e.g.,* use questioning by an advisor for sex-based harassment complaints when the maximum sanction is suspension or expulsion and have the decisionmaker ask questions proposed by the parties for other complaints of sex-based harassment, or use questioning by an advisor for all sex-based harassment complaints unless one of the parties or witnesses is a minor). This provision ensures that a recipient's educational community is aware in advance of what method of assessing credibility will be used. Under this provision, for example, a postsecondary institution that chooses to use a live hearing with questioning by an advisor only for some types of sex-based harassment complaints would be required to explain in its grievance procedures under what circumstances or to which types of sex-based harassment complaints a live hearing with questioning by an advisor would apply. In addition, a recipient's determination regarding whether to apply certain procedures to some, but not all, complaints must be made in a manner that treats complainants and respondents equitably consistent with § 106.45(b)(1).

Changes: All changes to § 106.46(f)(1) are described below.

Cross-Examination and Advisors of Choice

Comments: Some commenters said parties should not be able to personally cross-examine each other at a live hearing. Other commenters argued that the proposed regulations should be revised to allow respondents to directly cross-examine complainants if they lack an advisor or if their advisor is unwilling to conduct cross-examination. Some commenters asked whether a postsecondary institution is required to provide an advisor of choice if it is not using a live hearing with questioning by an advisor. Some commenters asked whether a postsecondary institution could place restrictions on the extent to which an advisor may participate in a live hearing. Some commenters were concerned about confidential employees serving as an advisor of choice. Other commenters suggested that the Department focus on other roles advisors play besides conducting cross-examination, such as providing support for a party.

Discussion: The Department appreciates the opportunity to clarify that even if a postsecondary institution chooses to use a live hearing with questioning by an advisor, the parties are never permitted to personally cross-examine each other, and that this prohibition, which exists in the 2020 amendments at § 106.45(b)(6)(i), is expressly included in what is now § 106.46(f)(1)(ii)(B).

In response to comments regarding advisors of choice, the Department clarifies that the requirement in § 106.46(f)(1)(ii)(B) to provide an advisor for a party who does not have one, who can ask questions on their behalf, only applies if a postsecondary institution is using a live hearing with questioning by an advisor. Nothing in the final regulations requires a postsecondary institution to provide a party with an advisor under any other circumstances. The Department also clarifies that although a postsecondary institution is permitted to use live hearings with questioning by an advisor even in such cases, the postsecondary institution, not the advisor, is responsible for conducting and overseeing the hearing. The Department notes that under § 106.46(e)(2), a postsecondary institution may establish restrictions regarding the extent to which an advisor may participate in the grievance procedures, as long as the restrictions apply equally to the parties. Thus, a postsecondary institution that is using a live hearing without questioning by an advisor may, for example, place limitations on an advisor's ability to speak during the live hearing.

As explained more fully in the discussion of § 106.44(d), in response to comments, the Department has revised § 106.46(f)(1)(ii)(B) to state that, when a postsecondary institution is required to appoint an advisor to ask questions on behalf of a party during advisor-conducted questioning, to avoid potential conflicts of interest a postsecondary institution may not appoint or otherwise require an individual who is currently a confidential employee or an individual who received information related to a particular case as a confidential employee to serve as the advisor in that case. However, as also explained in the discussion of § 106.44(d), a party may choose to have a confidential employee serve as the advisor of the party's choice under § 106.46(e)(2). The Department maintains that this approach respects the party's autonomy to choose an advisor while avoiding conflicts of interest that may arise from requiring a confidential employee to act as an advisor for the live hearing. The Department declines to make other changes with respect to the discussion of the role of advisors, but notes that under § 106.46(e)(2), a party has the right to be accompanied to any meeting or proceeding by an advisor of their choice, and this right applies regardless of whether a postsecondary institution is using live hearings with questioning by an advisor and includes the right to be accompanied by an advisor to individual meetings held under § 106.46(f)(1)(i).

In response to a commenter's suggestion that the Department focus on other roles advisors play besides conducting cross-examination, such as providing support for a party, the Department notes that nothing in the final regulations prohibits an advisor from providing support for a party regardless of whether the advisor will also be conducting the questioning.

Changes: All changes to § 106.46(f)(1) are described below.

When Credibility Is in Dispute

Comments: Some commenters asked why a decisionmaker only needs to assess credibility when it is in dispute and relevant to the allegations, asserting this limitation would give postsecondary institutions too much discretion. Some commenters said that the credibility of both parties is almost always an issue. Some commenters suggested that the Department add specific language to the regulatory text regarding how to determine whether credibility is in dispute. A group of commenters asked the Department to clarify whether a postsecondary institution is required to make specific findings on whether credibility is in dispute and relevant prior to cross-examination of each witness.

Discussion: In response to commenters who questioned why the requirements in proposed § 106.46(f)(1) would apply only when credibility is in dispute, the Department maintains that it is appropriate to require a postsecondary institution to provide a

process that enables decisionmakers to question parties and witnesses to adequately assess their credibility when credibility is in dispute and relevant to one or more allegations of sex-based harassment. As explained in the July 2022 NPRM, courts have held that cross-examination is unwarranted in situations in which credibility is not in dispute. *See* 87 FR 41508. The Department declines commenters' suggestion to add specific language to the regulatory text regarding how to determine whether credibility is in dispute because whether credibility is in dispute requires a fact-specific analysis. The Department explains that cases in which credibility is in dispute include those in which the recipient's determination relies on testimonial evidence, including cases in which a recipient ''has to choose between competing narratives to resolve a case.'' *Baum,* 903 F.3d at 578, 584.

The Department acknowledges that credibility disputes may be more common in sex-based harassment cases than other types of postsecondary discipline cases, but credibility is not in dispute in every sex-based harassment case. *See Univ. of Cincinnati,* 872 F.3d at 406 (recognizing that credibility is commonly in dispute in sex-based harassment cases but then observing that universities might also impose discipline based on evidence other than disputed witness testimony). For example, courts have held that credibility is not in dispute in the following situations: (1) when the respondent admits to engaging in the misconduct or admits the crucial facts at issue, *see, e.g., Baum,* 903 F.3d at 584 (explaining that if a student admits to engaging in misconduct, cross-examination is unnecessary because there is little to be gained by adversarial questioning when the accused student has already confessed); *Winnick,* 460 F.2d at 549–50 (due process did not require cross-examination because, among other reasons, credibility was not at issue because the plaintiff admitted to the crucial fact at issue); *Doe* v. *Univ. of Neb.,* 451 F. Supp. 3d 1062, 1123 (D. Neb. 2020) (no right to cross-examination exists when the accused admits to engaging in the misconduct); and (2) when a recipient reaches a decision based on evidence other than the complainant's statements, *see, e.g., Plummer,* 860 F.3d at 767, 775–76 (holding that a respondent had no right to cross-examination when the defendant university did not rely on testimonial evidence from the complainant); *Flor* v. *Univ. of N.M.,* 469 F. Supp. 3d 1143, 1153–54 (D.N.M. 2020) (holding there was no right to cross-examination because the university did not rely on the accuser's statements in concluding that the plaintiff violated university policy and instead relied on communications between the plaintiff and the accuser, and plaintiff did not challenge the authenticity of those communications). As explained in the July 2022 NPRM, in these situations, a postsecondary institution would not be required to implement its questioning process required under § 106.46(f)(1). *See* 87 FR 41508. The Department also clarifies that a postsecondary institution is not required to make specific findings on whether credibility is in dispute and relevant prior to cross-examination of each witness.

Changes: All changes to § 106.46(f)(1) are described below.

The Clery Act and Live Hearings or Individual Meetings

Comments: Some commenters noted that the Clery Act does not require a live hearing or individual meetings and questioned why the proposed regulations needed to include such requirements.

Discussion: The Department agrees that, as some commenters noted, the Clery Act does not require a live hearing or individual meetings with the decisionmaker. The Department promulgates these final regulations under Title IX and not under the Clery Act. The Department acknowledges that its Clery Act regulations overlap with these final regulations and impose different but not conflicting requirements in some circumstances. It has always been true that some recipients that are subject to both the Clery Act and the Title IX regulations must comply with both sets of regulations. The Department's regulations implementing the Clery Act establish requirements specific to the authority under and purposes of the Clery Act. As also acknowledged in the 2020 amendments, the lack of a live hearing or live meeting requirement in the Clery Act does not present a conflict, *see* 85 FR 30512–13, and the Department maintains that recipients are able to comply with the requirements of the Clery Act and these final regulations.

Changes: All changes to § 106.46(f)(1) are described below.

Additional Suggestions From Commenters

Comments: Commenters offered a number of additional suggestions for the Department regarding proposed § 106.46(f)(1). These suggestions included changing the language in proposed § 106.46(f)(1) to focus on reliability instead of assessing credibility; giving postsecondary institutions the authority to institute rules of decorum in light of the fact that some students will continue to be subject to questioning by an advisor; and requiring postsecondary institutions to provide reasonable accommodations to ensure full participation for people with disabilities in the live hearing process. Some commenters recommended using regional center consortiums to handle sex-based harassment cases. Some commenters requested guidance regarding alternatives to assess credibility beyond live hearings with questioning by an advisor, such as trauma-informed methods and suggested the Department add training on these topics to § 106.8(d).

Discussion: In response to a commenter's suggestion that the Department change the language in § 106.46(f)(1) to focus on reliability instead of assessing credibility, the Department agrees that a decisionmaker's review of the evidence may include analyzing the reliability of the evidence, but declines to change the language in § 106.46(f)(1) to focus on reliability. The Department notes that the related case law discussed above uses the term credibility. The Department also notes that a decisionmaker's determination regarding whether sex-based harassment occurred is not limited to assessing credibility, and the final regulations at § 106.45(h)(1) explain that a decisionmaker is also required to evaluate relevant and not otherwise impermissible evidence for its persuasiveness. The Department also maintains that postsecondary institutions are familiar with the term credibility and its usage in sex-based harassment grievance procedures.

In response to a commenter's suggestion that the Department permit postsecondary institutions to institute rules of decorum in light of the fact that some students will continue to be subject to cross-examination, the Department reiterates that the requirements in § 106.46(f)(3) operate as a floor, not a ceiling. Postsecondary institutions remain free to implement rules of decorum at live hearings beyond those specified in the final regulations at § 106.46(f)(3), as long as the rules apply equally to the parties.

The Department agrees with a commenter that postsecondary institutions are required to provide reasonable accommodations to ensure full participation for people with

disabilities in the live hearing process. The Department clarifies that recipients must comply with applicable disability laws, including by providing appropriate reasonable accommodations and providing auxiliary aids and services during a live hearing. What is required will depend on the disability and the circumstances, but might include, for example, providing a party or witness with extra time to answer a question or a particular means of answering questions. For additional information regarding complying with applicable disability laws throughout the grievance procedures, see the discussion of § 106.8(e).

The Department acknowledges commenters' recommendations for using regional center consortiums to handle sex-based harassment cases. Under the final regulations, consistent with the Department's position in the preamble to the 2020 amendments, recipients remain free to consider alternate investigation and adjudication models, including regional center models that outsource the investigation and adjudication responsibilities to outside experts. *See* 85 FR 30026, 30063. The Department notes that, even if a postsecondary institution chooses to outsource the investigation and adjudication function, the postsecondary institution as the recipient of Federal funding from the Department remains responsible for ensuring that its grievance procedures comply with the requirements in § 106.45, and if applicable § 106.46.

The Department acknowledges commenters' request for guidance regarding alternatives to assess credibility beyond live hearings with questioning by an advisor, such as trauma-informed methods. The Department notes that § 106.46(f)(1) includes two alternatives to advisor-conducted cross-examination, *i.e.,* live questioning in individual meetings with an investigator or decisionmaker or a live hearing with questioning by the decisionmaker. Section 106.46(g) also permits institutions to hold a live hearing with the parties in separate locations, and, in an effort to address potential trauma to any of the parties, § 106.46(f)(3) of the final regulations prohibits unclear or harassing questions. The Department understands that supporting recipients in the implementation of these regulations is important and will offer technical assistance, as appropriate, to promote compliance.

The Department declines commenters' suggestions to add additional training topics beyond the requirements of § 106.8(d), leaving flexibility to recipients to determine how to meet training requirements in a manner that best fits the recipient's unique educational community. The Department notes that the final regulations at § 106.8(d)(2) require all investigators, decisionmakers, and other individuals responsible for implementing a postsecondary institution's grievance procedures to be trained on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Changes: The Department has revised § 106.46(f)(1) to clarify that it covers the process for questioning parties and witnesses to aid in evaluating allegations and assessing credibility. The Department has also reorganized § 106.46(f)(1) to clarify that there are two options for questioning parties and witnesses to adequately assess a party's or witness's credibility, depending on whether the postsecondary institution chooses to conduct a live hearing. Section 106.46(f)(1)(i) governs the process when an institution chooses not to conduct a live hearing, and § 106.46(f)(1)(ii) governs the process when an institution chooses to conduct a live hearing. Section 106.46(f)(1)(i) also clarifies the process for conducting individual meetings with a party or witness, including, under § 106.46(f)(1)(i)(A), that such meetings may be conducted with the investigator or decisionmaker. In § 106.46(f)(1)(i)(B), the Department has clarified the process for allowing each party to propose questions that the party wants asked of any party or witness by the investigator or decisionmaker during individual meetings. The Department has added § 106.46(f)(1)(i)(C) to require each party to receive a recording or transcript of any individual meetings with parties or witnesses, with enough time for the party to have a reasonable opportunity to propose follow-up questions. In § 106.46(f)(1)(ii), the Department clarifies that if a postsecondary institution chooses to use a live hearing, it may allow the questions proposed by the party for any party or witness to be asked by the decisionmaker or by the party's advisor, and that in those instances in which a postsecondary institution is required to appoint an advisor to ask questions on behalf of a party during advisor-conducted questioning, a postsecondary institution may not appoint a confidential employee to be the advisor.

§ 106.46(f)(3): Procedures for the Decisionmaker To Evaluate the Questions and Limitations on Questions

Comments: Some commenters supported proposed § 106.46(f)(3), but noted that implementation would depend on what the decisionmaker considers relevant. Other commenters welcomed the continued discretion to limit advisor participation in proceedings and to establish rules of decorum. One commenter supported proposed § 106.46(f)(3), but asked the Department to require the decisionmaker to explain the rationale for excluding any question, not just those excluded due to relevance.

Some commenters asserted proposed § 106.46(f)(3) exceeded agency authority and was inconsistent with Title IX and case law because they viewed it as banning credibility testing of the parties.

Some commenters asserted that the Department does not have the authority to require parties to submit questions to the decisionmaker for approval before asking them and expressed concern that allowing the decisionmaker to approve questions would give the decisionmaker the power to place arbitrary limits on questioning that may impact the outcome of the grievance proceeding.

One commenter objected to the Department's proposal to prohibit unclear or harassing questions as arbitrary and capricious and expressed concern that this prohibition would lead decisionmakers to exclude relevant questions.

Discussion: The Department maintains that it is appropriate for the decisionmaker to determine whether a proposed question is relevant and not otherwise impermissible under §§ 106.2 and 106.45(b)(7) prior to the question being posed. This requirement is consistent with § 106.45(b)(6)(i) in the 2020 amendments, which similarly requires the decisionmaker to determine whether a question is relevant and explain any decision to exclude a question as not relevant before a complainant, respondent, or witness answers a cross-examination or other question. The Department notes that although the 2020 amendments do not include the term ''impermissible,'' as explained in the July 2022 NPRM, such questions and evidence were similarly prohibited under various provisions in the 2020 amendments, and the Department simply moved them to a single provision and categorized them as ''impermissible.'' *See* 87 FR 41470. The Department disagrees that requiring prescreening of questions is a ban on testing credibility and notes that § 106.46(f)(1) requires postsecondary

institutions to provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to one or more allegations of sex-based harassment.

In addition to being consistent with the 2020 amendments, requiring prescreening of questions for relevance and permissibility increases the efficiency and accuracy of the grievance procedures and, as stated in the preamble to the 2020 amendments, reduces the potential for traumatization of the parties. *See* 85 FR 30316. The Department also maintains the position from the 2020 amendments that requiring prescreening of questions does not result in unfairness or inaccuracy because, for example, these final regulations at § 106.8(d) require a decisionmaker to be trained on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. *See* 85 FR 30337.

The Department has the authority to require parties to submit questions to the decisionmaker to determine whether a question is relevant and not otherwise impermissible and declines to revise the language in § 106.46(f)(3) to permit someone other than the decisionmaker to make the determination. In enacting Title IX, Congress conferred the power to promulgate regulations onto the Department. 20 U.S.C. 1682. The Supreme Court has noted that ''[t]he express statutory means of enforc[ing] [Title IX] is administrative,'' as ''[t]h[at] statute directs Federal agencies that distribute education funding to establish requirements that effectuate the nondiscrimination mandate, and permits the agencies to enforce those requirements through 'any . . . means authorized by law' including ultimately the termination of Federal funding.'' *Gebser,* 524 U.S. at 280–81 (quoting 20 U.S.C. 1682). Thus, the Department is well within its authority under 20 U.S.C. 1682 to promulgate this provision.

The Department also notes that the 2020 amendments at § 106.45(b)(6)(i) similarly require the screening of questions by the decisionmaker for relevance and impermissibility and the Department has the authority to limit questions to those that are relevant and not otherwise impermissible. As explained elsewhere in this preamble, the Department has concluded that information that is irrelevant or that falls into one of the categories of impermissible evidence should not be introduced into a proceeding because such information could delay or confuse the proceedings, unduly infringe on parties' privacy interests, or otherwise have pernicious consequences. The Department accordingly maintains that requiring questions to be screened for relevance and permissibility helps effectuate Title IX by ensuring that recipients' grievance procedures are efficient and fair. *See* § 106.45(b)(6) and (h). The decisionmaker is the appropriate person to prescreen questions for relevance and permissibility because, as explained above, the decisionmaker is required to receive training on impartiality as well as on the meaning and application of the term ''relevant'' and on the types of evidence that are impermissible. The Department notes that to assist the decisionmaker in making consistent determinations regarding whether or not to exclude a question, the Department added a definition of ''relevant'' to § 106.2 that was not in the 2020 amendments. Section 106.46(f)(3) also requires a decisionmaker to explain any decision to exclude a question that is not relevant or otherwise permissible. These requirements adequately guard against a decisionmaker arbitrarily excluding questions. The Department also notes that, consistent with the preamble to the 2020 amendments, the ''parties may appeal erroneous relevance determinations, if they affected the outcome,'' 85 FR 30343, under the final regulations at § 106.46(i)(1)(i), which provides for ''appeal rights on grounds that include procedural irregularity that affected the outcome.'' *Id.*

To align with language in § 106.46(f)(1), the Department has revised § 106.46(f)(3) to require the decisionmaker to explain the any decision to exclude questions that are impermissible in addition to those that are excluded for relevance. But the Department declines to require the decisionmaker to explain the rationale for excluding questions that are unclear or harassing. To ensure that otherwise permissible questions are not inadvertently rejected because they were worded or framed in an unclear or harassing way, however, the Department is persuaded that a party must have an opportunity to clarify or revise a question that the decisionmaker has determined is unclear or harassing. This opportunity to clarify or revise a question is not available when a decisionmaker determines that a question is not relevant or otherwise impermissible because, in those cases, it is the underlying substance of the question—not the manner in which it was asked—that is prohibited. The Department has revised § 106.46(f)(3) to require this opportunity and to also require that the question be asked if the party sufficiently clarifies or revises a question so that it is no longer unclear or harassing. Permitting a party to satisfactorily revise a question and have it asked ultimately provides the decisionmaker and the parties with better evidence and leads to more reliable outcomes as opposed to excluding the question and requiring the decisionmaker provide a rationale for the exclusion. It is also appropriate to require the decisionmaker to explain any decision to exclude questions due to relevance or impermissibility because the final regulations specifically define ''relevant'' and the types of evidence that are impermissible, and decisionmakers receive training on these issues. The terms ''harassing'' and ''unclear'' are more easily understood by laypeople and thus do not require the same level of explanation.

The Department disagrees with commenters who asserted that the Department cannot prohibit questions that are unclear or harassing. As noted above, in enacting Title IX, Congress conferred the power to promulgate regulations onto the Department. 20 U.S.C. 1682. And the Supreme Court has affirmed the agency's administrative authority ''to establish requirements that effectuate the nondiscrimination mandate,'' and to enforce those requirements through '''any . . . means authorized by law[.]''' *Gebser,* 524 U.S. at 280–81 (quoting 20 U.S.C. 1682). Thus, the Department is well within its authority under 20 U.S.C. 1682 to promulgate this provision. The Department also notes that the preamble to the 2020 amendments similarly permitted a recipient to prohibit advisors from questioning witnesses in an abusive, intimidating or disrespectful manner, and noted that a recipient may remove an advisor for asking a question in a harassing, intimidating, or abusive manner (*e.g.,* advisor yells, screams, or approaches a witness in an intimidating manner). *See, e.g.,* 85 FR 30319–20, 30324, 30331, 30342, 303061. Prohibiting such questions also serves the important purpose of ensuring nondiscrimination by prohibiting harassment as a condition of participating in grievance procedures. Declining to prohibit harassing questions could deter students from reporting sex-based harassment because of fears about traumatization during grievance proceedings, ultimately impairing the goal of effectuating Title IX's mandate that recipients operate their education programs and activities

free of discrimination on the basis of sex.

The Department declines to define unclear or harassing in the regulatory text because the terms have wide and common general understanding, and a determination of what specifically would be harassing or unclear in particular scenarios is necessarily fact-specific. The Department notes that the prohibition on these sorts of questions could apply to both the question and to the manner in which the question is asked. For assistance in understanding the meaning of the terms, the Department directs the commenter to the above-cited language from the preamble to the 2020 amendments, which was also referenced in the July 2022 NPRM, *id.,* and to the language in the July 2022 NPRM explaining that a question would be unclear if it is ''vague or ambiguous such that it would be difficult for the decisionmaker or party being asked to answer the question or discern what the question is about. For example, some of the key words in the question may have more than one meaning, or the period of time to which the question refers to may be unclear.'' 87 FR 41510. The Department also notes that, as explained above, § 106.46(f)(3) has been revised to require the decisionmaker to give a party an opportunity to clarify or revise a question the decisionmaker deemed unclear or harassing and have it asked if it is sufficiently clarified or revised. In addition, as noted above, consistent with the 2020 amendments, under the final regulations at § 106.46(i)(1)(i), the parties may appeal the erroneous exclusion of questions if they affected the outcome because it provides for appeal rights on grounds that include procedural irregularity that affected the outcome. *See* 85 FR 30343. The Department clarifies that questions about the complainant's sexual interests would always be excluded as impermissible, and questions about the complainant's prior sexual conduct would be excluded as impermissible unless offered to prove that someone other than the respondent committed the alleged conduct or is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment. *See* § 106.45(b)(7)(iii). Whether other questions about a party's prior sexual conduct are harassing is a fact-specific determination that depends on the content of the question, the manner in which it is asked, and the purpose for which is it offered.

The Department appreciates the opportunity to clarify that the ban on unclear or harassing questions applies to questions asked of both parties and witnesses. The language describing proposed § 106.46(f)(3) in the July 2022 NPRM, which cited language from the preamble to the 2020 amendments on this issue, discussed prohibiting advisors from questioning parties or witnesses in an abusive, intimidating, or disrespectful manner, and the Department did not intend to limit the provision to parties. *See* 87 FR 41510. To clarify this, the Department has revised the language in § 106.46(f)(3) to state that a postsecondary institution must not permit questions that are unclear or harassing of the party or witness being questioned.

To provide additional clarity for postsecondary institutions regarding their ability to impose and enforce rules of decorum, the Department has revised the language in § 106.46(f)(3) to state that a postsecondary institution may ''adopt and apply other reasonable rules regarding decorum'' instead of ''impose other reasonable rules regarding decorum.''

Changes: The Department has revised § 106.46(f)(3) to require a decisionmaker to explain any decision to exclude a proposed question as impermissible, as well as for relevance, and to require a party to have the opportunity to clarify or revise a question that the decisionmaker has determined is unclear or harassing and have the question asked if it is sufficiently clarified or revised. The Department has also clarified that unclear or harassing questions may not be asked of a party or witness. Finally, the Department has revised the language to clarify that a postsecondary institution may ''adopt and apply other reasonable rules regarding decorum.''

§ 106.46(f)(4): Refusal To Respond to Questions and Inferences Based on Refusal To Respond to Questions

Comments: Commenters offered varied opinions of proposed § 106.46(f)(4). For example, some commenters supported proposed § 106.46(f)(4) because the section as proposed required a decisionmaker to disregard prior supportive statements of a party who does not respond to questions related to their credibility while permitting a decisionmaker to consider statements against interest made by the party. Other commenters asserted that proposed § 106.46(f)(4) exceeded agency authority, was inconsistent with Title IX and case law, including the court's decision in *Victim Rights Law Center,* 552 F. Supp. 3d at 134, and created a ban on testing the credibility of the parties. And other commenters viewed proposed § 106.46(f)(4), including the phrases ''does not respond to questions related to their credibility'' and ''supports that party's position,'' as unworkable, vague, or confusing. Some commenters were also concerned that proposed § 106.46(f)(4) could chill reporting because potential complainants may choose not to report sex-based harassment if they know that if they refuse to answer a question related to their credibility all of their statements will be disregarded.

Commenters who favored giving postsecondary institutions additional flexibility and discretion proposed various ideas for alternative language. Some commenters suggested allowing a decisionmaker to rely on prior statements and consider how the refusal to answer some or all questions integrates with their overall credibility assessment or to consider the party's refusal to respond to questions and give such refusal the weight they deem appropriate under the totality of the circumstances, noting this approach has been adopted by other administrative hearing bodies when a witness is unavailable or unwilling to appear to answer certain questions. One commenter suggested that a postsecondary institution should be permitted to consider the extent to which a party's evasiveness or apparent candor impacts that party's credibility and be given reasonable discretion to decide whether to consider or exclude certain evidence. Another commenter opposed proposed § 106.46(f)(4) because it would not distinguish between a party or witness who intentionally refuses to cooperate with an investigation and a party or witness who may not or cannot remember aspects of the incident.

Some commenters were concerned that proposed § 106.46(f)(4) would only apply to parties and not witnesses and urged the Department to apply proposed § 106.46(f)(4) to witnesses in the same manner as it applies to parties.

Some commenters were concerned that proposed § 106.46(f)(4) would conflict with some State laws that require a postsecondary institution to give the complainant the choice as to whether the complainant wants to repeat their account of the alleged sex-based harassment.

One commenter asked the Department to remove the word ''solely'' because, according to the commenter, it is impermissible to draw any inference based on lack of testimony, especially in cases that could involve future criminal proceedings.

Discussion: The Department proposed § 106.46(f)(4) due to concerns that

''placing no limitations on the decisionmaker's ability to consider statements made by a party who does not submit to a credibility assessment could lead to manipulation by the parties.'' 87 FR 41509. After carefully considering the comments, the Department agrees with the many commenters who expressed concerns that proposed § 106.46(f)(4) would have been difficult to implement in practice. The Department also acknowledges commenters' concerns that proposed § 106.46(f)(4) failed to provide postsecondary institutions and their decisionmakers with appropriate flexibility to fully implement Title IX. In light of the commenters' concerns, the Department has revised § 106.46(f)(4) to provide the decisionmaker with additional discretion and has removed the language commenters found confusing and difficult to implement, while still permitting the decisionmaker to place less weight on statements made by a party or witness who refuses to respond to questions. Final § 106.46(f)(4) is within the Department's authority and not inconsistent with the case law because it is designed to effectuate Title IX's nondiscrimination mandate by helping ensure that grievance procedures produce fair and reliable outcomes. Final § 106.46(f)(4) provides postsecondary institutions with necessary flexibility and discretion to rely on their expertise in evaluating and weighing evidence while still enabling them to address situations in which a party or witness attempts to manipulate the process by presenting inaccurate testimony and refusing to answer questions that probe at those inaccuracies. This addresses the potential for manipulation by the parties that the court in *Victim Rights Law Center* expressed concern about. *See* 552 F. Supp. 3d at 132–33.

In addition, in response to commenters' specific concerns that it would be difficult to determine which questions are related to credibility and that whether a question is related to credibility could differ depending on the context, circumstances, and substance of the answer, the Department has removed the reference to questions related to credibility from § 106.46(f)(4) in the final regulations and has revised this provision to apply to questions in general and not just those related to credibility.

As many commenters discussed, decisionmakers are regularly tasked with evaluating and weighing evidence when making determinations as to whether sex-based harassment occurred. After considering the commenters' views and proposed alternatives, the Department has decided that it is not necessary to set out specific regulatory requirements for when and how a decisionmaker may consider statements made by a party or witness who refuses to respond to questions related to their own credibility. Instead, the Department has determined a decisionmaker must have the flexibility to determine, based on the totality of the circumstances, the weight to be given, if any, to a statement made by a party or witness who refuses to respond to questions deemed relevant and not impermissible, including those related to credibility. The Department notes that questions posed to a party or witness, and thus the only questions to which a party or witness might not respond, must be relevant and not impermissible under §§ 106.2 and 106.45(b)(7) and not unclear or harassing under § 106.46(f)(3). The Department also notes that the final regulations at § 106.45(h)(1) require the decisionmaker to evaluate all relevant and not otherwise impermissible evidence for its persuasiveness. The requirement to evaluate the relevant evidence for its persuasiveness necessarily includes consideration of the weight or credibility to assign to a party's or witness's statements. The language in § 106.46(f)(4) giving the decisionmaker flexibility to decide how to handle statements made by a party who refuses to respond to relevant and not impermissible questions applies to situations in which a party or witness declines to participate entirely in the Title IX grievance procedures. It also applies to situations in which a party or witness otherwise participates in the Title IX grievance procedures but declines to respond to some or all questions. Consistent with the Department's position in the 2020 amendments, ''statements'' applies to any statement of a party or witness and ''has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements.'' 85 FR 30349.

As part of the evaluation and weighing of the evidence, a decisionmaker could therefore take into account the reasons why a party or witness refused to answer questions when determining what weight to assign to that party or witness's statements. For example, the decisionmaker could consider whether the party or witness intentionally refused to answer any questions so that earlier statements made by that party or witness could not be tested during questioning, or whether the party or witness answered nearly all relevant questions and offered a reasonable justification for not responding to a small number of questions. This change will provide postsecondary institutions with necessary flexibility and discretion to rely on their expertise in evaluating and weighing evidence in responding to complaints of sex-based harassment, while still enabling them to address situations in which a party or witness attempts to manipulate the process by presenting inaccurate testimony and refusing to answer questions that probe at those inaccuracies. This additional flexibility may alleviate commenters' concerns that proposed § 106.46(f)(4) would have conflicted with some State laws that require a postsecondary institution to give the complainant the choice as to whether the complainant wants to repeat their account of the alleged sex-based harassment because a decisionmaker could take the existence of such a State law into account in considering the complainant's refusal to respond to questions.

The Department acknowledges that some commenters questioned why proposed § 106.46(f)(4) would not apply to witnesses and asked the Department to apply it to witnesses. The Department has revised the language in § 106.46(f)(4) based on the determination that it should apply to witnesses in the same manner it applies to the parties.

The Department acknowledges that some commenters would prefer the Department not permit a decisionmaker to discount statements made by a party or witness who does not respond to questions, but as explained above the Department has concerns that prohibiting a decisionmaker from determining the amount of weight, if any, to give a statement made by a party or witness who refuses to respond to questions could lead to manipulation by the parties. The Department notes that under § 106.46(f)(4) as revised, a decisionmaker may decide, based on the totality of the circumstances, to give full weight to statements made by a party or witness who refused to respond to a question, and a decisionmaker is not required to exclude such statements.

The Department disagrees that § 106.46(f)(4) creates a ban on testing the credibility of the parties. The final regulations at §§ 106.45(g) and 106.46(f) discuss the processes that a recipient must have in place to assess credibility, and § 106.46(f)(4) permits a decisionmaker to determine the amount of weight, if any, to place upon statements made by a party or witness who refuses to respond to questions. It

does not prohibit recipients from assessing credibility.

The Department acknowledges that some commenters requested clarification regarding the phrase ''does not respond to questions related to their credibility'' and how many questions a party must refuse to answer and whether refusal to respond to one question was sufficient. The Department has removed this language in the final regulations. Although the final regulations discuss a party or witness who refuses to respond to questions, it is not necessary to define this phrase or clarify how many questions a party or witness must refuse to respond to in light of the other revisions made to § 106.46(f)(4). As explained above, § 106.46(f)(4) as finalized permits a decisionmaker to determine, based on the totality of the circumstances, what weight, if any, to give statements made by a party or witness who refuses to respond to one or more questions. Thus, the decisionmaker has discretion to consider whether the number of questions the party or witness refused to respond to should be taken into consideration when determining the weight to give that party's statements. The decisionmaker also has discretion to determine whether the party or witness intentionally refused to respond to questions, or did not refuse but simply could not recall details for a variety of valid reasons.

The Department declines to make any substantive revisions to the language in § 106.46(f)(4) restricting a recipient from drawing inferences about whether sex-based harassment occurred based solely on the refusal to answer by a party or witness. The Department notes that this language is similar to language in the 2020 amendments, *see, e.g.,* 85 FR 30349 n.1341, and it is appropriate not to permit a postsecondary institution to draw inferences about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond to questions because such a determination must be based on the decisionmaker's evaluation of all the relevant and not otherwise impermissible evidence under § 106.46(h). It is not necessary to change ''whether sex-based harassment occurred'' to ''whether or not sex-based harassment occurred'' because the current phrasing is consistent with the terminology used throughout the final regulations and would include a determination that sex-based harassment did not occur. The Department disagrees with a commenter that it is never permissible to draw an inference as to whether sex-based harassment occurred based on a party's or witness's refusal to respond to questions. *Cf. Baxter,* 425 U.S. at 318 (discussing the ''prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them''). To be sure, as the commenter pointed out, criminal consequences may sometimes follow from the same conduct that constitutes sex-based harassment, but whether it would be permissible to draw an adverse inference from a refusal to respond to such questions in a later criminal trial is distinct from the issue of whether such an inference is permissible in Title IX grievance procedures. As already explained above, Title IX grievance procedures are significantly different from criminal trials because, among other things, they do not implicate the same degree of potential infringement on a respondent's liberty and hence do not require the same protections for respondents. The Department clarifies that it is impermissible to draw an adverse inference about whether sex-based harassment occurred based only on a respondent's refusal to respond to questions, including in situations in which a respondent may face future criminal proceedings, and thus the Department declines the commenter's suggestion to remove the term ''solely.''

Regarding specifying when credibility assessments are appropriate, who should make them, and how to apply them to determine investigation outcomes, the Department notes that the final regulations at §§ 106.45(g) and 106.46(f) discuss the processes that a recipient must have in place to enable the decisionmaker to assess credibility, and more specific information regarding processes for assessing credibility is provided in the preamble section discussing § 106.46(f)(1).

In light of the revisions the Department has made to proposed § 106.46(f)(4) to remove references to credibility and language regarding statements that support that party's position from the final regulations, it is not necessary to further clarify those terms.

Changes: The Department has removed the reference to questions related to credibility from § 106.46(f)(4) and revised this provision to apply to questions in general and not just those related to credibility. The Department has also revised § 106.46(f)(4) to permit a decisionmaker to determine the weight to be given, if any, to a statement made by a party or witness who refuses to respond to questions deemed relevant and not impermissible.

11. Section 106.46(g) Live Hearings

Impact of Live Hearings on Parties and Postsecondary Institutions

Comments: Some commenters asserted that the proposed removal of the live hearing requirement would provide postsecondary institutions with the flexibility to adopt practices based on their unique environments. Other commenters stated that the live hearing requirement from the 2020 amendments unnecessarily burdens parties and postsecondary institutions, especially smaller and less well-resourced postsecondary institutions. Some commenters noted that making live hearings optional will enable smaller postsecondary institutions to pursue alternatives to live hearings that encourage reporting and address fears of retaliation.

Some commenters supported the proposed removal of the live hearing requirement because, according to the commenters, live hearings burden and traumatize complainants and may cause them not to seek support. Some commenters said that removing the live hearing requirement would cause less trauma for complainants without impacting parties' due process rights.

Some commenters stated that a live hearing requirement chills reporting and explained that complainants may not participate in the Title IX grievance procedures to avoid public ridicule and exposure of sensitive information. Some commenters said in-person interaction between the parties should be avoided.

Other commenters disagreed that the live hearing requirement posed unreasonable burdens or chilled reporting. One commenter, for example, stated that the credibility of an allegation should be questioned when an individual is not willing to make a complaint that will be subject to the accountability that a live hearing provides.

Discussion: The Department acknowledges the views of some commenters that removal of the live hearing requirement would provide flexibility and may increase reporting and thanks postsecondary institutions for sharing their specific experiences with the requirements of the 2020 amendments. The Department also understands that some commenters disagree that live hearings are burdensome and chill reporting and view live hearings as necessary regardless of any potential burden they may pose to a postsecondary institution. After carefully considering the views expressed by the commenters, the Department maintains the position articulated in the July 2022 NPRM that

the relevant case law interpreting Title IX, due process, and fundamental fairness do not require every postsecondary institution to hold a live hearing in all sex-based harassment cases as long as the postsecondary institution provides another live-questioning process. *See* 87 FR 41506–07. The Department has determined that the requirements in the final regulations at § 106.46(g) for the live hearing process, and § 106.46(f) for the live-questioning process if a postsecondary institution chooses not to use a live hearing, appropriately protect the right of all parties to have a meaningful opportunity to present and respond to allegations of sex-based harassment. These provisions also protect postsecondary institutions' interest in grievance procedures that enable the decisionmaker to determine the facts and that are equitable to the parties. The Department acknowledges that in-person interaction may be challenging for parties and notes that even if a postsecondary institution chooses to use a live hearing, the final regulations at § 106.46(g) permit a postsecondary institution to conduct the live hearing with the parties physically present in separate locations, including virtually.

The Department recognizes that before the 2020 amendments postsecondary institutions used a variety of methods to conduct investigations and that postsecondary institutions have varying resources. Without taking a position on the specific investigation methods described by the commenters, the Department notes that, as discussed above, the final regulations provide a postsecondary institution with reasonable options for how to structure its grievance procedures to ensure they are equitable for the parties while accommodating each postsecondary institution's administrative structure, educational community, and the applicable Federal, State, or local law. The Department also notes that all recipients of Federal financial assistance from the Department are required to comply with the final regulations regardless of their resources.

The Department maintains that individuals decline to make a complaint of sex-based harassment for a variety of reasons and disagrees with the proposition that declining to make a complaint of sex-based harassment when a live hearing is required means, as one commenter alleged, that the credibility of the allegation should be questioned.

Changes: None.

Due Process and Fairness Considerations

Comments: Some commenters stated that, at the postsecondary level, live hearings are necessary for due process and fundamental fairness, arguing that a live hearing with cross examination is valuable when parties and witnesses are adults. Some of these commenters added that the rights of the respondent must be balanced with the rights of the complainant, particularly in light of the harm to the respondent caused by a wrongful finding, such as expulsion, and further argued that recipients will not protect respondents' rights on their own.

Some commenters stated that the proposed regulations would lead to the elimination of live hearings because postsecondary institutions are more likely to use procedures that are less transparent and accountable so that, according to the commenters, institutions can let their biases play out when given flexibility to do so. One commenter stated that when postsecondary institutions have discretion, they remove procedural safeguards, which happened with conduct that is not covered under the definition of ''sexual harassment'' under the 2020 amendments. One commenter stated that live hearings should be required in cases in which credibility is at issue so decisionmakers can hear a full and unbiased presentation of evidence. Some commenters stated that the proposed removal of the live hearing requirement will foster sex bias and stereotypes in adjudications. Other commenters stated that it will also impact the ability to review and respond to evidence, noting that access to evidence prior to a hearing allows parties to effectively participate in the proceedings. Some commenters shared personal stories of bias and other experiences under the Department's guidance that was in effect before the 2020 amendments.

Discussion: The Department understands that some commenters would prefer the Department to maintain the requirement for live hearings with advisor-conducted cross-examination from the 2020 amendments. Although the Department agrees that some courts have held that postsecondary institutions must use a live hearing in certain sex-based harassment cases, after thoroughly considering the views of the commenters, the Department maintains the position articulated in the preamble to the 2020 amendments that the Supreme Court has not ruled on what procedures satisfy due process in the specific context of Title IX sex-based harassment grievance procedures held by a postsecondary institution and that what constitutes a meaningful opportunity to be heard depends on specific circumstances. *See* 85 FR 30327. As discussed above, the Department also maintains the position articulated in the July 2022 NPRM that the relevant case law interpreting Title IX, due process, and fundamental fairness do not require every postsecondary institution to hold a live hearing in all cases as long as the postsecondary institution provides another live-questioning process. *See* 87 FR 41506–07. As stated in the July 2022 NPRM, permitting, but not requiring, postsecondary institutions to use a live hearing for sex-based harassment complaints provides a postsecondary institution with reasonable options for how to structure its grievance procedures to ensure they are equitable for the parties while accommodating each postsecondary institution's administrative structure, educational community, and the applicable Federal, State, or local law. *See* 87 FR 41505.

The Department recognizes the view of some commenters that, if the final regulations do not require live hearings under Title IX, postsecondary institutions will eliminate live hearings, and the concerns expressed by some commenters that, when not required to do so, a number of postsecondary institutions did not to choose to hold a live hearing. However, the Department disagrees that this approach will lead to the elimination of live hearings. As an initial matter, the final regulations permit a postsecondary institution to use a live hearing when applicable case law or other sources of law require that approach. The Department acknowledges that once the final regulations go into effect some postsecondary institutions, particularly those for which applicable case law or other sources of law do not require a live hearing or that have an administrative structure that makes it difficult to conduct a live hearing, may choose to provide another live-questioning process instead of a live hearing for some or all types of sex-based harassment complaints. The goal of the final regulations is to fully effectuate Title IX's nondiscrimination mandate and, as explained above, the relevant case law does not support requiring every postsecondary institution to hold a live hearing as part of its obligations under Title IX. Nothing in the final regulations precludes a postsecondary institution from complying with applicable case law or

other sources of law regarding live hearings.

The Department acknowledges commenters who stated that a live hearing is necessary when credibility is at issue so that the decisionmakers can hear a full and unbiased presentation of evidence and expressed concern that methods other than live hearings are inadequate because they may not be objective, rely on investigators who lack training, or foster stereotypes and bias because they are not transparent. The Department also acknowledges commenters who shared personal stories of bias and other experiences prior to the 2020 amendments. The Department notes that the final regulations do not simply implement prior OCR guidance. They include, for example, more specific requirements for a recipient's prompt and equitable grievance procedures and explicitly require training on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. The final regulations, like the 2020 amendments, require training regarding conflicts of interest and bias, regardless of whether a live hearing is used. The final regulations at § 106.45(b)(2) prohibit any person designated as a Title IX Coordinator, investigator, or decisionmaker from having a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. Additionally, § 106.8(d) requires investigators, decisionmakers, and other persons responsible for implementing the recipient's grievance procedures to receive training on a number of topics, including the recipient's grievance procedures under § 106.45, and if applicable § 106.46 (which could include training on how to assess credibility under § 106.46(f)); how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; the meaning and application of the term ''relevant'' in relation to questions and evidence; and the types of evidence that are impermissible regardless of relevance under § 106.45, and if applicable § 106.46.

Regarding commenters who expressed specific concern that the removal of the live hearing requirement would lead to bias based on sex, § 106.31(a)(1) and (b)(4) require that a recipient carry out its grievance procedures in a nondiscriminatory manner and prohibit a recipient from discriminating against any party based on sex. In addition, § 106.45(b)(1) requires a recipient's grievance procedures to treat complainants and respondents equitably and that this requirement applies regardless of the sex of the complainant or respondent. Anyone who believes that a recipient's treatment of a complainant or respondent constitutes sex discrimination may file a complaint with OCR, which OCR would evaluate and, if appropriate, investigate and resolve consistent with the requirement that a recipient carry out its grievance procedures in a nondiscriminatory manner. The Department also notes that any person, regardless of sex, may be a complainant or a respondent, and thus permitting, but not requiring, a postsecondary institution to use live hearings does not discriminate based on sex.

In response to commenters who raised concerns that the removal of the live hearing requirement would limit transparency and negatively impact the parties' ability to review and respond to the evidence, the Department notes that the final regulations contain several requirements regarding accessing evidence, which apply regardless of whether a live hearing is used and which promote transparency. Section 106.45(f)(4) requires that a recipient provide each party with an equal opportunity to access the relevant and not otherwise impermissible evidence or an accurate description of such evidence, as well as a reasonable opportunity to respond. If the recipient provides a description of the evidence, it must provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party. In addition, § 106.46(e)(6)(i) requires that, for complaints of sex-based harassment involving a student party at postsecondary institutions, a postsecondary institution must provide the parties with an equal opportunity to access either the relevant and not otherwise impermissible evidence, or the same written investigative report that accurately summarizes the evidence. If the postsecondary institution provides access to an investigative report, it must provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party.

Changes: None.

Explanation of Removal of Live Hearing Requirement

Comments: Some commenters generally stated that the proposed removal of the live hearing requirement would be arbitrary and capricious. Another commenter stated that the Department only focused on why cross-examination is not necessary but failed to discuss the costs of removing a requirement to conduct live hearings with cross-examination, as compared with other methods.

Discussion: The Department disagrees that the removal of the live hearing requirement is arbitrary and capricious. The Department notes the extensive discussion in the July 2022 NPRM regarding the proposed removal of the requirement for live hearings with advisor-conducted cross-examination. *See* 87 FR 41503–09. As discussed above, some courts have held that postsecondary institutions must utilize a live hearing in certain sex-based harassment cases. However, as the Department articulated in the preamble to the 2020 amendments, the Supreme Court has not ruled on what procedures satisfy due process in the specific context of a postsecondary institution's Title IX sex-based harassment grievance procedures. What constitutes a meaningful opportunity to be heard depends on the specific circumstances. *See* 85 FR 30327. In addition, as discussed above, the Department maintains the position articulated in the July 2022 NPRM that the relevant case law interpreting Title IX, due process, and fundamental fairness does not require a postsecondary institution to hold a live hearing in all cases as long as the postsecondary institution provides another live-questioning process. *See* 87 FR 41506–07.

The Department maintains that it has adequately addressed any costs associated with the removal of the live hearing requirements and references the July 2022 NPRM, which discussed the costs and benefits of the various proposed changes to the grievance procedure requirements. *See* 87 FR 41546–47, 41554–58. For a detailed discussion of the costs and benefits of these final regulations, see the *Regulatory Impact Analysis* section.

Changes: None.

Requiring Live Hearings in Certain Circumstances

Comments: Some commenters stated that a postsecondary institution should be required to hold a live hearing if requested to do so by either party. Other commenters urged the Department to require a live hearing unless both parties knowingly and voluntarily waive the right to a live hearing by choosing an informal resolution process or if the postsecondary institution has good cause as to why a live hearing would be inappropriate and clearly articulates its good cause in writing with an opportunity for the parties to be heard. Another commenter stated that live hearings should be required unless a

complainant requests a single decisionmaker. One commenter stated that when a postsecondary institution makes live hearings optional, they should only take place when both parties consent in writing so that both parties have an equal say in determining the method used for adjudication. Another commenter asked the Department to require a postsecondary institution to provide for a live hearing during the appeals process if new evidence or arguments are offered to the appellate decisionmaker.

Some commenters stated that live hearings should be required when there is a possibility of serious or life-altering consequences. One commenter said that a live hearing should be required for all sex-based harassment complaints at elementary schools and secondary schools because it is the best way to assess credibility.

Another commenter asked whether postsecondary institutions that typically use an administrative decisionmaking process to resolve sex-based harassment complaints would be permitted to use a live hearing under extraordinary circumstances.

Discussion: The Department declines to make any changes in response to suggestions from commenters to require a postsecondary institution to conduct a live hearing under certain circumstances or for certain types of complaints. As explained above, a postsecondary institution should have some degree of latitude to determine how to structure its grievance procedures to ensure they are equitable for the parties while accommodating each postsecondary institution's administrative structure, educational community, and the applicable Federal, State, or local law. This includes determining whether and under what circumstances to use a live hearing for sex-based harassment complaints involving student complainants or student respondents. Regardless of that discretion, however, postsecondary institutions must provide a live-questioning process that enables the decisionmaker to assess the credibility of parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex-based harassment. In situations in which a recipient chooses not to use a live hearing, § 106.46(f)(1)(i) allows either the investigator or the decisionmaker to ask questions of the parties and witnesses during individual meetings. If the investigator asks the questions of the parties and witnesses, the decisionmaker would rely on the investigator's assessment of credibility.

The Department similarly declines to require a postsecondary institution to provide for a live hearing during the appeals process if new evidence or arguments are offered to the appellate decisionmaker. Nothing in the final regulations precludes a postsecondary institution from doing this when applicable case law or other sources of law require that approach or the postsecondary institution uses its discretion to choose that approach.

The Department maintains that it is appropriate to give postsecondary institutions the discretion as to whether to use a live hearing and declines to require live hearings when there is a possibility of serious or life-altering consequences. The Department notes that postsecondary institutions might well choose to develop more formal procedures for disciplinary matters with more significant consequences, but believes the final regulations—which require an equal opportunity to access relevant and not otherwise impermissible evidence, a live-questioning process, and an opportunity for an appeal—are sufficient to ensure the fairness of grievance procedures.

The Department also declines a commenter's suggestion to require a live hearing for all sex-based harassment complaints at elementary schools and secondary schools. Nothing in § 106.45(g), which governs the process for questioning parties and witnesses at the elementary school and secondary school level, precludes an elementary school or secondary school from choosing to utilize a live hearing for sex-based harassment complaints. However, the Department notes that, as explained in the preamble to the 2020 amendments, parties under the grievance process in elementary schools and secondary schools generally are not adults and lack the developmental ability of adults and the legal right to pursue their own interests. *See* 85 FR 30364. If an elementary school or secondary school chooses to hold a live hearing as part of its process for questioning parties and witnesses under § 106.45(g), it has discretion as to how to conduct such a hearing because the live hearing procedures in § 106.46(g) only apply to sex-based harassment complaints involving a student complainant or respondent at postsecondary institutions. The Department wants to leave elementary schools and secondary schools with flexibility to apply live hearing procedures that fit the needs of their educational environment, which is consistent with the Department's position on this issue in the preamble to the 2020 amendments. *See* 85 FR 30365. For example, if a recipient chooses to use a live hearing in a proceeding at the elementary school level, the young ages of the parties and witnesses involved may warrant limiting the duration of the hearing or ensuring that parties and witnesses have assistance during questioning.

Regarding commenters' questions as to whether a postsecondary institution that typically does not hold a live hearing for sex-based harassment complaints could do so for some cases and whether a postsecondary institution could decide on a case-by case basis or for certain categories of cases to hold a live hearing, as explained in the discussion of § 106.45(b)(8), a postsecondary institution may choose to use a live hearing for some, but not all, complaints of sex-based harassment as part of its grievance procedures under § 106.46. As required under § 106.45(b)(8), the postsecondary institution's written grievance procedures must articulate consistent principles for how it will determine the types of complaints for which it will use live hearings (*e.g.,* for complaints in which both parties are students or complaints for which the maximum sanction is suspension or expulsion). In addition, a recipient's determination regarding whether to apply certain procedures to some, but not all, complaints must be made in a manner that treats complainants and respondents equitably consistent with § 106.45(b)(1).

The Department declines to require both parties to consent in writing before a postsecondary institution may use a live hearing because as explained above, it is appropriate to provide postsecondary institutions with the flexibility to determine whether and when to use a live hearing. Nothing in the final regulations precludes a postsecondary institution from choosing on its own only to use a live hearing if both parties consent in writing.

Regarding whether certain aspects of the live hearing are optional and how the removal of the live hearing requirement impacts the live-questioning process, the Department notes that if a postsecondary institution chooses to use a live hearing for complaints of sex-based harassment involving a student, the postsecondary institution must comply with all of the requirements for a live hearing in § 106.46(g). A detailed discussion of live-questioning procedures, including the various options a postsecondary institution has for questioning parties and witnesses to aid in evaluating allegations and assessing credibility, is in the discussion of § 106.46(f). If the

postsecondary institution chooses to use a live hearing under § 106.46(g), then it must follow the procedures in § 106.46(f)(1)(ii). Conversely, if the postsecondary institution chooses not to use a live hearing under § 106.46(g), then it must follow the procedures in § 106.46(f)(1)(i).

Changes: None.

Live Hearing Logistics

Comments: One commenter supported the option of holding live hearings virtually because it provides a trauma-informed process for complainants and allows the process to continue when in-person meetings are not feasible. Another commenter asked the Department to issue guidance on virtual live hearings. One commenter supported the requirement that recipients hold live hearings virtually upon the request of any party, but asked the Department to change ''will'' in proposed § 106.46(g) to ''must'' for clarity. One commenter asked the Department to state that the postsecondary institution must ensure both parties have equal opportunity to speak and listen in a hybrid live hearing, when one person testifies in person and the other remotely. Some commenters, however, stated that telephonic or virtual testimony hinders the ability to assess witness demeanor and requested that the Department require in-person testimony.

Some commenters expressed concern that the phrase ''or communicating in another format'' is unclear because although the language likely permits an alternative form of communication to accommodate a disability, individuals without a disability could claim the right to communicate in another format, such as typing in a chat instead of speaking. Other commenters encouraged the Department to ensure that hearings and questioning are trauma-informed, which the Department understood to mean that it would ensure that individuals conducting the hearing would be required or trained to take into consideration the signs and symptoms of trauma and take steps to avoid re-traumatizing individuals participating in the hearing.

Discussion: The Department appreciates the varying views expressed by commenters regarding holding live hearings with the parties physically present in the same geographic location or with the parties physically present in separate locations, including virtual participation. The Department declines to issue any additional guidance at this time regarding conducting live hearings virtually but clarifies that nothing in § 106.46(g) requires the parties to be physically present at the same location for a live hearing. Section 106.46(g) permits a postsecondary institution to allow any party to participate in the live hearing virtually as long as the decisionmaker and parties can simultaneously see and hear the party or witness while that party is speaking. The Department maintains that it is necessary to revise § 106.46(g) to require a postsecondary institution to ensure both parties have equal opportunity to speak and listen in a hybrid live hearing when one person testifies in person and the other remotely and notes that the final regulations at § 106.45(b)(1) require a recipient's grievance procedures to treat the parties equitably.

The Department agrees with the commenter's suggestion to change ''will'' to ''must'' to clarify that upon the request of either party, the postsecondary institution must conduct the live hearing with the parties physically present in separate locations (which can be virtual) and the Department has revised the regulatory text accordingly.

The Department acknowledges the view of the commenters that telephonic or virtual testimony may hinder the ability to assess witness demeanor but declines to make any changes to require in-person testimony at a live hearing. The Department notes that § 106.46(g) only permits the parties to participate virtually if the decisionmaker and parties can simultaneously see and hear the party or witness while that party is speaking; thus, telephonic testimony without video is not permitted. The Department maintains the position in the preamble to the 2020 amendments that any minimal reduction in the ability to assess demeanor by the use of technology is justified by the benefits of shielding a complainant from testifying in the presence of a respondent. *See* 85 FR 30355–56.

The Department agrees the proposed § 106.46(g) was potentially unclear as to when a person would be allowed to ''communicat[e] in another format.'' The Department's intent was that a person would be allowed to do so only when necessary to accommodate a disability that required communication in a format other than speaking. Upon further consideration, the Department has determined that it is not necessary to include this language in the regulatory text. The Department reiterates the position from the preamble to the 2020 amendments, 85 FR 30498, and elsewhere in this preamble that recipients' obligations to comply with these final regulations and with disability laws applies to all aspects of responding to sex discrimination under Title IX, including throughout the grievance procedures in § 106.45, and if applicable § 106.46. Compliance with disability laws may require a postsecondary institution to permit a person with a disability to use an alternative form of communication during a live hearing. Persons who do not require an accommodation for a disability or auxiliary aid or service would be required to speak during the hearing, as opposed to communicating through a method such as typing in a chat, as suggested by the commenter. For additional information regarding students with disabilities who are complainants or respondents in Title IX grievance procedures, see the discussion of § 106.8(e).

The Department declines to require recipients to ensure that hearings and questioning are trauma-informed because recipients that sufficiently train their investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures, as required by § 106.8(d)(2), will be able to implement the recipients' grievance procedures in ways that treat complainants and respondents respectfully and fairly, and that imposing specific trauma-informed obligations would interfere with recipients' need for flexibility in tailoring their training for their educational community. The Department notes that, consistent with the Department's position explained in the preamble to the 2020 amendments, a recipient has discretion to use a trauma-informed approach in handling sex discrimination complaints as long as the approach complies with the requirements in the final regulations, including the grievance procedure requirements in § 106.45, and if applicable § 106.46. *See* 85 FR 30323.

Changes: The Department has revised § 106.46(g) by replacing ''will'' with ''must'' so that upon the request of either party the postsecondary institution must conduct the live hearing with the parties physically present in separate locations, and by removing the phrase ''or communicating in another format.''

12. Section 106.46(h) Determination Whether Sex-Based Harassment Occurred

Comments: Commenters expressed a variety of views on proposed § 106.46(h). For example, one commenter supported proposed § 106.46(h) because it would require recipients to notify both complainants and respondents of sanctions. The commenter stated such information is necessary for the complainant to feel

safe returning to school. Another commenter supported proposed § 106.46(h) because it would help parties to understand a recipient's determination, allow a party to appeal, and help the judiciary to evaluate whether recipients handled cases appropriately.

Some commenters opposed proposed § 106.46(h) because, for example, they preferred the 2020 amendments or believed proposed § 106.46(h) was too vague in describing the information required in a written determination. One commenter also expressed concern that recipients would be able to find students responsible for sex-based harassment without demonstrating any violation of a recipient's code of conduct. Other commenters opposed proposed § 106.46(h) because it would not require the written determination to include an analysis of credibility.

One commenter requested that proposed § 106.46(h) be modified to apply to all complaints of sex discrimination. Another commenter requested proposed § 106.46(h) include a requirement that the written determination expressly identify which elements of the allegations were found by the standard of proof and which were not.

One commenter requested clarification of whether ''simultaneously'' would mean ''without undue delay between notifications.'' Another commenter requested clarification whether recipients must separately inform a complainant of ''any'' remedies they will receive, not just ''whether'' they will receive remedies.

Discussion: The Department disagrees that § 106.46(h) is too vague in describing the information required in a written determination. Section 106.46(h) mandates that a written determination must include certain key elements so that the parties have a thorough understanding of the investigative process and information considered by the recipient in reaching conclusions. *See* 87 FR 41511. Section 106.46(h) provides for a written determination adequate for the purpose of an appeal or judicial proceeding reviewing the determination regarding responsibility. The Department also disagrees that references to ''sex-based harassment'' within § 106.46(h) are not sufficiently precise. ''Sex-based harassment'' is a defined term under these regulations and can be understood to include all conduct in the definition in § 106.2.

The Department declines to modify § 106.46(h) to apply to all complaints of sex discrimination. Section § 106.45(h)(2), which applies to all complaints of sex discrimination for all recipients, including elementary schools and secondary schools, provides for notification in writing of the determination whether sex discrimination occurred under Title IX, including the rationale for this determination. Section 106.46(h), on the other hand, contains additional requirements that apply only to complaints of sex-based harassment involving a student party at a postsecondary institution. Because the allegations, evidence, and disciplinary sanctions in sex-based harassment cases at postsecondary institutions are often more extensive and complex than other forms of complaints of sex discrimination, it is appropriate to require notifications about the determination whether sex-based harassment occurred to provide additional details, including a written explanation of how the evidence was evaluated and how the harassment, if any, will be disciplined. A detailed notification, in writing, also helps all parties understand how these often-complex cases have been resolved.

The Department also declines to require recipients to identify a violation of a recipient's code of conduct in a written determination. Recipients retain discretion to refer in the written determination to any provision of the recipient's own code of conduct that prohibits conduct meeting the § 106.2 definition of ''sex-based harassment,'' but § 106.46(h) helps ensure that these final regulations are understood to apply to a recipient's response to sex-based harassment under Title IX and not to apply to a recipient's response to non-Title IX types of misconduct. The Department likewise declines to expressly require a written determination to include an analysis of credibility or identify which elements of the allegations were found by the standard of proof and which were not. The Department notes that to the extent that a credibility analysis is relevant to a decisionmaker's evaluation of the relevant evidence and determination whether sex-based harassment occurred, it would be included in the written determination under § 106.46(h)(1)(iii). The Department also declines to specify the exact types of sanctions that may be imposed in a written determination under § 106.46(h) because recipients have the flexibility to determine disciplinary sanctions, as appropriate, consistent with these final regulations. The Department notes that any disciplinary sanctions imposed would need to be consistent with the definition of ''disciplinary sanctions'' and otherwise comply with the requirements in these final regulations.

The Department appreciates the opportunity to clarify that the term ''simultaneously'' in § 106.46(h) should be interpreted in accordance with its plain meaning. The Department understands ''simultaneously'' to ordinarily mean ''at the same time.'' *See Simultaneous,* Merriam-Webster Dictionary, *https://www.merriam-webster.com/dictionary/simultaneous* (last visited Mar. 12, 2024). The Department declines to adopt the commenter's suggestion that simultaneously might mean ''without undue delay between notifications,'' but the Department would not conclude a recipient failed to comply with Title IX because of a de minimis delay in notifications, such as a delay of a few minutes when sending email notifications to the parties. The Department also appreciates the opportunity to clarify that § 106.46(h) does not require a recipient to provide information about the particular remedies offered in the written determination, only whether remedies will be provided, to protect the privacy of the complainant while preserving the overall fairness of giving both parties identical copies of the written determination simultaneously. Section § 106.45(h)(3) provides that the Title IX Coordinator is responsible for coordinating the provision and implementation of remedies and, when a written determination states that remedies will be provided, the party receiving such remedies can then communicate separately with the Title IX Coordinator to discuss what remedies are appropriately designed to preserve or restore access to the recipient's education program or activity.

Finally, for consistency with other provisions in the regulations, the Department has revised § 106.46(h)(1)(iii) to clarify that a written determination from a postsecondary institution whether sex-based harassment occurred must include the decisionmaker's evaluation of the evidence that is ''relevant and not otherwise impermissible,'' and replaced ''the appeal, if an appeal is filed, or, if an appeal is not filed,'' with ''any appeal, or if no party appeals,'' in § 106.46(h)(2) for clarity and consistency with other provisions. The Department has also deleted ''of'' before ''whether'' for consistency with the other provisions in the final regulations.

Changes: In § 106.46(h)(1)(iii), the Department has added the words ''and not otherwise impermissible'' after the word ''relevant.'' In § 106.46(h) and

(h)(1)(iii), the Department has deleted ''of.'' In § 106.46(h)(2), the Department has replaced ''the appeal, if an appeal is filed, or, if an appeal is not filed'' with ''any appeal, or, if no party appeals[.]''

13. Section 106.46(i) Appeals

General Support and Opposition

Comments: Some commenters supported § 106.46(i) because it would outline the bases upon which an appeal must be offered and provide a recipient discretion to grant an appeal on an additional basis if equally available to the parties.

However, other commenters objected to § 106.46(i)(1) based on their interpretation that it would only require a recipient to offer a respondent an appeal from a determination that sex-based harassment did occur, while imposing no such requirement to offer a complainant an appeal from a determination that sex-based harassment did not occur. These commenters asserted that such a provision would be inconsistent with requirements to resolve complaints in an ''equitable'' manner in § 106.45(b)(1) and to ensure that any additional bases for appeal are equally available to all parties in § 106.46(i)(2).

In contrast, other commenters disagreed with allowing a complainant to appeal a determination that sex-based harassment did not occur, although one commenter acknowledged that the Clery Act requires a recipient to offer equivalent appellate rights to both parties. Some commenters asserted that allowing a complainant to appeal a dismissal or determination that sex-based harassment did not occur disfavors respondents.

One commenter challenged the Department's assertion that § 106.46(i) is not a departure from the appeals provision in the 2020 amendments because the proposed regulations would require a party to show that one of the bases for appeal would ''change,'' rather than ''affect,'' the outcome of the complaint. The commenter asserted that the Department failed to justify this proposed change, which would make it nearly impossible to successfully appeal a decision. Another commenter suggested replacing ''change'' with ''impact'' throughout § 106.46(i)(1)(i)–(iii) because, in the commenter's view, it would more accurately describe the Department's intent in outlining the bases for appeal.

One commenter asked how the requirement to offer an appeal would interact with State laws that require an elementary school or secondary school to hold an expulsion hearing within 30 school days after the recipient determines that a student has engaged in sexual harassment. The commenter also suggested that the ability of a student complainant or respondent to file an OCR complaint would provide an adequate appeal process such that the Department could delete the requirement that a recipient offer an appeal from a determination whether sex-based harassment occurred.

Discussion: The Department acknowledges the comments on § 106.46(i) and clarifies language in the proposed regulations that might have been misinterpreted as only requiring a recipient to offer an appeal to a respondent from a determination that sex-based harassment did occur. As discussed in the July 2022 NPRM, § 106.46(i) preserves § 106.45(b)(8) of the 2020 amendments, 87 FR 41511, which requires a recipient to ''offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of'' a complaint based on procedural irregularity; new evidence that was not reasonably available at the time of the determination; or Title IX Coordinator, investigator, or decisionmaker bias or conflict of interest. *See* 34 CFR 106.45(b)(8). Accordingly, the final regulations contain a technical revision at § 106.46(i) to clarify that a postsecondary institution must offer the parties an appeal from a determination whether sex-based harassment occurred and from a postsecondary institution's dismissal of a complaint or any allegations therein.

As noted in the preamble to the 2020 amendments, requiring a postsecondary institution to offer an appeal equally to the parties will make it more likely that a recipient reaches sound determinations in sex-based harassment complaints, which will give complainants and respondents greater confidence in the final outcome of grievance procedures. 85 FR 30396. Additionally, the Department disagrees that requiring a recipient to offer an appeal on an equal basis to the parties disfavors a respondent because both a complainant and a respondent have important interests in the outcome of a sex-based harassment complaint that can affect either party's ability to access educational opportunities. The complainant's interest is whether any sex-based harassment that occurred will be remedied and its recurrence prevented. At the same time, the respondent has an interest in not being subjected to undue disciplinary sanctions. Although these interests may differ, each represents high-stakes, potentially life-altering consequences deserving of an accurate outcome. *Univ. of Cincinnati,* 872 F.3d at 404 (recognizing that the complainant ''deserves a reliable, accurate outcome as much as'' the respondent). Also, as commenters noted, § 106.46(i) is consistent with the Clery Act requirement that a postsecondary institution equally offer the parties an appeal from the result of disciplinary proceedings if such procedures are available. *See* 34 CFR 668.46(k)(2)(v)(B).

Further, the Department disagrees with assertions that allowing a complainant to appeal a determination that sex-based harassment did not occur disfavors the respondent. As stated in the preamble to the 2020 amendments, Title IX grievance procedures differ in purpose and procedure from a criminal proceeding, 85 FR 30397, and in any event, the Department is not persuaded that a complainant's ability to appeal an adverse determination results in ''double jeopardy.'' The Department acknowledges that respondents face a burden if a complainant appeals a determination that sex-based harassment did not occur, but we maintain that it is important for a postsecondary institution to review a determination that was reached via alleged procedural irregularity, bias, or conflict of interest affecting the outcome, or when newly discovered evidence may change the outcome. As noted above, the ability to appeal extends equally to complainants and respondents who would each have the right and opportunity to ask for a redetermination if warranted. Additionally, several commenters—including State legislators, Title IX practitioners, and organizations that combat sexual violence—supported the bases for which an appeal must be offered under § 106.46(i)(1).

Despite some commenters' assertions, using the term ''change'' from proposed § 106.46(i), the term ''affect'' from the 2020 amendments, or the term ''impact'' from one commenter's suggestion would not have any substantive effect on how § 106.46(i) is applied.[75] Nonetheless, of the three terms, ''change'' is most consistent with directives that Federal agencies ensure that regulations are written in plain language and easy to understand. *See, e.g.,* Exec. Order No. 13563. Further, because using the term ''change'' rather than ''affect'' does not

[75] *Compare Change,* Merriam-Webster Dictionary, *https://www.merriam-webster.com/dictionary/change* (last visited Mar. 12, 2024), with *Affect,* Merriam-Webster Dictionary, *https://www.merriam-webster.com/dictionary/affect* (last visited Mar. 12, 2024), and *Impact,* Merriam-Webster Dictionary, *https://www.merriam-webster.com/dictionary/impact* (last visited Mar. 12, 2024).

substantively alter the regulations, the Department disagrees with the commenter's assertion that using the word ''change'' would make it ''impossible'' to appeal an adverse decision.

Additionally, in response to one commenter expressing concern with the requirement to offer an appeal while referencing State law that appears to govern disciplinary proceedings for elementary schools and secondary schools, the Department wishes to clarify that only a postsecondary institution that receives a complaint of sex-based harassment involving a student party must offer the parties an appeal consistent with § 106.46(i). Further, it is the Department's view that an elementary school or secondary school will be able to comply with § 106.45(i), which is the applicable provision governing appeals for complaints of sex discrimination at the elementary school and secondary school levels, while meeting its separate obligations under State law governing student discipline because a recipient is only required to offer the parties an appeal process that, at a minimum, is the same as it offers in comparable proceedings, if any, including proceedings relating to other discrimination complaints. The Department recognizes that many States have laws that address sex discrimination, including sex-based harassment, and other misconduct that negatively impacts students' access to equal educational opportunities. Nothing in these final regulations precludes a State, or an individual recipient, from continuing to address such matters in a manner that also complies with these final regulations.

The Department declines to remove requirements related to appeals from the final regulations because offering the opportunity to appeal a determination on the bases in § 106.46(i)(1) enables a recipient to correct significant issues that could undermine the impartiality and reliability of grievance procedures and reduces a party's reliance on OCR or private litigation to challenge the outcomes. As a result, as discussed in the preamble to the 2020 amendments, offering the opportunity to appeal can potentially yield just outcomes more efficiently than a process outside the recipient's grievance procedures. *See* 85 FR 30398. The same reasoning applies to a recipient's dismissal of a complaint, or allegations therein; when a recipient's dismissal is in error, the parties should have the opportunity to challenge the recipient's dismissal decision so that the recipient may correct the error and avoid inaccurately dismissing a complaint that needs to be resolved in order to identify and remedy sex discrimination. *See id.*

Changes: The Department has revised final § 106.46(i)(1) to clarify that a postsecondary institution must offer the parties an appeal from a determination whether sex-based harassment occurred, and from a postsecondary institution's dismissal of a complaint or any allegations therein. Additionally, the Department has revised final § 106.46(i)(2)–(3) for clarity and to update cross references to other parts of these final regulations.

Request To Add or Modify Bases for Appeal

Comments: Some commenters objected to the absence of certain bases for appeal, including not requiring a recipient to offer an appeal for simple error or a determination being against the weight of the evidence, and asserted that case law supports requiring a recipient to offer an appeal on these bases. Other commenters asked whether the proposed regulations would limit the bases for appeals to just those enumerated under § 106.46(i) or allow appeals to challenge parts of the recipient's determination, such as the appropriateness of a sanction or remedy.

One commenter suggested the Department outline a procedure for appeal to ensure fair and consistent appeals.

Discussion: The Department declines to add additional bases for which a postsecondary institution must offer an appeal under § 106.46(i) because the requirement to offer an appeal based on procedural irregularity, new evidence, and bias or conflict of interest balances the interest a party has in reviewing a recipient's determination and ensuring sex-based harassment does not continue or recur with a recipient's interest in having discretion to design and implement grievance procedures that are appropriate for its education program or activity. As explained in the preamble to the 2020 amendments, the Department selected these three bases for which a recipient must offer an appeal because each basis represents an error that, if left uncorrected by the recipient, indicates that the determination may be inaccurate, and thus that sex-based harassment in the recipient's education program or activity has not been identified and appropriately addressed. 85 FR 30398. At the same time, the Department recognizes the importance of granting a recipient flexibility and discretion in designing and implementing grievance procedures that are otherwise consistent with § 106.45, and if applicable § 106.46. Recipients are better positioned in these circumstances to know the unique needs and values of their educational communities. Accordingly, §§ 106.45(i)–(j) and 106.46(i)(2) provide a recipient the discretion to offer an appeal on additional bases, which may include the opportunity to appeal a remedy or sanction. If a recipient decides to offer an appeal on additional bases, then both the complainant and respondent must have the opportunity to appeal on the same bases. As stated in the preamble to the 2020 amendments, it would be unfair and run counter to the spirit of Title IX to permit complainants to appeal a sanction but not permit respondents to appeal a sanction, and vice versa. As a result, if a recipient allows appeals on the basis of severity of sanctions, that appeal must be offered equally to both parties. 85 FR 30399.

The Department similarly declines to require a postsecondary institution to offer an appeal on the basis of simple error or a determination being clearly erroneous or against the weight of the evidence. First, the Department is unpersuaded by arguments that the authorization of the single investigator model necessitates an appeal on such a basis because final § 106.45(d)(3)(iii) requires a recipient to ensure that the decisionmaker for the appeal did not take part in an investigation of the allegations or the dismissal of the complaint. This requirement from § 106.45 is incorporated by § 106.46(a) for an appeal under § 106.46(i). As such, the decisionmaker for an appeal arising out of a sex-based harassment complaint involving a postsecondary student cannot be the same person who investigated or dismissed the complaint, which ensures that the recipient's appeal decisionmaker reviews the underlying case independently. Additionally, final § 106.45(b)(2) requires an appeal decisionmaker to be free from bias and conflicts of interest, and § 106.8(d)(2)(iii) requires an appeal decisionmaker to be trained to serve impartially.

Second, the appellate cases cited by commenters do not hold that a recipient must offer an appeal on the bases of simple error,[76] clear error, or a determination being against the weight of the evidence. Rather, those cases indicate that a decision being against the weight of the evidence can support an inference of bias in the implementation of a recipient's Title IX procedures. *See Oberlin Coll.,* 963 F.3d at 586–88 (explaining that ''the merits of

[76] The cases cited by commenters did not discuss the meaning of ''simple error.''

the decision itself'' can ''support an inference of sex bias''); *Doe* v. *Univ. of S. Ind.,* 43 F.4th 784, 799 (7th Cir. 2022) (''In a sufficiently lopsided Title IX case, . . . an erroneous outcome can support an inference of gender bias.''); *Doe* v. *Tex. Christian Univ.,* 601 F. Supp. 3d 78, 89 (N.D. Tex. 2022) (''missteps running 'against the substantial weight of the evidence' are at least some indication of bias'' (quoting *Univ. of Ark.-Fayetteville,* 974 F.3d at 864)). The Department's final regulations at § 106.46(i)(1)(iii) allow a party to appeal on the basis of decisionmaker bias, and an appeal under the final regulations can thus take into account whether a decision was against the weight of the evidence as part of a party's assertion of bias. Accordingly, a party would be able to appeal on the basis of decisionmaker bias in the hypotheticals posed by one commenter.

The Department also declines to modify § 106.46(i)(1)(ii) to prohibit a party from withholding evidence because the provision already specifies that new evidence must not have been reasonably available at the time the determination or dismissal was made. Accordingly, § 106.46(i)(1)(ii) already adequately guards against a party inappropriately withholding evidence during an investigation to present on appeal. Further, because the final regulations contemplate that not every recipient will include a live hearing in its grievance procedures under § 106.46, the commenter's suggestion to deem any evidence not presented during the investigation as forfeited during the hearing could be inapplicable for many recipients, as well as overly restrictive for recipients that do require a live hearing.

For similar reasons, the Department declines to use the word ''adjudication'' rather than ''determination'' in § 106.46(i)(1)(i)–(ii). The commenter who suggested this change appeared to assume that an ''adjudication'' would be synonymous with a ''hearing.'' Making the suggested change with that understanding of the term ''adjudication,'' however, would result in an inconsistency with § 106.46(g) by implying that a live hearing is required.

The Department also declines to remove the reference to ''Title IX Coordinator'' and ''investigator'' from § 106.46(i)(1)(iii) because, as the commenter acknowledged, bias or a conflict of interest on behalf of the Title IX Coordinator or investigator may not always result in a procedural irregularity, and providing the parties the opportunity to appeal based on Title IX Coordinator or investigator bias or conflict of interest will help ensure accuracy in a recipient's grievance procedures, which will serve Title IX's goal of identifying sex discrimination, remedying its effects, and preventing its recurrence.

Additionally, the Department declines to offer more specific guidance at this time on what a recipient's appeal procedures should entail. How a recipient implements its appeal procedures could depend on a variety of factors, including a party's basis for requesting an appeal and whether the recipient offers an appeal on additional bases. Regardless of how a recipient structures its appeal procedures, however, those procedures must treat complainants and respondents equitably, in accordance with § 106.45(b)(1). The Department understands that supporting recipients in the implementation of these regulations and ensuring that students know their rights is important. The Department will offer technical assistance, as appropriate, to promote compliance with these final regulations.

Finally, based on its own review, the Department has deleted references to ''the matter'' and made other revisions to § 106.46(i)(1)(i)–(iii) for clarity and consistency with other parts of the final regulations.

Changes: The Department has deleted references to ''the matter'' and made other revisions to § 106.46(i)(1)(i)–(iii) for clarity and consistency with other parts of the final regulations.

14. Section 106.46(j) Informal Resolution

Comments: Some commenters expressed general support for proposed § 106.46(j). Other commenters opposed proposed § 106.46(j) because they believed it would exceed the Department's authority and be inconsistent with Title IX and established case law, but did not elaborate on their reasoning. Commenters also objected to a recipient having the choice not to offer informal resolution.

Discussion: The Department disagrees that § 106.46(j) exceeds the Department's authority. Congress has authorized the Department to issue regulations to effectuate Title IX's prohibition on sex discrimination in education programs or activities that receive Federal financial assistance consistent with achievement of the objectives of the statute. *See* 20 U.S.C. 1682. For further explanation of the Department's authority to promulgate and enforce regulations related to grievance procedures requirements, see the discussion of §§ 106.45(a)(1) and 106.46(a). Comments related to a recipient's discretion to offer informal resolution are addressed in the discussion of § 106.44(k) in this preamble.

Changes: None.

F. Assistant Secretary Review

1. Section 106.47 Assistant Secretary Review

Comments: Commenters generally supported proposed § 106.47. Some commenters, however, asked the Department to require students to give OCR notice when a lawsuit is filed against a postsecondary institution and suggested that OCR conduct a review before or after a lawsuit is resolved to determine whether the postsecondary institution handled the matter appropriately.

One commenter asked the Department to clarify that, for Title IX erroneous outcome claims, the Assistant Secretary should be able to question whether a recipient reached an erroneous determination because the recipient was unlawfully discriminating on the basis of sex by, for example, favoring male over female complainants or vice versa.

Discussion: The Department agrees that § 106.47 will promote clarity and flexibility for recipients by confirming that OCR will not substitute its judgment for the judgment of the recipient's decisionmaker and that recipients have the flexibility to make their own determinations regarding the appropriate weighing of relevant and not otherwise impermissible evidence. The Department recognizes that a student may file a private Title IX lawsuit against a postsecondary institution. Such a lawsuit is separate from OCR's administrative enforcement authority under Title IX, and the Department declines in this rulemaking to require students to notify OCR when a lawsuit is filed against a postsecondary institution or to require OCR to review private Title IX lawsuits to determine whether a postsecondary institution complied with Title IX. The Department will enforce the final regulations consistent with its authority under 20 U.S.C. 1682 and the procedures in 34 CFR 100.7–11 (incorporated through 34 CFR 106.81). Anyone who believes a recipient of Department funds has violated Title IX may file a complaint with OCR.

The Department clarifies that § 106.47 applies only to determinations regarding whether sex-based harassment occurred under § 106.45, and if applicable § 106.46. The Department maintains the position taken in the preamble to the 2020 amendments that the intent of § 106.47 is to convey that OCR will not

substitute its judgment for the judgment of the recipient's decisionmaker regarding the weighing of relevant and not otherwise impermissible evidence in a particular case. *See* 85 FR 30221. Nothing in § 106.47 prevents OCR from holding a recipient accountable for noncompliance with any provision of the Department's Title IX regulations, including § 106.31(a) and (b)(4), which require that a recipient carry out its grievance procedures in a nondiscriminatory manner and prohibit a recipient from discriminating against any party based on sex.

Changes: The Department has revised § 106.47 to specify that the provision covers a determination made by a recipient in a particular complaint alleging sex-based harassment. The Department has also revised § 106.47 to clarify that the provision applies to situations in which the Assistant Secretary for Civil Rights would have reached a different determination than the recipient.

III. Pregnancy and Parental Status

A. Revised Definitions

1. Section 106.2 Definition of ''Pregnancy or Related Conditions''

General Scope of Coverage

Comments: Some commenters supported the proposed definition of ''pregnancy or related conditions'' in § 106.2 for reasons including that it will help remove barriers to educational access for all students who are pregnant or experiencing pregnancy-related conditions and address perceived gaps in the current regulations. Some commenters emphasized the importance of coverage for lactation in the proposed definition in § 106.2, noting this coverage's consistency with similar protections in the Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k) (PDA), the Patient Protection and Affordable Care Act, 42 U.S.C. 18001 *et seq.* (ACA), and the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* (FLSA).

Some commenters urged the Department to clarify the proposed definition covers a variety of pregnancy-related medical conditions and types of recoveries. Some commenters asked the Department to explain that a related condition within the definition of ''pregnancy or related conditions'' under § 106.2 need not qualify as a disability under the ADA to fit the Title IX definition of pregnancy-related conditions under § 106.2 or to qualify for a reasonable modification under § 106.40(b)(3)(ii). Some commenters asked that the final regulations use terminology that protects all students, employees, and applicants for admission or employment from sex discrimination based on pregnancy or related conditions.

Some commenters urged the Department to include ''perceived'' and ''expected'' pregnancy or related conditions in the definition of ''pregnancy or related conditions'' to prevent discrimination against students seeking fertility care, planning to become pregnant, or who have the potential to become pregnant. One commenter asked that the Department clarify what ''potential'' pregnancy or related conditions means in proposed § 106.40(b)(1) as applied to the elementary school and secondary school settings.

Some commenters requested an explanation of the Department's proposed change from the phrase ''pregnancy and related conditions'' that is used in the title of current § 106.40(b) to ''pregnancy or related conditions'' in the proposed definition in § 106.2.

Some commenters asserted the Department's proposed definition was unnecessary.

Discussion: As discussed in the July 2022 NPRM, *see* 87 FR 41534, and in the discussion of § 106.10, the definition of ''pregnancy or related conditions'' builds on the longstanding prohibition on discrimination based on ''pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery'' that has existed since the Title IX regulations were first promulgated in 1975, *see* 40 FR 24128 (codified at 45 CFR 86.21(c)(2), 86.40(b)(2), 86.57(b) (1975)); 34 CFR 106.21(c), 106.41(b)(1), 106.57(b) (current). Since 1975, the Department has also been clear that recipients cannot discriminate based on these conditions and gained experience and further understanding about what standards are necessary and appropriate to provide students and employees the ability to learn and work while pregnant or experiencing pregnancy-related conditions. *See* 87 FR 41513. Based on the Department's longstanding interpretations and enforcement activities as well as information from commenters, stakeholders who spoke at the June 2021 Title IX Public Hearing, and the development of related laws and case law in this area detailed in the July 2022 NPRM, the revised definition of ''pregnancy or related conditions'' in the final regulations is necessary to carry out Title IX's nondiscrimination mandate. *See* 87 FR 41513–16.

Accordingly, the final definition of ''pregnancy or related conditions'' includes pregnancy, childbirth, termination of pregnancy, and lactation, and all related medical conditions and recovery. The definition includes the full spectrum of processes and events connected with pregnancy. For many, needs related to pregnancy, childbirth, termination of pregnancy, lactation, recovery, and related medical conditions will be highly intertwined, and in many cases inseparable. To emphasize the scope of the definition and to add clarity, the Department is also deleting the word ''their'' from the definition, so the reference to recovery reads ''[r]ecovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.''

The Department agrees with commenters that including ''lactation'' in the definition of ''pregnancy or related conditions'' is consistent with Title IX's goal of eliminating discrimination on the basis of sex in education. As explained in the July 2022 NPRM, ''it is undisputed that lactation is a physiological result of being pregnant and bearing a child[.]'' 87 FR 41514 (internal citations omitted). The Department also agrees the definition more closely aligns with obligations under other statutes,[77] such as the PDA and the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), 29 U.S.C. 218d.[78]

[77] The Department notes that the ACA requirement to provide most non-exempt employees with reasonable break time and space to pump (incorporated into the FLSA, 29 U.S.C. 207(r)), has since been replaced by the PUMP Act (also incorporated into the FLSA, 29 U.S.C. 218d), which provides similar protections to most exempt employees as well.

[78] *See, e.g., Hicks* v. *City of Tuscaloosa,* 870 F.3d 1253, 1259 (11th Cir. 2017) (holding that lactation is a pregnancy-related medical condition covered under the PDA); *EEOC* v. *Hous. Funding II, Ltd.,* 717 F.3d 425, 428–29 (5th Cir. 2013) (same); U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance on Pregnancy Discrimination and Related Issues (June 25, 2015) (2015 EEOC Pregnancy Guidance), *https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues* (explaining that because ''lactation is a pregnancy-related medical condition,'' discrimination against lactating or breastfeeding employees can implicate Title VII); U.S. Dep't of Labor, Fact Sheet #73: FLSA Protections for Employees to Pump Breast Milk at Work (Jan. 2023), *https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers* (recognizing most employees' rights under the FLSA to break time for lactation). The Department is aware that some courts have held that the PDA's protection of pregnancy-related medical conditions requires that those conditions be ''incapacitating,'' *see, e.g., Wallace* v. *Pyro Mining Co.,* 789 F. Supp. 867, 869–70 (W.D. Ky. 1990), *aff'd,* 951 F.2d 351 (6th Cir. 1991) (table), but in its 2015 guidance, the EEOC stated its disagreement with *Wallace* and said: ''Nothing [in the PDA] limits protection to incapacitating pregnancy-related medical conditions,'' *see* 2015 EEOC Pregnancy Guidance, at n.55. The Department agrees with the EEOC and

Continued

The Department acknowledges that there are many different medical conditions that are related to pregnancy, childbirth, termination of pregnancy, or lactation. To avoid confusion or the implication that a specific medical condition may not be covered, the Department declines to add to the regulatory text a list of specific medical conditions that are related to, affected by, or arise out of pregnancy, childbirth, termination of pregnancy, or lactation. However, the Department acknowledges that such conditions include but are not limited to conditions identified in the July 2022 NPRM and by commenters, such as pregnancy-related fatigue, dehydration (or the need for increased water intake), nausea (or morning sickness), increased body temperature, anemia, and bladder dysfunction; gestational diabetes; preeclampsia; hyperemesis gravidarum (*i.e.,* severe nausea and vomiting); pregnancy-induced hypertension (high blood pressure); infertility; recovery from childbirth, miscarriage, or abortion; ectopic pregnancy; prenatal or postpartum depression; and lactation conditions such as swelling or leaking of breast tissue or mastitis. 87 FR 41515. In response to commenters who requested that the Department add menstruation as a related condition, discrimination pertaining to menstruation, perimenopause, menopause, and related conditions is a basis of prohibited sex discrimination, as explained in detail in the discussion of § 106.10.

A pregnancy-related medical condition does not have to be a disability as defined by the ADA for it to fall within the definition of ''pregnancy or related conditions'' in § 106.2, or for a student to qualify for a reasonable modification under § 106.40(b)(3)(ii). Sections 106.10 and 106.40(b)(3)(ii) do not refer to or rely on the ADA. In addition, if someone who is pregnant or experiencing a pregnancy-related condition has a disability as defined in Section 504 or the ADA, that individual is protected from discrimination under Section 504 and the ADA, as applicable, whether or not the disability is related to pregnancy. In response to comments regarding the scope of application of the pregnancy-related protections, the Department confirms that the pregnancy-related protections of the final regulations protect all students, employees, and applicants for admission or employment from discrimination on the basis of pregnancy or related conditions.

With respect to the suggestion to add the word ''perceived'' to the definition of ''pregnancy or related conditions,'' the Department agrees that the definition of ''pregnancy or related conditions'' in § 106.2, as it is applied in § 106.10, extends to discrimination based on a perceived status, whether the perception is accurate or not. However, this conclusion is already apparent from the text of the statute and relevant case law, which recognizes that discrimination based on perceived characteristics violates Title IX. *See, e.g., Grabowski* v. *Arizona Bd. of Regents,* 69 F.4th 1110, 1113, 1116–18 (9th Cir. 2023) (holding that Title IX bars sexual harassment on the basis of perceived sexual orientation) (citing *Bostock,* 590 U.S. 644; *Price Waterhouse* v. *Hopkins,* 490 U.S. 228 (1989)); *cf. EEOC* v. *Abercrombie & Fitch Stores, Inc,* 575 U.S. 768, 773–74 (2015) (holding that a plaintiff need not show that the employer knew that an applicant required a religious accommodation to prove religious discrimination under Title VII, in part because Congress did not add a knowledge requirement to Title VII's prohibition on disparate-treatment discrimination). As noted in the July 2022 NPRM, Title IX's broad prohibition on discrimination ''on the basis of sex'' includes, at a minimum, ''discrimination against an individual because, for example, they are or are perceived to be . . . currently or previously pregnant[.]'' 87 FR 41532. For example, if a professor refuses to allow a student to participate in a clinical course based on the mistaken belief that the student is pregnant, that professor may be discriminating against a student based on sex and denying the student access to the recipient's education program or activity based on the stereotype that a pregnant student is not physically capable of participating in the course or will not be as dedicated due to the demands of pregnancy.

Likewise, in connection with the suggestion to add the word ''expected'' to the definition of ''pregnancy or related conditions,'' the Department disagrees that this is necessary, because §§ 106.21(c) (Admission), 106.40(b)(1) (Parental, family, or marital status, pregnancy or related conditions (for students)), and 106.57(b) (Parental, family, or marital status, pregnancy or related conditions (for employment)), as amended in these final regulations, provide that a recipient may not discriminate against any applicant, student, or employee on the basis of ''current, potential, or past pregnancy or related conditions.'' The Department interprets the word ''potential'' to cover pregnancy or related conditions that are expected, likely, or have the capacity to occur. In response to one commenter's question, protection based on potential pregnancy or related conditions would apply to, for example, individuals about whom rumors circulate related to pregnancy (*e.g.,* regarding an individual's fertility care, planning for pregnancy, circumstances of pregnancy, or the cause or reason for termination of pregnancy) or in the context of individuals seeking fertility care or otherwise planning a possible pregnancy.

Additionally, § 106.10 of the final regulations prohibits discrimination on the basis of sex stereotypes, which may include discrimination based on others' expectations regarding a person's pregnancy or related conditions and assumptions about limitations that may result. For example, a school that fired a teacher when she got married based on the assumption that all married women get pregnant and quit their jobs would be discriminating based on sex stereotypes about both married women and about pregnancy and would thus violate Title IX's prohibition on discrimination ''on the basis of sex.'' 20 U.S.C. 1681.

In response to commenters' question as to the reason the Department changed the title of § 106.40(b) from ''pregnancy and related conditions'' to ''pregnancy or related conditions,'' the Department did so for clarity and to match the defined term ''pregnancy or related conditions'' as defined in these final regulations at § 106.2. ''Or'' is more accurate and inclusive as ''pregnancy or related conditions'' includes situations in which a person is pregnant and also has a related condition as well as in which someone is only pregnant or only has a pregnancy-related medical condition.

While some commenters thought that defining ''pregnancy or related conditions'' was unnecessary because pregnancy discrimination is already protected under Title IX, as indicated in the July 2022 NPRM, defining the term ''pregnancy or related conditions'' more precisely describes the requirements of Title IX and helps clarify perceived gaps in coverage. 87 FR 41515.

Changes: The Department deleted the word ''their'' from clause (3) of the definition of ''pregnancy or related conditions'', so that clause (3) now states ''[r]ecovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.''

with those courts, such as the Fifth Circuit, that have recognized that the PDA contains no such limitation. *See, e.g., Hous. Funding II, Ltd.,* 717 F.3d at 428.

Comments Regarding Inclusion of Termination of Pregnancy

Comments: Some commenters expressed support for the Department's inclusion of ''termination of pregnancy'' in the proposed definition of ''pregnancy or related conditions,'' and explained that many forms of discrimination occur based on termination of pregnancy, including harassment, the refusal to excuse absences, and retaliation. Some commenters also expressed the view that the proposed regulations will help student athletes, who need support during and after pregnancy or termination of pregnancy to recover and resume educational and athletic activities.

Some commenters generally opposed the inclusion of ''termination of pregnancy'' in the definition of ''pregnancy or related conditions,'' for a variety of reasons, including religious or moral objections; because they see it as dissimilar from pregnancy, childbirth, or lactation; or because they believe its inclusion is inconsistent with the purpose of Title IX. Some commenters stated that they opposed any Federal government support for or involvement with abortion.

Some commenters requested that the Department clarify that the phrase ''termination of pregnancy'' in the definition of ''pregnancy or related conditions,'' includes miscarriage, ''loss of pregnancy,'' future or past abortion, or abortion for any reason. Others asked that some or all these elements be excluded; for example, some commenters asked that ''termination of pregnancy'' include miscarriage but exclude abortion. Some commenters expressed that the phrase ''termination of pregnancy'' was vague.

Discussion: The Department appreciates commenters' range of views about the inclusion of ''termination of pregnancy'' in the definition of ''pregnancy or related conditions'' in § 106.2. To reiterate, the Title IX regulations have included nondiscrimination protection for ''termination of pregnancy'' since their initial promulgation in 1975, which prohibited discrimination on the basis of ''pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom[.]'' *See* 40 FR 24128 (codified at 45 CFR 86.21(c)(2), 86.40(b)(2), 86.57(b) (1975)); 34 CFR 106.21(c), 106.41(b)(1), 106.57(b) (current). Thus, to the extent that commenters' concerns involved the Department newly including such protection in the regulations, those concerns were based on a misunderstanding of the current regulations.

Addressing commenters' concerns about clarity and vagueness, the Department disagrees that the term ''termination of pregnancy'' is vague. Consistent with the inclusion of the text in the original Title IX regulations in 1975, the Department interprets ''termination of pregnancy'' to mean the end of pregnancy in any manner, including, miscarriage, stillbirth, or abortion. Additionally, the definition of ''pregnancy or related conditions'' includes ''medical conditions related to'' or ''recovery from'' pregnancy and termination of pregnancy. Miscarriage, stillbirth, and abortion, among other conditions, are medical conditions related to pregnancy, as are recovery from miscarriage, stillbirth, and abortion. Title IX prohibits discrimination against any person based on their seeking, obtaining, or having experienced termination of pregnancy, subject only to narrow limitations discussed in the next section. The Department reiterates that the inclusion of ''termination of pregnancy'' in the revised definition of pregnancy or related conditions under § 106.2 merely incorporates the current regulations in place since 1975. *See* 40 FR 24128 (codified at 45 CFR 86.21(c)(2), 86.40(b)(2), 86.57(b) (1975)); 34 CFR 106.21(c), 106.41(b)(1), 106.57(b) (current).

The Department disagrees that ''termination of pregnancy'' should be excluded from the definition of ''pregnancy or related conditions'' based on the commenters' arguments that it is inconsistent with the purpose of Title IX because it is unlike pregnancy, childbirth, and lactation. As noted in the preceding section, the definition of ''pregnancy or related conditions'' is broadly inclusive and covers all aspects of pregnancy, as necessary to carry out Title IX's nondiscrimination mandate. Termination of pregnancy is an aspect of pregnancy. Like pregnancy or childbirth, termination of pregnancy—whether related to miscarriage, stillbirth, or abortion—can present health needs that create obstacles to education or employment. As a result, ensuring that recipients do not discriminate on the basis of termination of pregnancy is necessary to ensure that individuals are not subject to discrimination on the basis of sex.

Comments related to termination of pregnancy and religious objections are addressed in the First Amendment discussion below.

Changes: None.

Abortion Neutrality Provision, 20 U.S.C. 1688

Comments: Some commenters asserted that including ''termination of pregnancy'' in the definition of ''pregnancy or related conditions'' would be inconsistent with 20 U.S.C. 1688 (the ''Danforth Amendment'' or ''section 1688''), and that instead the definition should exempt abortion and health insurance coverage of abortion. Some commenters asked whether a recipient is required to or would feel pressured to report a suspected abortion to law enforcement, and if so, the implications for parental rights. Some commenters asked the Department to confirm that it would be a violation of Title IX to discipline a student for terminating a pregnancy.

Some commenters concluded that including ''termination of pregnancy'' in the definition of ''pregnancy or related conditions'' impermissibly preempts State law. A group of commenters asked the Department to clarify how a recipient can comply with its Title IX obligations to those who experience termination of pregnancy or related conditions without coming into conflict with or violating State abortion laws.

Discussion: As explained above, since the Title IX regulations were first promulgated in 1975, the Department consistently interpreted the statute's broad nondiscrimination mandate to prohibit discrimination on the basis of termination of pregnancy. 40 FR 24128 (codified at 45 CFR 86.21(c)(2), 86.40(b)(1), 86.57(b) (1975)); 34 CFR 106.21(c), 106.41(b)(1), 106.57(b) (current). Although ''termination of pregnancy'' encompasses abortion, the Department acknowledges that section 1688 limits the Department's enforcement of section 1681's general nondiscrimination mandate in specific ways. Section 1688 provides that nothing in Title IX ''shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion.'' This is followed by a clause that prohibits the first sentence from being read ''to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.''

Consistent with this limitation, these final regulations prevent recipients from being required to provide or pay for benefits or services related to, or use facilities for, abortions, even when the denial could otherwise be construed as discriminatory under section 1681. Said another way, if a recipient's refusal to

provide or pay for benefits or services related to abortion is challenged as sex discrimination under section 1681, the recipient could cite section 1688 to argue that it is under no obligation to provide or pay for any benefit or services related to an abortion. For example, because of section 1688, Title IX does not require a campus-run hospital or health center to provide abortions, even if it offers a wide array of other health services. Similarly, because of section 1688, Title IX does not require a school that offers student health insurance to cover abortion under its plan, even if the plan covers other temporary medical conditions. By contrast, a school that chooses to provide health insurance for other temporary medical conditions cannot deny coverage for treatment related to miscarriage, which is covered by Title IX's protection against discrimination for ''termination of pregnancy,'' but does not fall within the limitation of section 1688. A determination that the Danforth Amendment limits Title IX, if at all, in ways beyond those just described will be fact-specific and must be evaluated on a case-by-case basis, considering whether the issue involves (1) a request for a recipient to pay for or provide (2) a benefit or service, that is (3) related to an abortion, within the intent of section 1688. The Department further explains the application of section 1688 to reasonable modifications for students due to pregnancy or related conditions in the discussion of final § 106.40(b)(3)(ii) below.

The Danforth Amendment text makes clear that the narrow limitation it places on the Department's enforcement of Title IX's nondiscrimination mandate may not justify other forms of discrimination prohibited by section 1681. Consistent with section 1688's self-constraining clause, and informed by contemporaneous sources regarding congressional intent with respect to the passage of the Danforth Amendment,[79] the Department interprets section 1688's prohibition on penalties to mean that a recipient may not rely on section 1688 to deprive any person of any right or privilege because they are considering, want to have, or have had a legal abortion, provided that the right or privilege the person seeks to exercise does not require the recipient to provide or pay for a benefit or service related to an abortion. As such, a policy or action that specifically targets individuals who have received abortion care for adverse treatment may violate the general nondiscrimination mandate in section 1681. Moreover, a recipient may not punish or retaliate against a student or employee solely for seeking or obtaining an abortion. For example, a high school may not exclude a student from participating in the student council solely because the student has had an abortion, because doing so would be discrimination prohibited by section 1681. Participating in the student council is not a benefit or service related to abortion, and excluding the student on the basis of abortion would constitute a penalty. Accordingly, section 1688 would provide no defense to the school. Similarly, a college may not deny a professor a raise just because it learned she planned to have an abortion because doing so would constitute discrimination prohibited by section 1681. Because the raise has nothing to do with abortion and so is not a benefit or service related to abortion, and denying the raise would also be a penalty, Section 1688 likewise would provide no defense. *See also* 134 Cong. Rec. H565–02 (daily ed. Mar. 2, 1988) (statements of Sen. John Danforth, Sen. James Jeffords, Rep. Augustus Hawkins, Rep. Walter Leslie AuCoin, Rep. William Donlon Edwards). Inquiries into the circumstances of an abortion may also be discriminatory—for example, if informed by sex stereotypes or handled in a manner different than how a recipient treats other temporary medical conditions—or may impermissibly deter a student or employee from exercising rights under Title IX. A recipient can implement these regulations without asking questions of a student, employee, or applicant for admission or employment about the specific circumstances surrounding the person's pregnancy or related conditions, including a potential or past abortion.

Section 1688 provides a partial limitation on the Department's ability to enforce section 1681's nondiscrimination protection related to abortion. However, the Department disagrees that section 1688 requires it to wholly exempt abortion and abortion services from the proposed definition of ''pregnancy or related conditions,'' as suggested by one commenter.

Changes: None.

Dobbs v. Jackson Women's Health Organization and Consistency With State Law

Comments: Some commenters asked the Department to clarify how the proposed regulations' inclusion of ''termination of pregnancy'' complies or otherwise interacts with the Supreme Court's overturning of *Roe* v. *Wade,* 410 U.S. 113, 154 (1973) in *Dobbs* v. *Jackson Women's Health Organization,* 597 U.S. 215, 230 (2022). Some believed *Dobbs* made inclusion of ''termination of pregnancy'' more important for reasons including that State abortion restrictions could result in more students remaining pregnant or more likely to be discriminated against based on termination of pregnancy.

Some commenters concluded that including ''termination of pregnancy'' in the definition of ''pregnancy or related conditions'' impermissibly preempts State law. A group of commenters asked the Department to clarify how a recipient can comply with its Title IX obligations to those who experience termination of pregnancy or related conditions without coming into conflict with or violating State abortion laws.

Discussion: The Supreme Court issued the *Dobbs* decision on June 24, 2022, the day after the Department released an unofficial copy of the July 2022 NPRM to the public. The content of the unofficial copy did not change before publication in the **Federal Register** on July 12, 2022. With respect to questions commenters raised about the *Dobbs* decision's interaction with nondiscrimination protection for termination of pregnancy under Title IX, as well as section 1688's prohibition on penalties related to legal abortions, the Department clarifies that the *Dobbs* decision does not alter the Department's interpretation of the terms ''pregnancy or related conditions'' or ''termination of pregnancy,'' or its interpretation of Title IX's general nondiscrimination mandate in section 1681 or section 1688. The Department is not adopting the final regulations as a response to *Dobbs. Dobbs* did not opine on a

[79] The legislative history of the Danforth Amendment indicates that Congress intended the scope of the Amendment's first sentence to be confined to providing or paying for benefits or services related to an abortion, not to extend to all forms of discrimination against someone who has an abortion or experiences related medical conditions. *See* 134 Cong. Rec. H565–02 (daily ed. Mar. 2, 1988) (statements of Rep. Augustus Hawkins, Rep. William Donlon Edwards, and Sen. James Jeffords). For example, several lawmakers observed that the Amendment would not limit Title IX's general nondiscrimination protections for medical conditions or complications related to an abortion. *See* 134 Cong. Rec. H565–02 (daily ed. Mar. 2, 1988) (statements of Rep. Augustus Hawkins, Rep. Walter Leslie AuCoin, Rep. William Donlon Edwards, Sen. James Jeffords). Congressional debate also reflects that lawmakers intended the Danforth Amendment's prohibition on ''penalties'' to broadly include the denial of privileges, such as scholarships, housing, participation in extracurricular activities, including athletics; and the refusal to hire or promote employees. *See* 134 Cong. Rec. H565–02 (daily ed. Mar. 2, 1988) (statements of Sen. John Danforth, Sen. James Jeffords, Rep. Augustus Hawkins, Rep. Walter Leslie AuCoin, Rep. William Donlon Edwards).

recipient's obligation to ensure that students or employees who seek or have had abortions have equal access to education or employment. The Department acknowledges commenter questions regarding the intersection of the final regulations with Title IX, *Dobbs,* and State laws restricting access to abortion, and the Department will offer technical assistance, as appropriate, to help respond to questions. In response to commenters asking about the interaction between Title IX and State laws restricting access to abortion, the Department notes that, a policy or action that specifically targets individuals who have received abortion care for adverse treatment may violate the general nondiscrimination mandate in section 1681.

Changes: None.

Statutory Authority

Comments: Some commenters posited that prohibiting discrimination based on a decision to terminate a pregnancy is beyond the Department's authority under Title IX, and that such a prohibition would require a congressional amendment to Title IX or else would violate the major questions doctrine, as articulated by the Supreme Court in *West Virginia* v. *EPA,* 597 U.S. 697, 721 (2022). Some commenters expressed their concern that the Department would expand abortion access through enforcement and other regulatory guidance.

Discussion: The Department's regulation of discrimination based on pregnancy or related conditions, including termination of pregnancy, does not raise concerns under the major questions doctrine.[80] The Supreme Court has recognized the Department's broad authority, based on Congress' express delegation, to issue regulations prohibiting sex discrimination under Title IX. *Gebser,* 524 U.S. at 292; 20 U.S.C. 1682. As discussed in the July 2022 NPRM and in the above section on the § 106.2 Definition of ''Pregnancy or Related Conditions''—General Scope of Coverage, the prohibition on discrimination based on pregnancy or related conditions, including termination of pregnancy, is neither extraordinary nor unprecedented, and in fact has been in place since the Title IX regulations were first promulgated in 1975. *See* 87 FR 41513; 40 FR 24128 (codified at 45 CFR 86.21(c)(2), 86.40(b)(1), 86.57(b) (1975)); 34 CFR 106.21(c), 106.41(b)(1), 106.57(b) (current).

While only Congress has the authority to amend a statute, the Department disagrees that the definition of ''pregnancy or related conditions'' is beyond the scope of the Department's authority under Title IX. Congress authorized the Department to issue regulations to effectuate Title IX's prohibition on sex discrimination in education programs or activities that receive Federal financial assistance, consistent with achievement of the objectives of the statute. *See* 20 U.S.C. 1682. The Department is not redefining or attempting to redefine Title IX, but rather effectuating Title IX pursuant to its statutory authority, *see* 20 U.S.C. 1682, and the applicable regulations have prohibited discrimination based on termination of pregnancy for nearly half a century.

Responding to concerns that the Department will expand abortion access through enforcement and other regulatory guidance, the Department again reiterates that it has interpreted Title IX to protect against discrimination based on termination of pregnancy since 1975. Title IX and its implementing regulations ensure that students and employees are able to make their own decisions about pregnancy or related conditions without losing equal access to education or education-related employment. Further, the Department's enforcement and other regulatory guidance are limited to a recipient's obligation under Title IX to ensure that students or employees who seek or have had abortions have equal access to education or employment, and, therefore, are unrelated to expanding abortion access.

Changes: None.

Cost-Benefit Analysis and Rationale

Comments: Some commenters argued that defining ''pregnancy or related conditions'' to include abortion or termination of pregnancy is arbitrary and capricious, and that the Department did not adequately justify or weigh the costs and benefits of broadly defining pregnancy or related conditions. Other commenters directed the Department's attention to research and data regarding barriers faced by pregnant students and employees in educational environments.

Discussion: The Department explains in detail the potential costs and benefits of the final regulations related to nondiscrimination based on pregnancy or related conditions in the *Regulatory Impact Analysis.* In addition to this discussion, the Department notes that the final regulations reflect the Department's decisions regarding how best to implement the nondiscrimination mandate of Title IX, after considering public comment and stakeholder engagement. The Department is not required under the Administrative Procedure Act, relevant Executive Orders, or OMB circulars, to cite statistics regarding every underlying issue when conducting rulemaking. Nor is it arbitrary and capricious to interpret ''pregnancy or related conditions'' to include termination of pregnancy, including abortion, for reasons explained in the July 2022 NPRM and reiterated above. *See* 87 FR 41513.

Changes: None.

Harm

Comments: Some commenters stated that including ''termination of pregnancy'' in the definition of pregnancy or related conditions would harm women in various ways they felt were contrary to Title IX, including that it might impermissibly encourage or fund abortions or increase sexual violence. Other commenters argued that including ''termination of pregnancy'' in the definition of pregnancy or related conditions would incentivize recipients to offer access to abortions because accommodating a student's or an employee's termination of pregnancy and recovery would be less expensive and less burdensome for the recipient than providing the student or employee with modifications for pregnancy, childbirth, and lactation.

Discussion: The Department disagrees with commenters who argued that the final regulations should not prohibit discrimination based on termination of pregnancy for the reasons they described above. The regulations simply ensure that students and employees are able to make their own decisions about pregnancy or related conditions without losing equal access to education or education-related employment.

The final regulations make clear that a recipient has obligations to students and employees at all stages of pregnancy, including through recovery and in connection with related medical conditions. Contrary to some commenters' assertions, making clear that a recipient may not discriminate on the basis of pregnancy or related conditions and must provide reasonable modifications to students will enable students to participate in education programs and activities without discrimination. As described below, the final regulations clarify and strengthen protections based on pregnancy or related conditions that will promote students' and employees' continued access to a recipient's education program or activity including, for

[80] *See, e.g., West Virginia,* 597 U.S. at 721. The Supreme Court's decision in *West Virginia* was issued on June 30, 2022, after the Department released the unofficial copy of the July 2022 NPRM on June 23, 2022, so that case also could not be addressed in the July 2022 NPRM.

example, providing reasonable modifications to students for prenatal care, birth, and postpartum care, and providing lactation space for students and employees.

In addition to protections against pregnancy discrimination, these final regulations contain provisions providing lactation space for students and employees. Nothing in the final regulations encourages or discourages pregnancy or termination of pregnancy. In addition, contrary to commenters' concern, the final regulations do not encourage sexual violence but rather contain extensive provisions aimed at preventing, addressing, and eliminating it, because sexual violence is prohibited sex discrimination.

Some comments appear to reflect a misunderstanding of the regulations. First, a recipient is not required to provide reasonable modifications due to pregnancy or related conditions for employees. Second, with respect to students, these final regulations at § 106.40(b)(3)(ii) make clear that a recipient must make only such reasonable modifications as necessary to prevent sex discrimination and ensure equal access to the recipient's education program or activity based on the student's individualized needs in consultation with the student. Although such reasonable modifications will be determined on a case-by-case basis, the Department anticipates that typically they will not be particularly expensive or extensive.

With respect to concerns that these regulations may encourage individuals to get abortions or incentivize recipients to offer access to abortions rather than reasonable modifications, the Department is unaware of evidence that Title IX's longstanding provisions relating to discrimination on the basis of pregnancy or related conditions, including termination of pregnancy, have the effects commenters projected. As noted above, the final regulations do not dictate how students or employees make pregnancy or health-related decisions, but rather ensure that a recipient allows them equal educational or employment access no matter how their pregnancy progresses or what conditions result. The Department concludes, in any event, that ensuring that individuals do not face discrimination on the basis of pregnancy or related conditions, including termination of pregnancy, in federally funded education programs or activities is necessary to effectuate Title IX's mandate.

Changes: None.

Intent of Title IX

Comments: Some commenters asserted that prohibiting discrimination based on termination of pregnancy conflicts with Title IX because discrimination based on termination of pregnancy is not a basis of sex discrimination or because it only affects women.

Discussion: Discrimination based on termination of pregnancy is sex discrimination for several reasons. First, the Department notes that discrimination on the basis of pregnancy is a type of sex discrimination acknowledged by case law. *See Conley* v. *Nw. Fla. State Coll.,* 145 F. Supp. 3d 1073, 1077–78 (N.D. Fla. 2015) (holding that Title IX's prohibition on sex discrimination covered pregnancy based on both statutory interpretation and legislative history); *see also Wort* v. *Vierling,* Case No. 82–3169, slip op. (C.D. Ill. Sept. 4, 1984), *aff'd on other grounds,* 778 F.2d 1233 (7th Cir. 1985) (noting that the district court found that a school discriminated against a student on the basis of sex in violation of Title IX when it dismissed her from the National Honor Society because of her pregnancy); *Muro* v. *Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll.,* No. CV 19–10812, 2019 WL 5810308, at *3 (E.D. La. Nov. 7, 2019) (''Courts have held that discrimination on the basis of pregnancy, childbirth, or related medical conditions is a form of sex discrimination prohibited by Title IX.''); *Varlesi* v. *Wayne State Univ.,* 909 F. Supp. 2d 827, 854 (E.D. Mich. 2012) (holding that pregnancy discrimination ''is unquestionably covered as a subset of sex discrimination under Title IX''). Likewise, the Title IX regulations have considered discrimination based on termination of pregnancy an aspect of pregnancy discrimination since 1975. *See* 40 FR 24128 (codified at 45 CFR 86.21(c)(2), 86.40(b)(1), 86.57 (1975)); 34 CFR 106.21(c), 106.41(b)(1), 106.57(b) (current).

Second, because pregnancy is necessarily a condition related to sex characteristics (*e.g.,* uterus, ovaries, fallopian tubes), discrimination based on conditions that arise from pregnancy, including termination of pregnancy, constitutes discrimination on the basis of sex characteristics. Commenters offered no persuasive reason for withdrawing protections for pregnancy discrimination on the basis of the termination of pregnancy.

Finally, pregnancy discrimination, including because of termination of pregnancy, is also a type of discrimination on the basis of sex stereotypes. For example, a professor who learns a student recently terminated her pregnancy and refuses to allow her into a field work course because the professor believes that students who recently terminated a pregnancy are unable to complete field work would be discriminating on the basis of sex stereotypes. As discussed in the July 2022 NPRM, discrimination against students and employees who are pregnant or experiencing pregnancy-related conditions—including conditions relating to termination of pregnancy—frequently functions as a proxy for sex in discriminatory policies and procedures. *See* 87 FR 41513. Such discrimination is sometimes based on sex stereotypes about the roles of men and women, or, in other cases, a recipient may fail to accommodate conditions associated with women as effectively as those associated with men. This sort of discrimination can result not only from animus, but also from sex-based indifference to the needs of this student and employee population. *See id.*

Changes: None.

Consistency With Other Federal laws

Comments: Some commenters argued that including ''termination of pregnancy'' in the definition of pregnancy or related conditions is inconsistent with other Federal laws, including Title VII, Section 1557 of the ACA, 42 U.S.C. 18116 (Section 1557), Title X of the Public Health Service Act, 42 U.S.C. 300 to 300a-6 (Title X), the Helms Amendment, 22 U.S.C. 2151b(f)(1), and Federal case law. For example, some commenters asserted that the Title IX final regulations would require recipient health insurance or healthcare to cover abortion under Title IX and not under Title VII; and that the regulations violate the Helms Amendment, which prohibits the use of certain Federal funds for foreign assistance to pay for abortion as a method of family planning or to coerce anyone to provide an abortion. Some commenters said that the Department should address the impact of the proposed regulations in health care or explicitly state that Title IX does not apply in the health care context.

Discussion: To the extent that commenters raised concerns that the final regulations conflict with other Federal laws such as Title VII, Title X, Section 1557, and the Helms Amendment because these commenters perceived the final Title IX regulations to require a recipient to pay for abortions either directly or through health insurance, these commenters are mistaken. As explained above in the

section on the § 106.2 Definition of ''Pregnancy or Related Conditions''—Abortion Neutrality Provision, 20 U.S.C. 1688, nothing in Title IX or these final regulations requires recipients to pay for abortions either directly or through health insurance. Indeed, these regulations are consistent with 20 U.S.C. 1688, which provides that Title IX may not be ''construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion.'' The Department and these final regulations abide by that limitation.

Section 1557 prohibits sex discrimination in federally funded health programs and activities, some of which may also be education programs and activities covered under Title IX. Title IX and Section 1557 are independent authorities, and requirements under Section 1557 are outside of the scope of this rulemaking. To the extent a recipient operates an education program or activity subject to Title IX that is also a health program or activity subject to Section 1557, it is obligated to comply with both.

Changes: None.

Alternative Proposals

Comments: Some commenters suggested alternatives to the inclusion of ''termination of pregnancy'' in the definition of ''pregnancy or related conditions,'' including providing adoption assistance and free medical care, providing accommodations and assistance to pregnant students and mothers, supporting lactation spaces in schools and adding changing tables to restrooms.

Some commenters asked that the Department address the issues related to pregnancy in ways other than through the regulations, including through a separate rulemaking, subregulatory guidance, training, or a public forum.

Discussion: The Department appreciates commenters' suggestions for alternatives to inclusion of ''termination of pregnancy'' in the regulations but believes that such coverage is necessary to prevent sex discrimination, as described above. Although some of the commenters' ideas such as adoption assistance and free medical care are beyond the scope of the final regulations, the Department notes that several of the commenters' other suggestions are encompassed in the final regulations, such as requiring lactation spaces in schools and providing reasonable modifications for students who are pregnant or experiencing pregnancy-related conditions.

The Department declines the suggestions to conduct a separate rulemaking related to pregnancy or related conditions, instead of issuing these final regulations, because the process for developing these final regulations has been extensive and thorough, with a wide range of views expressed and considered, including on issues related to pregnancy or related conditions. Going forward, the Department will offer technical assistance and guidance, as appropriate, to promote compliance with the final regulations.

Changes: None.

First Amendment

Comments: Some commenters opposed the inclusion of abortion within the definition of ''pregnancy or related conditions'' because of their views—moral, religious, or otherwise—that life begins at conception. Relatedly, they stated that including ''termination of pregnancy'' in the definition of pregnancy or related conditions would interfere with constitutionally protected rights, including parental rights, various religious freedoms, and free speech rights. For example, they suggested that the inclusion of ''termination of pregnancy'' in the proposed definition of ''pregnancy or related conditions'' would jeopardize the religious freedoms of individuals and entities that object to abortion, including healthcare providers, members of certain faiths, or religious schools or other institutions, and potentially subject them to discrimination.

Commenters asked the Department to exempt individuals and recipients from Title IX compliance that would conflict with their moral or religious beliefs; for example, so they would not have to provide abortion-related health care or information. Some commenters asked the Department to clarify when anti-abortion speakers or acts would violate Title IX.

Discussion: The Department has carefully considered concerns that the definition of ''pregnancy or related conditions'' may impact religious beliefs and expression. As an initial matter, the Department observes again that prohibiting discrimination based on ''termination of pregnancy'' is not new but instead has been part of the Title IX regulations since 1975. *See* 40 FR 24128(codified at 45 CFR 86.21(c)(2), 86.40(b)(1), 86.57(b) (1975)); 34 CFR 106.21(c), 106.40(b)(1), 106.57(b) (current). Thus, to the extent that commenter concerns involved negative consequences that commenters thought might follow from ''adding'' such protection to the regulations, those concerns are based on a misunderstanding of the existing regulations. Likewise, as described under the heading Consistency with Other Federal Laws, the final regulations do not require a recipient to provide or pay for benefits or services related to, or use facilities for, abortions.

Further, the pregnancy-related provisions, including the definition of ''pregnancy or related conditions,'' do not limit § 106.6(d), which states that nothing in the Title IX regulations requires a recipient to restrict any rights that would otherwise be protected from government action by the First Amendment; deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments; or restrict any other rights guaranteed against government action by the United States Constitution. The Department reaffirms that a recipient cannot use Title IX to limit the free exercise of religion or protected speech or expression. Similarly, the Department also underscores that none of the amendments to the regulations changes or is intended to change the commitment of the Department to fulfill its obligations in a manner that is fully consistent with the First Amendment and other guarantees of religious freedom in the Constitution of the United States and Federal law. *See, e.g.,* 42 U.S.C. 2000bb–2000bb-4 (Religious Freedom Restoration Act). For additional discussion regarding the First Amendment, see the section on Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2).

Finally, Title IX has since its passage in 1972 contained an exemption for a recipient that is controlled by a religious organization from complying with provisions of the regulations that conflict with a specific tenet of the religious organization. 20 U.S.C. 1681(a)(3). This provision and § 106.12 of the Department's Title IX regulations, which implements this statutory provision, remain unchanged. The Department posts correspondence regarding religious exemptions on its website.[81] For additional explanation of religious exemptions from Title IX, see the discussion of Religious Exemptions (Section VII).

Changes: None.

[81] *See https://www2.ed.gov/about/offices/list/ocr/correspondence/other.html* (last visited Mar. 12, 2024).

2. Section 106.2 Definition of ''Parental Status''

Comments: The Department received many comments expressing support for the proposed definition of ''parental status.'' The Department also received comments opposing the proposed definition of ''parental status,'' with several commenters asserting that the definition would be too broad and others raising concerns about the proposed additions of ''in loco parentis,'' ''legal custodian or guardian,'' and ''actively seeking legal custody, guardianship, visitation, or adoption.'' One commenter suggested raising the age of the person receiving care from 18 years old to 21 years old.

Other commenters proposed that the Department adopt a more inclusive term than ''parental status,'' such as guardian or representative, and asked the Department to include coverage of domestic partners of a child's parent as well as parents who have conceived via assisted reproductive technology but are not biologically related. Some commenters asked the Department to define ''family status.''

Discussion: Since 1975, the regulations implementing Title IX have prohibited sex-based distinctions based on parental, family, or marital status to ensure that persons are not limited or denied in their access to a recipient's education program or activity based on sex. 40 FR 24128 (codified at 45 CFR 86.21(c), 86.40(a), 86.57(a) (1975)); 34 CFR 106.21(c), 106.40(a), 106.57(a) (current). However, prior to this rulemaking, the term ''parental status'' had not been defined in the Title IX regulations. The Department recognizes that sex stereotypes about who bears responsibility for raising children are still common and may affect applicants, students, and employees who are or may become parents when accessing educational opportunities. By defining ''parental status'' in § 106.2, the Department provides clarity regarding the scope of Title IX's prohibition on sex discrimination related to parental status, and the Department acknowledges commenters' support for including this definition. As explained in the July 2022 NPRM, the Department found Executive Order 13152, 65 FR 26115, which has been in place since May 2000, informative in developing this definition. *See* 87 FR 41516. Commenters provided no case law, nor was the Department able to find any, indicating that the definition is too broad, unclear, or otherwise legally insufficient. The definition of ''parental status'' in § 106.2 does not bestow parental authority on any person. As a general matter, parental rights are determined by State law, and this definition does not abrogate those rights. Instead, the definition defines the scope of the prohibition on sex discrimination in the adoption or implementation of any policy, practice, or procedure concerning parental status of a student, employee, or applicant for admission or employment.

Regarding the inclusion of a person who is ''in loco parentis,'' many commenters interpreted this language as permitting a recipient to be ''in loco parentis'' over a student. The definition of ''parental status'' in § 106.2 applies only to its use in §§ 106.21(c)(2)(i), 106.37(a)(3), 106.40(a), and 106.57(a)(1), which prohibit sex discrimination related to a person's parental status. To read the definition to include a recipient as ''in loco parentis'' would be incorrect as the definition refers to a person who may be subjected to sex discrimination under these regulations, which in this context would not be an entity. Moreover, as stated above, this provision does not bestow parental authority or grant parental rights. The Department declines to offer specific examples of people who would be considered ''in loco parentis'' and how to obtain that designation because that will depend on the facts and circumstances of a particular case and on State law. As ''in loco parentis'' is a familiar term in law, it is unnecessary to offer further clarification.

Similarly, the Department declines to offer specific examples of who would be considered a legal custodian or guardian and how such an individual would be selected and appointed, as that determination will depend on the facts and circumstances of a particular case and on State law. As with ''in loco parentis,'' ''legal custodian or guardian'' is familiar in law and it is unnecessary to offer further clarification.

Regarding the inclusion of a person who is ''actively seeking legal custody, guardianship, visitation, or adoption,'' the Department disagrees with commenters who asserted this language diminishes parental rights. Commenters misinterpreted this provision as creating a conflict among parental rights by granting the same parental rights to those who are actively seeking legal custody over another person as an individual who already has legal authority over another. Again, this definition does not grant or diminish parental rights to any person. It simply defines categories of individuals who are protected against sex discrimination under final §§ 106.21(c)(2)(i), 106.37(a)(3), 106.40(a), and 106.57(a)(1); it also does not dictate whom the Department would consider to be a parent, guardian, or authorized legal representative for purposes of other parts of the Title IX regulations.

The Department declines to raise the age of the person receiving care to 21 years old because most States have set the age of legal majority at 18 years old, and the definition of ''parental status'' includes those with the relevant relationship with respect to persons over the age of 18 who are incapable of self-care because of a physical or mental disability.

The Department acknowledges the suggestion to use a more inclusive term than ''parental,'' such as guardian or representative, but the text of the definition addresses the underlying concern of ensuring that individuals other than legal parents are protected from discrimination. Additionally, the Department declines to add a separate category to the definition of ''parental status'' for domestic partners and parents who have conceived via assisted reproductive technology but are not biologically related to a child because only one of the seven categories enumerated in the definition is limited to biological relationships and many of the categories could also apply to such individuals, depending on the facts presented.

Finally, the Department considered the suggestion to define ''family status'' but determined that a definition is not necessary. The Department considers the term ''family status'' to be sufficiently well understood that it need not be defined in the regulatory text, but nevertheless clarifies that the Department considers the term to be broadly inclusive and refers to the configuration of one's family or one's role in a family.

Changes: None.

B. Admissions

1. Section 106.21(c) Parental, Family, or Marital Status; Pregnancy or Related Conditions

General Support

Comments: Some commenters supported prohibiting discrimination against applicants for admission based on pregnancy or related conditions because it would allow for a more inclusive educational environment, would contribute to increased college or university completion rates and greater upward mobility for students who are pregnant or experiencing pregnancy-related conditions, and would be vital to such applicants' wellness and success. A group of commenters stated that the proposed regulations clarify and expand upon existing Title IX protections and

help ensure that neither pregnancy nor parenting status hinder a student's full and equal access to educational opportunities.

Discussion: The Department acknowledges commenters' support for § 106.21. The Department shares the goals of ensuring that school environments are inclusive and that recipients prevent discrimination and ensure equal access to their education programs or activities for students who are pregnant or experiencing pregnancy-related conditions to give full effect to Title IX.

The Department made three changes to the text of final § 106.21(c)(2). Upon review, the Department determined that replacing the word ''apply'' with ''implement'' in § 106.21(c)(2)(i) improves clarity consistent with similar revisions in final §§ 106.40(a) and 106.57(a), and for consistency also decided to replace the words ''establish or follow'' in § 106.21(c)(2)(ii) with ''adopt or implement.'' In addition, in § 106.21(c)(2)(iii), the Department made a grammatical correction by adding the word ''a'' between the words ''[m]ake'' and ''pre-admission inquiry.''

The Department explains the application of the final regulations to parental status in the discussion of the definition of ''parental status'' in § 106.2.

Changes: Section 106.21(c)(2)(i) has been revised to substitute the word ''implement'' for the word ''apply.'' Section 106.21(c)(2)(ii) has been revised to substitute the words ''adopt or implement'' for the words ''establish or follow.'' Lastly, § 106.21(c)(2)(iii) has been revised to add the word ''a'' before ''pre-admission inquiry.''

Application Only to Recipients Subject to Subpart C

Comments: Some commenters suggested that the Department clarify that the revised provisions in proposed § 106.21 do not apply to nonvocational elementary schools and secondary schools, which the commenters deemed appropriate considering current § 106.15(d), proposed § 106.31(a)(3), and current Departmental guidance.

Discussion: The Department confirms that Subpart C of the regulations, which governs admissions, does not apply to nonvocational elementary schools and secondary schools. 34 CFR 106.15(c), (d). The Department adds that, under § 106.34(a), nonvocational elementary schools and secondary schools may not refuse participation based on sex, with some exceptions listed in the provision, and § 106.34(c) addresses admissions to single-sex public nonvocational elementary schools and secondary schools.

Changes: None.

''Perceived'' and ''Expected''

Comments: One commenter urged the Department to add ''perceived'' and ''expected'' to the list of protected statuses in § 106.21(c)(2)(ii) to better capture the ways that stigma and bias about pregnancy prevent equal access to educational opportunities. The commenter explained that adding ''perceived'' and ''expected'' to the list of protected statuses would help ensure that applicants rumored or otherwise perceived to be pregnant are not denied educational opportunities, that applicants who seek fertility care or otherwise plan to be pregnant are not discriminated against on that basis, and that applicants are not denied educational opportunities because they might become pregnant.

Discussion: The Department declines to add ''perceived'' and ''expected'' statuses to § 106.21(c)(2)(ii) for the same reasons discussed in connection with the comment recommending that the Department make the same change to the ''definition of pregnancy'' in § 106.2. The Department's rationale is explained more fully in the discussion of § 106.10.

Changes: None.

Pre-Admission Inquiries

Comments: One commenter requested that the Department change proposed § 106.21(c)(2)(iii), which prohibits a recipient from making a pre-admission inquiry into the marital status of an applicant, to include ''current, potential, or past pregnancy or related conditions,'' which the commenter stated is particularly important following *Dobbs.* That commenter also requested that the Department extend proposed § 106.21(c)(2)(iii) to include ''family status and parental status'' because women are often custodial parents and a recipient with stereotypical concerns about a parenting applicant's commitment to her education may use such information to discriminate against that applicant. Another commenter urged the Department to clarify that pre-admission inquiries regarding the parental status of an applicant are permitted under Title IX if they do not affect the applicant's chances of admission.

A group of commenters objected to the Department's proposal to replace the phrase ''such applicants of both sexes'' in current § 106.21(c)(4) with ''all applicants'' in proposed § 106.21(c)(2)(iii), because the ''both sexes'' phrasing best conveys what Title IX prohibits and is used in the Title IX statute, the removal of the phrase would make the sentence grammatically incorrect, and keeping the words ''both sexes'' would not preclude a recipient from choosing to ask more specifically how an applicant identifies.

Some commenters encouraged the Department to consider the impact of proposed changes to pre-admission inquiries regarding a student's sex in proposed § 106.21(c)(2)(iii), including the impact on student privacy.

Discussion: The Department agrees that an applicant's pregnancy or related conditions and sex-based distinctions regarding parental, family, or marital status should not affect their chances of admission to a recipient institution and emphasizes that pre-admission inquiries regarding the marital status of an applicant are not permitted under the Department's Title IX regulations. However, the Department declines to add ''current, potential, or past pregnancy or related conditions'' or ''family status and parental status'' to § 106.21(c)(2)(iii) of the final regulations. Section 106.21(c)(2)(i) and (ii) of the final regulations already states that a recipient covered by subpart C must not discriminate against any applicant based on current, potential, or past pregnancy or related conditions and must not implement any policy, practice, or procedure—including pre-admission inquiries—concerning the parental, family, or marital status of a student or applicant that treats that person differently based on sex. In addition, the Department acknowledges the concerns raised by commenters who explained that the widely used Common Application includes a question regarding whether the applicant has children and if so, how many, and that the anonymized responses are a rare source of data on the parenting student population that is helpful to researchers and advocates.

The Department disagrees with the assertion that it is critical to retain the words ''such applicants of both sexes'' in § 106.21(c)(2)(iii). Contrary to the commenters' characterization, stating that this pre-admission inquiry is permissible ''only if this question is asked of all applicants'' is consistent with Title IX's prohibition on sex discrimination and conveys the same point as the current language, which prohibits a recipient from asking such questions just of students of one sex. In addition, the words ''all applicants'' are more inclusive and are grammatically correct. The Department also does not find persuasive the fact that the ''both sexes'' language was used in the 1972 statutory text, because it was used in only one specific provision for

recipients that were transitioning from admitting only students of one sex to admitting students of both sexes. *See* 20 U.S.C. 1681(a)(2).

As explained more fully in the discussion of § 106.44(j), the Department has carefully considered the impact of the regulatory changes on maintaining confidentiality of personally identifiable information, and in response to commenter concerns the Department revised final § 106.44(j) to prohibit the disclosure of personally identifiable information obtained in the course of complying with this part, with some exceptions. The disclosure restrictions are explained more fully in the discussion of § 106.44(j).

Changes: None.

Intersection With Disability Law

Comments: One commenter opposed the requirement in proposed § 106.21(c)(1) that, in determining admissions, a recipient must treat pregnancy or related conditions or any temporary disability resulting therefrom in the same manner and under the same policies as any other temporary disability or physical condition, because the commenter interpreted the standard as requiring pregnancy to be considered a disability. Another commenter asserted that the proposed regulations were inconsistent with disability law to the extent they would require a recipient to treat pregnant applicants differently than those with other types of temporary disabilities.

Discussion: As the Department indicated in the July 2022 NPRM, some conditions or complications related to pregnancy might qualify as disabilities under Section 504 and the ADA, but pregnancy itself is not a disability. 87 FR 41523. The Department continues to stress that if someone who is pregnant or experiencing pregnancy-related conditions has a disability, Section 504 or the ADA may also apply, whether or not the disability is related to pregnancy.

At the same time, the Department agrees that it is important that a recipient understand how to treat applicants for admission who are pregnant or experiencing pregnancy-related conditions under Title IX. The Department has considered the fact that some recipients may not maintain standalone policies related to ''temporary disabilities,'' since that term is not used in Section 504 or the ADA, and that such an omission could result in the application of the Title IX provision regarding pregnancy and admissions being unclear. To simplify § 106.21(c)(1) and avoid any suggestion that the provision applies only when a recipient maintains policies related strictly to ''temporary disabilities'' that may be used in comparison, the Department has deleted the term ''or any temporary disability resulting therefrom'' and changed the words ''any other temporary disability or physical condition'' to ''any other temporary medical conditions.'' The Department views these changes as clarifying the scope of coverage and ensuring that § 106.21(c)(1) will apply to the extent a recipient has any policies or practices regarding temporary medical conditions, as that term is ordinarily understood.

A recipient's policy with respect to temporary medical conditions may be subsumed within its policy related to disabilities, or it may be separate. The Department also clarifies that, if the recipient does not have a policy regarding the treatment of temporary medical conditions, it must treat pregnancy or related conditions in the same manner that it treats temporary medical conditions in practice. When the applicant has a pregnancy-related condition that qualifies as a disability under the ADA or Section 504, the individual is also protected from discrimination under those laws as well.

Because a recipient's policies and practices regarding other temporary medical conditions are the proper comparators for pregnancy or related conditions, final § 106.21(c)(1) requires that pregnancy or related conditions and temporary medical conditions be treated in the same manner and under the same policies and practices, including with respect to the provision of reasonable modifications to applicants with temporary medical conditions. If a recipient does not have a policy or practice of providing reasonable modifications for applicants with temporary medical conditions, it is not required to provide reasonable modifications for pregnancy or related conditions under Title IX. However, as noted above, when the applicant has a pregnancy-related condition that qualifies as a disability, the recipient must comply with its nondiscrimination obligations under the ADA and Section 504.

Changes: In final § 106.21(c)(1), the words ''or any temporary disability resulting therefrom'' have been removed and the words ''disability or physical condition'' have been changed to ''medical conditions.''

Request To Extend Reasonable Modifications to Applicants

Comments: A group of commenters asserted that under proposed § 106.21(c)(1), pregnant and parenting applicants for admission should have rights to reasonable modifications under Title IX, independent of what modifications are provided to those with temporary disabilities, so that pregnant and parenting applicants are afforded the same protections under Title IX as pregnant and parenting students who are enrolled and to address the concern that a recipient may be unaware of its obligation to accommodate an applicant with a temporary disability.

Discussion: The Department carefully considered the suggestion to extend the reasonable modifications requirement to applicants for admission but declines to do so for a few reasons. First, the Department would need to consider additional information before making such a change, particularly given factors of possible cost, administrative burden, and possible interplay with other overlapping legal requirements. Second, the Department notes that final § 106.21(c)(1) requires a recipient, in the admissions process, to treat pregnancy or related conditions in the same manner and under the same policies as it would treat any other temporary medical condition. As a result, for example, if a recipient provides an applicant who is recovering from back surgery an extension of time for a medically necessary period to submit a required application essay, it must do the same for a student who is recovering from childbirth. Finally, applicants whose pregnancy-related medical conditions qualify as disabilities under Section 504 or the ADA may also be entitled to reasonable accommodations during the application process under those laws.

Changes: None.

Parental Status

Comments: One commenter stated that it is unnecessarily narrow for proposed § 106.21(c)(2)(i) to prohibit only discrimination that treats parenting applicants differently based on sex and urged the Department to explicitly prohibit discrimination against applicants for admission based on that person's ''current, potential, perceived, expected, or past parental, family, marital, or caregiver status,'' so that recipients will not think they may discriminate against parenting students or applicants as long as they do so equally across sexes. The commenter explained that discrimination based on parental, family, and caregiver status often constitutes discrimination on the basis of sex because women are more often custodial parents, and such discrimination is often tied to stereotypes that women who are

mothers are likely to neglect their education or should be focused only on providing care to their children.

Discussion: The Department would need to consider additional information before making such a change, particularly given possible considerations of cost and administrative burden. The Department notes that a recipient covered by Subpart C is prohibited from treating parenting applicants differently based on sex under final § 106.21(c)(2)(i) and from discriminating against them based on sex stereotypes under § 106.10, including about the proper roles of mothers and fathers or the proper gender of caretakers.

Changes: None.

C. Discrimination Based on a Student's Parental, Family, or Marital Status, or Pregnancy or Related Conditions

1. Section 106.40 Parental, Family, or Marital Status; Pregnancy or Related Conditions; and Section 106.40(a) Status Generally

Comments: Many commenters expressed support for proposed § 106.40(a) because it provides protection and addresses barriers that parenting students face in pursuing educational opportunities. Some commenters shared personal stories regarding their experiences as parenting students, including being asked to withdraw from a postsecondary institution, being discouraged from having more children, risking loss of scholarships, and being subjected to sex stereotypes regarding the expected roles of mothers and fathers.

In addition, several commenters urged the Department to broaden the protections in proposed § 106.40(a) by explicitly prohibiting discrimination, including sex-based harassment, based on perceived, expected, or past parental, family, marital, or caregiver status rather than prohibiting only discrimination that treats parenting students differently based on sex. One commenter asked the Department to specify that discrimination based on parental status is prohibited throughout the student's participation in the education program or activity, not just immediately following the birth or adoption of a child. Some commenters asserted that expectant parents who are not giving birth, caregivers who are not parents, and students who are perceived to be parents are improperly excluded from the protection of proposed § 106.40(a).

Discussion: The Department acknowledges commenters' support of proposed § 106.40(a). The Department understands commenters' suggestions to broaden the protections in proposed § 106.40(a) to explicitly prohibit discrimination and harassment based on perceived, expected, or past parental, family, marital, or caregiver status rather than prohibiting discrimination that treats parenting students differently based on sex. However, the Department would need to consider additional information before making such a change.

With respect to the suggestion to add the word ''perceived,'' the Department declines this suggestion because a recipient is already prohibited from treating parenting students differently based on sex and from discriminating against them based on sex stereotypes, including stereotypical views about the roles of mothers, fathers, or caretakers, under § 106.10. The Department agrees that it is sex discrimination to use sex stereotypes to deny equal educational opportunities related to a student's perceived marital or parental status.

The Department also declines suggestions to add the word ''expected'' to the regulatory text, as the text already includes the word ''potential,'' which the Department interprets to cover discrimination based on the expectation that a student is or is not married or a parent or has some other family status. The Department further notes that the definition of ''parental status'' is not limited to a timeframe immediately following the birth or adoption of a child and agrees that the protection of § 106.40(a) applies throughout a student's participation in a recipient's education program or activity. Regarding concerns about non-birthing parents and caregivers, the Department refers commenters to the discussion of the definition of ''parental status'' in § 106.2.

Changes: Consistent with similar changes for consistency in §§ 106.40(a) and 106.57(a), the Department has substituted the word ''implement'' for ''apply.''

2. Section 106.40(b)(1) Pregnancy or Related Conditions—Nondiscrimination

Comments: Many commenters expressed general support for the proposed regulations' prohibition on discrimination on the basis of ''pregnancy or related conditions,'' explaining that this prohibition would be consistent with Title IX's mandate to prohibit sex discrimination. These commenters believed proposed § 106.40(b)(1) would advance pregnant and parenting students' equal access to educational opportunities and improve outcomes for those students and their children. Some commenters appreciated that the proposed regulations would remove the outdated ''false pregnancy'' term. Some commenters stated that students who are, or might be, pregnant should not be denied education, and that modifications to an education program should be made when necessary for the safety and comfort of pregnant students, allowing them to both parent and succeed academically. Several commenters cited the experiences of individual students who either were harassed or feared harassment related to pregnancy or related conditions.

Many commenters explained that pregnant and parenting students face barriers to completing their education, including discrimination, harassment, and a lack of institutional supports. Some commenters provided information about the impact of pregnancy and parenting on teen parents, including the negative impact on high school graduation rates, career opportunities, and mental health, noting the disproportionate impact of teen pregnancy and parenting on certain groups. Some commenters observed that pregnancy discrimination is prevalent in postsecondary education, and that parenting students are less likely to graduate because of punitive attendance policies and, when they do graduate, have higher levels of debt than their non-parenting peers.

Some commenters asked the Department to confirm that it is a violation of Title IX for a recipient to cause someone to lose a college scholarship or their place on a team because of pregnancy. Finally, some commenters urged the Department to issue updated guidance for K–12 recipients on the Title IX rights of pregnant and parenting students.

Discussion: The Department acknowledges the information shared by commenters about the barriers to education faced by students who are pregnant, experiencing pregnancy-related conditions, or parenting. The Department agrees that the final regulations will clarify recipient obligations to ensure that pregnant and parenting students are not subject to discrimination on the basis of sex. The Department acknowledges the support for § 106.40(b)(1) prohibiting discrimination against students and employees based on ''current, potential, or past'' pregnancy or pregnancy-related conditions, and agrees that this updated and comprehensive term will help reduce barriers to educational access and professional achievement and improve access to education and career opportunities.

Commenters' support reinforces the Department's view, as indicated in the

July 2022 NPRM, that protecting students from discrimination on these bases will help to achieve Title IX's objective of eradicating sex discrimination in federally funded education programs and activities. *See* 87 FR 41518. As discussed in the July 2022 NPRM, Title IX was enacted in part because women were being denied educational access due to views that they were less capable and less committed to academic demands given their perceived pregnancy and childbearing obligations. 87 FR 41393. The Department is convinced that clarifying Title IX's protections to cover current, potential, or past pregnancy or related conditions will ensure that a student is not treated unfairly due to, for example, a likelihood of having children in the future, having had children in the past, or having experienced pregnancy or related medical conditions. The Department further confirms its view that, fundamental to the purpose of Title IX, the final regulations will significantly help address the barriers to educational access arising from perceptions about pregnancy and childbearing.

The Department notes that current § 106.40(b)(1) already prohibits discrimination against any student, including in any extracurricular activity such as athletics, based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom. Final § 106.40(b)(1) similarly prohibits any discrimination based on a student's current, potential, or past pregnancy or related conditions. ''Pregnancy or related conditions'' is defined in § 106.2 to include pregnancy, childbirth, termination of pregnancy, and lactation; medical conditions related to pregnancy, childbirth, termination of pregnancy, and lactation; and recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions, providing broadly inclusive coverage.

In these final regulations, the Department maintains its longstanding interpretation that a recipient violates Title IX by stopping or reducing financial assistance on the basis of pregnancy or related conditions; subjecting students of one sex to additional or different requirements, such as requiring women athletes to sign contracts listing pregnancy as an infraction; or excluding students from participating in a recipient's education program or activity, including extracurricular activities and athletics, on the basis of the student's pregnancy or a related condition. *See, e.g.,* U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter: Student Athletes and Pregnancy (June 25, 2007), *https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20070625.html.*

Regarding the request for updated guidance for K–12 students, the Department understands the importance of supporting recipients in the implementation of these regulations and ensuring that students know their rights. The Department anticipates that these regulations, which apply with equal force in the elementary school and secondary school setting, will clarify a recipient's obligations to students experiencing pregnancy or related conditions or who are parenting. To the extent that questions remain, or situations arise that require further clarification, the Department will offer technical assistance and consider guidance, as appropriate, to promote compliance with these final regulations.

Changes: The Department has not made changes to the first sentence of final § 106.40(b)(1). Changes to the second sentence of final § 106.40(b)(1) are explained in the discussion of § 106.40(b)(1) and (b)(3)(iii) below regarding Voluntary Access to Separate Portion of Program or Activity.

3. Section 106.40(b)(2) Pregnancy or Related Conditions—Responsibility To Provide Title IX Coordinator Contact and Other Information

Comments: Many commenters expressed support for the proposed requirement that a recipient who has been informed of a student's pregnancy or related conditions provide that student, or a person who has the legal right to act on behalf of the student, with information relating to the Title IX Coordinator, including contact information. Commenters noted that even though Title IX has long prohibited sex discrimination against pregnant and parenting students, many students and employees are unaware of their rights, and that proposed § 106.40(b)(2) will benefit students by informing them of those rights and making staff more responsive to such students. Several commenters shared personal accounts of how their lack of awareness of their rights as pregnant or parenting students led them to lose instructional time and other educational opportunities.

One commenter asserted that the requirement that the employee tell the student how to notify the Title IX Coordinator ''for assistance'' was vague and could run afoul of certain State laws that restrict or discourage access to abortion. Some commenters also asserted that the phrase ''informed of'' in the proposed provision was vague, overbroad, or could capture information that is revealed unintentionally, and asked the Department to provide relevant examples demonstrating its application. One commenter asked the Department to explain when, if ever, an employee should act based on information regarding a student's pregnancy obtained indirectly.

Some commenters raised concerns about students' privacy and, for example, urged that the regulations protect students from incurring civil or criminal penalties related to pregnancy or related conditions, and clarify that disciplining or referring students to law enforcement on these bases violates Title IX. Some commenters worried the proposed provision would require a recipient to ask students sensitive or unwelcome questions or make inappropriate assumptions about their medical status and needs. Some commenters asked what the provision would require a recipient to document, including whether they needed to document if the Title IX Coordinator was previously notified, and how to protect student privacy and records.

One commenter suggested that the Department remove the part of the proposed provision that states that an employee need not act if the employee reasonably believes the Title IX Coordinator has already been notified, to avoid an employee's mistaken assumption regarding such notification.

One commenter expressed that the provision was burdensome, for example, due to the cost of training staff on action that may be unneeded and because the proposed provision would be too difficult to implement and monitor.

Other commenters objected that the provision was paternalistic or would encourage sex stereotyping. Some commenters feared that the provision would require employees to speak with students in cases of abuse or unintended pregnancy or to incorrectly imply that a student required a modification to the educational program. One commenter stated that an employee providing the relevant information under the provision could harm student-faculty relations.

Several commenters suggested the Department use other approaches to inform students of their rights related to pregnancy or related conditions, either instead of or in addition to the proposed provision. These suggestions included written policies and procedures pertaining to pregnancy and parental rights, student training, or providing information through a website or syllabus statement.

Other changes to the provision suggested by commenters included that employees refer students to the disability services office to reduce the

burden on recipients and students and better align the processes under Section 504 and the ADA; or that the Department adopt a single process for both pregnancy-related and disability accommodations.

Some commenters suggested that the Department narrow the type of employees subject to the provision to those with student-facing roles. In addition, some commenters requested that references to ''the Title IX Coordinator'' in proposed § 106.40 be changed to ''the recipient'' to clarify that the recipient has the ultimate responsibility under this section.

Finally, some commenters opposed proposed § 106.40(b)(2), arguing that the provision would expand the scope of Title IX beyond the Department's authority or without required congressional authorization.

Discussion: Requiring employees to share the Title IX Coordinator's contact information and information about the Title IX Coordinator's ability to take specific actions will give students the information they need to choose whether to seek reasonable modifications, voluntary leave, or access to a lactation space as necessary, and will help prevent potential disruptions to their access to education.

Importantly, the provision will not require students or their families to have any advance knowledge of a recipient's obligations (such as providing reasonable modifications, lactation space, or leave), or to invoke specific words to trigger the requirement to provide them with information about the Title IX Coordinator. But the provision also does not require the recipient's employees to directly inform the Title IX Coordinator of any information they obtain related to a student's pregnancy. The provision thus balances several important interests. First, the provision respects the student's interest in being free from sex discrimination and accessing necessary support from the recipient. Second, the provision promotes the right of the student and the student's legal representatives to determine if, when, and what information to share with a recipient regarding a student's pregnancy or related conditions. Third, the provision accounts for the administrative burden on recipients in carrying out this critical informational function. Overall, the Department is convinced that the regulations will empower students and their families to decide whether they wish to obtain school-based supports, thereby avoiding sex discrimination to the greatest extent possible, with minimal burden for recipients.

The Department agrees with the commenter's suggestion that replacing the term ''for assistance'' in § 106.40(b)(2) would provide clearer instruction to employees about what information they must share and would prevent mischaracterization of the Title IX Coordinator's role. In response to this comment, the Department has revised the final regulations to require that an employee inform the student or a person who has a legal right to act on behalf of the student, when applicable, of the Title IX Coordinator's contact information and that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the recipient's education program or activity.

Further, the Department seeks to clarify other aspects of the employee's role under § 106.40(b)(2). Contrary to the misunderstanding of some commenters, the Department clarifies that § 106.40(b)(2) does not require a school employee to approach a student unprompted, ask a student about their pregnancy or any other subject, or make assumptions about the student's needs or medical status. The provision also does not require an employee to directly notify the Title IX Coordinator regarding a student's pregnancy or related conditions. Rather, the final provision requires an employee to promptly provide the Title IX Coordinator's contact information only when a student, or a person who has a legal right to act on behalf of the student, first informs that same employee of that student's pregnancy or related conditions. Even then, the employee would only provide this information if the employee reasonably believes that the Title IX Coordinator has not already been notified. The employee must also inform the student or person who has a legal right to act on behalf of the student that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the education program or activity. The Department is modifying the final regulations to omit the phrase ''employee is informed,'' which drew concern from some commenters, and to clarify that a student or their legal representative must directly inform an employee to trigger the requirements under this provision. It is not enough for an employee to be informed indirectly, or by someone other than the student or their legal representative, or to merely suspect that a student may be pregnant or experiencing pregnancy-related conditions.

A student or a person who has a legal right to act on behalf of the student ''informs'' an employee of a student's pregnancy or related conditions when the student or such person tells the employee that the student is pregnant or experiencing pregnancy-related conditions, either verbally or in writing. For example, if a student tells a teacher, ''I am pregnant and will be late to class on Wednesday due to a doctor's appointment,'' the student has informed the teacher of the pregnancy and the teacher's obligations under § 106.40(b)(2) are triggered. However, if the teacher merely overhears one student making the same statement to another, the student has not directly informed the teacher, so the employee is not required to act under the provision. The requirement that the employee act only when directly informed in this manner balances a student's interest in privacy and autonomy with the necessity of preventing or eliminating sex discrimination in a recipient's education program or activity. For similar reasons, once information about the Title IX Coordinator's contact information and coordination duties is provided, a student or the student's legal representative should have the choice to disclose pregnancy or related conditions to a recipient through the Title IX Coordinator as they feel appropriate. Absent information about conduct that reasonably may constitute sex discrimination (*e.g.,* the student telling the employee that not only is the student pregnant, but that the student has been prohibited from trying out for the school play due to the pregnancy)—in which case notification obligations are governed by § 106.44(c)—employees are not required to directly inform the Title IX Coordinator of a student's pregnancy or related conditions.

In addition, while an employee has no duty to act under § 106.40(b)(2) based only on their observation of or receipt of a secondhand report about a student's pregnancy, employees should recognize that such information may trigger duties outside of Title IX. *See* 87 FR 41519 n.10; 34 CFR 104.35; U.S. Dep't of Educ., Office for Civil Rights, Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools, at 12, 19 (Dec. 2016), *http://www.ed.gov/ocr/docs/504-resource-guide-201612.pdf.*

For several reasons, the Department declines the suggestion to modify the provision so that an employee would be obliged to provide the student relevant information only when the student first requests a reasonable modification. First, a student may be unaware of their right to a reasonable modification and

thus not know to ask a staff member about it. Second, this type of requirement would complicate the employee's duty by requiring the employee to determine whether a student's statement regarding pregnancy also expressed interest in reasonable modifications, instead of simply requiring an employee to act whenever a student or the student's legal representative informs the employee of the student's pregnancy or related conditions. Third, the Title IX Coordinator is best and most efficiently positioned to provide information to a student on the complete range of the recipient's obligations under these final regulations, including leave, lactation space, and how the student can make a complaint of discrimination.

Further, the Department is sensitive to and has accounted for student concerns about confidentiality. While a recipient must comply with final § 106.40(b)(2), the provision does not require documentation of compliance—contrary to what some commenters asserted. Any records maintained voluntarily by a recipient would be subject to the disclosure restrictions of § 106.44(j) of the final regulations, which prohibits the disclosure of personally identifiable information obtained in the course of complying with this part, with some exceptions. The disclosure restrictions are explained more fully in the discussion of § 106.44(j). Also, as explained above in the discussion of final § 106.2 regarding the definition of ''pregnancy or related conditions'' and its application to termination of pregnancy, a recipient may not punish or retaliate against a student solely for seeking or obtaining an abortion.

The Department acknowledges commenters' questions and range of views regarding whether the provision should apply when an employee reasonably believes that the Title IX Coordinator has been notified. The Department clarifies that there is no requirement that an employee ask a student whether the Title IX Coordinator has been notified. If the employee is unaware whether the Title IX Coordinator has been notified at the moment the student or their legal representative informs the employee of the student's pregnancy or related conditions, the employee's only responsibility under the provision is to provide the student with the required information regarding the Title IX Coordinator. For example, if a student tells a teacher, ''I'm letting you know I'm pregnant'' and nothing more, the employee must provide the necessary information under the provision—specifically, the Title IX Coordinator's contact information and that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the education program or activity. However, if the student instead says, ''I'm pregnant and working with the Title IX Coordinator to make sure I have access to a bigger desk in your math class,'' the employee has no further obligation to inform under § 106.40(b)(2), because it is reasonable for the employee to believe from that conversation that the Title IX Coordinator has already been notified of the student's pregnancy. The Department notes that an employee's ''reasonable belief'' that the student has informed the Title IX Coordinator does not need to come from the student but could also come from the Title IX Coordinator telling relevant teachers, for example, that the student has been approved for reasonable modifications related to the student's pregnancy. The Department's approach minimizes the burden on employees and students when it is reasonably clear from context that the Title IX Coordinator already knows about the student's pregnancy or related conditions.

With respect to the concern that § 106.40(b)(2) may result in the student learning about the Title IX Coordinator from multiple staff members—which would only occur because the student, or a person who has a legal right to act on behalf of the student, informed multiple employees of the student's pregnancy or related conditions—the Department acknowledges this possibility but believes it is important to err on the side of the student receiving more, rather than less, information about the rights and modifications that may be available to them during their pregnancy. The Department concludes that this provision is calibrated to enhance student access to this important information, while avoiding redundancy, when possible, and respecting student autonomy and privacy.

The Department disagrees with commenter concerns that the provision is discriminatory, paternalistic, or encourages sex stereotyping. As discussed above, an employee's action under the provision is driven completely by the student or the student's legal representative and contains no requirement that an employee act based on supposition regarding the student's status. The provision focuses on students who are pregnant or experiencing pregnancy-related conditions to avoid having those students face obstacles to education related to those conditions and associated with their sex characteristics, and thus falls within the scope of Title IX under final § 106.10. While equal access to education for students who are not pregnant or experiencing pregnancy-related conditions—such as a pregnant student's partner, a student adopting a child, or a student whose close family member is pregnant—is important, there is no need to immediately inform such students, who are not pregnant or experiencing pregnancy-related conditions, of how to obtain pregnancy-related rights under § 106.40(b)(3) that do not apply to them. The Department further disagrees with the commenter's assertion that the provision will harm student-faculty relationships; to the contrary, providing a simple framework under § 106.40(b)(2) for employees to respond to students who disclose pregnancy or related conditions will strengthen such relationships by increasing students' perceptions that staff care about their needs.

The Department acknowledges commenters who shared a variety of alternative or supplemental approaches for students to receive information about the Title IX Coordinator, which some commenters also felt would minimize the burden on recipients. The Department declines to narrow the provision's application to employees who are ''student facing'' because students may be more comfortable disclosing pregnancy or related conditions to some employees over others for a variety of reasons. This approach fosters recipients providing students with more information rather than less, considering that commenters indicated—as a general matter and in their own personal accounts—that students are not currently aware of the Title IX prohibition on pregnancy discrimination and the rights that follow from it. For instance, a registrar may not be a ''student facing'' role like a teacher or a coach, but a student might disclose to a registrar that they are dropping a class because they are pregnant and will be delivering a child during exam time. In that setting, it is important for the registrar to inform the pregnant student about how to contact the Title IX Coordinator if they want to ask for reasonable modifications or about other recipient obligations that might allow them to stay enrolled in the class.

The Department declines the suggestion to require recipients to conduct training for students. This provision is focused on conveying information, in a timely manner, to the subset of students who are pregnant or experiencing pregnancy-related conditions while in school.

As to the suggestion that the Department require recipients to post information about the availability of pregnancy-related modifications on syllabi or websites, the Department does not think that website or syllabi-type notifications, which are not directed at the individual student, will alone effectively ensure that students know about these important and time-sensitive Title IX rights. However, nothing in Title IX or this part prohibits recipients from posting information about the availability of pregnancy-related modifications on syllabi or websites.

Responding to concerns about the employee training burden, the Department continues to view this burden as minimal. Under the final regulations, employees are asked to share only two pieces of information with students: (1) the Title IX Coordinator's contact information; and (2) that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the recipient's education program or activity. Training on this matter, as required by § 106.8(d)(1)(iii), will likely require a limited amount of time and can be incorporated into existing broader trainings on Title IX issues or other topics. For further explanation of the training requirements of § 106.8(d)(1)(iii), see the discussion of that provision.

The Department understands commenters' interest in aligning pregnancy and disability accommodation procedures. A recipient is welcome to do so when consistent with the requirements of the final Title IX regulations and other applicable laws. However, given the role the Title IX Coordinator plays in ensuring the recipient's consistent compliance with Title IX and their awareness of applicable regulations, the Title IX Coordinator—or their designee as permitted under final § 106.8(a)(2)—remains the appropriate point of contact for students under § 106.40(b)(2). Likewise, it is inappropriate to replace ''Title IX Coordinator'' with ''the recipient'' in the provision, because telling a student to contact the recipient generally does not provide clear direction as to an appropriate point of contact. The final regulations will provide such clarity.

The Department disagrees that the provision is beyond the scope of the Department's authority under Title IX. Pregnancy discrimination has long been prohibited by Title IX and its implementing regulations, but comments the Department received confirm that students do not know about their rights in this context and do not know that Title IX obligates recipients to help them ensure that they can fully access the recipient's education program or activity even while pregnant or experiencing pregnancy-related conditions. This provision is therefore necessary to ensure that pregnant students—whose needs are by nature time sensitive—can promptly avail themselves of available Title IX resources. Thus, this provision is necessary to ''effectuate the provisions of Title IX'' and is at the core of the Department's Title IX regulatory authority. As explained in the July 2022 NPRM, Title IX requires a variety of implementation strategies if it is to serve as a ''strong and comprehensive measure,'' 118 Cong. Rec. at 5804 (statement of Sen. Bayh), to ''achieve[ ] . . . the objective[ ]'' of eliminating sex discrimination in federally subsidized education programs and activities under 20 U.S.C. 1682, *id.* at 5803. 87 FR 41513.

The Department has revised the title of this provision from ''Requirement for recipient to provide information'' to ''Responsibility to provide Title IX Coordinator contact and other information'' because it is more explanatory and better informs readers of the topic of the provision. The Department has also revised the phrase ''unless the employee reasonably believes that the Title IX Coordinator has been notified'' for clarity by removing the word ''already,'' and moved the phrase from the end of the sentence to the middle for readability.

Changes: The Department has revised final § 106.40(b)(2) to clarify that unless the employee reasonably believes that the Title IX Coordinator has been notified of the student's pregnancy or related conditions, the employee's obligation to act begins when a student or a person who has a legal right to act on behalf of the student ''informs'' the employee of such pregnancy or related conditions. The Department has further revised final § 106.40(b)(2) to clarify that the employee's obligation is to promptly provide the student, or person who has a legal right to act on behalf of the student, with the Title IX Coordinator's contact information and inform that person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the recipient's education program or activity. The Department revised the phrase ''unless the employee reasonably believes that the Title IX Coordinator has been notified'' in § 106.40(b)(2) by removing the word ''already,'' and moved the phrase from the end of the sentence to the middle. The Department also revised the title of this provision from ''Requirement for recipient to provide information'' to ''Responsibility to provide Title IX Coordinator contact and other information.''

4. Section 106.40(b)(3) Pregnancy or Related Conditions—Specific Actions To Prevent Discrimination and Ensure Equal Access

Timelines

Comments: Some commenters asked the Department to clarify how much notice a student must provide to obtain reasonable modifications and other steps in proposed § 106.40(b)(3) and how promptly the recipient must respond to such requests. Some commenters urged that a student be required to provide notice in a timeframe that is reasonable, allows the recipient sufficient time to prepare and act on the student's request, and considers the complexity and logistics of the task; and that absent such timely notice, a recipient has no obligation to act.

Discussion: As set out in final § 106.40(b)(3) and consistent with the proposed regulations in the July 2022 NPRM, 87 FR 41520, a recipient must promptly take the steps specified in § 106.40(b)(3), including implementing reasonable modifications. Determining promptness in each case is a fact-specific inquiry that depends on a variety of factors, including the needs of the student, the substance and timing of the requested modification, and the characteristics of the education program or activity. A recipient should consider the importance to a student of accessing reasonable modifications to ensure full participation in the recipient's education program or activity, and whether the absence of a modification to a policy, practice, or procedure could impede a student's academic or educational progress. As explained in greater detail in the discussion of § 106.40(b)(3)(ii)(A), a recipient is not required to make a modification that the recipient can demonstrate would fundamentally alter the nature of its education program or activity.

The Department agrees that it would be helpful for students who seek reasonable modifications to notify the Title IX Coordinator or their designee as early as possible to ensure that the recipient has enough time to review their request and provide a reasonable modification. However, no matter when a student notifies the Title IX Coordinator of pregnancy or related conditions or seeks any measures under § 106.40(b)(3)(ii)–(v), a recipient must

respond promptly and effectively to ensure equal access to the recipient's education program or activity consistent with the requirements of Title IX. Students may not be able to provide notice to a recipient related to pregnancy far in advance of when specific actions consistent with § 106.40(b)(3) are needed for various reasons, including because the need for specific actions may occur without advance warning, the student may need time to decide whether to disclose their pregnancy or related condition to their school, or the student may lack awareness of a recipient's process.

The Department notes that many modifications can be offered and implemented with relatively little administrative effort on the part of the recipient, such as the examples provided in § 106.40(b)(3)(ii)(C) of allowing the student to drink, eat, sit, or stand during class as needed. There is also no prohibition on a student returning to the Title IX Coordinator after the recipient has taken initial steps under final § 106.40(b)(3)(ii)–(v) if a further need emerges related to pregnancy or related conditions. In such a case, the recipient must take further action consistent with § 106.40(b)(3)(ii)–(vi).

Changes: The Department has revised § 106.40(b)(3) to state that a recipient must take specific actions under paragraphs (b)(3)(i) through (vi) to promptly and effectively prevent sex discrimination and ensure equal access to the recipient's education program or activity once the student, or a person who has a legal right to act on behalf of the student, notifies the Title IX Coordinator of the student's pregnancy or related conditions.

Staffing Flexibility and Effectiveness

Comments: Some commenters supported the proposed regulations—which would have required that reasonable modifications because of pregnancy or related conditions ''be effectively implemented, coordinated, and documented by the Title IX Coordinator''—because they would have made clear that the Title IX Coordinator has the authority and responsibility to ensure that reasonable modifications are provided to students.

Several commenters suggested that the Department allow recipients greater flexibility regarding which employees oversee compliance with a recipient's obligations to students who are pregnant or experiencing pregnancy-related conditions. These commenters' reasons included that the Title IX Coordinator's job has become too large for one person; other staff at the recipient may be more knowledgeable about the students or available resources; a Title IX Coordinator may have a conflict of interest in both receiving and investigating reports of discrimination related to pregnancy or related conditions; and pregnancy protection under some local laws allows greater staffing flexibility.

Some commenters asked the Department to clarify that the Title IX Coordinator's responsibility is to coordinate, rather than implement, the steps required in the proposed provision. Some commenters requested that the Department clarify that the responsibilities in proposed § 106.40(b)(3) are the recipient's, not the Title IX Coordinator's individually.

Discussion: Recognizing the need for clarity regarding the role of the Title IX Coordinator in their official capacity, and the need for staffing flexibility in carrying out these provisions, the Department has revised final § 106.40(b)(3) to state that the recipient is responsible for taking the actions specified in that paragraph once a student (or a person with the legal right to act on the student's behalf) has notified the Title IX Coordinator of a student's pregnancy or related conditions. The final regulations at § 106.40(b)(3) provides that the recipient must do so promptly and effectively.

The Department has further amended the provision to state that the Title IX Coordinator must be responsible for coordinating the actions. Consistent with final § 106.8(a)(2), the Department clarifies that a recipient may delegate, or permit a Title IX Coordinator to delegate, specific duties to one or more designees. Accordingly, recipients have flexibility to choose the staff they think are most appropriate to carry out duties under § 106.40(b)(3), provided that the Title IX Coordinator retains ultimate oversight for ensuring that the recipient complies with § 106.40(b)(3)'s requirements. The Department agrees that providing recipients this flexibility will enable them to use resources most effectively to serve students in a way that will be responsive to the needs of their school communities. To the extent that a recipient wishes to utilize other administrators or departments to carry out some tasks required under § 106.40(b)(3), they may do so provided the work is coordinated with oversight of the Title IX Coordinator and performed consistent with the requirements of the final regulations.

Recognizing that each of the steps under § 106.40(b)(3) (as adopted in these final regulations) is equally important, the Department further revised the requirement that a recipient's actions be effective—which the Department had previously proposed to include as an express term in § 106.40(b) only in connection with reasonable modifications—to apply to all the recipient's actions under final § 106.40(b)(3). This requirement ensures that recipients and members of their communities understand that the recipient's actions, including providing reasonable modifications and voluntary leave because of pregnancy or related conditions, and access to lactation spaces, must be fully and effectively implemented and serve their intended purposes under the final regulations to prevent sex discrimination and ensure equal access to the recipient's education program or activity. Effectiveness requires, for example, ensuring that all relevant school staff are complying with their role in carrying out § 106.40(b)(3)(ii)–(vi) and that there are no other structural or resource barriers to compliance. For example, if a recipient provides the student a reasonable modification to use the restroom when needed during the student's high school classes, but the student's science teacher refuses to allow the student to do so, the reasonable modification has not been effectively implemented by the recipient, and the recipient must remedy the situation to ensure effective implementation. Likewise, if the recipient provides a student with an access code to a locked lactation space, but the student cannot enter because the keypad is broken, this is ineffective implementation that the recipient must remedy.

Responding to a commenter's concern that the regulations as revised conflict with a city regulation [82] that requires a school principal or their designee to take particular steps once they become aware that a student is pregnant or has a child, the Department notes that the revisions here make clear that recipients can delegate certain duties of the Title IX Coordinator, such as to a school principal, consistent with § 106.8(a)(1) and (2). With respect to bias, the Department disagrees that there is inherent bias in a Title IX Coordinator both receiving and investigating a complaint of pregnancy discrimination. However, if for some other reason a Title IX Coordinator who receives a complaint of pregnancy discrimination had a conflict of interest or bias for or against complainants or respondents

[82] The commenter cited Chancellor's Regulation A–740, *Pregnant and Parenting Students and Reproductive Health Privacy* (Nov. 13, 2008), *https://www.nyc.gov/html/acs/education/pdf/A740%20Pregnant%20and%20Parenting%20students.pdf.*

generally or an individual complainant or respondent, the Title IX Coordinator would be prohibited from serving as an investigator or decisionmaker in connection with that particular complaint consistent with the requirements of final § 106.45(b)(2), and the recipient would be responsible for ensuring the substitution of an alternate appropriate individual. In addition, final § 106.8(d)(2)(iii) and (4) require that a Title IX Coordinator receive training on bias, which is designed to ensure that any Title IX Coordinator in this situation is able to identify bias and take the necessary steps to address it.

Changes: As noted above, the Department has revised § 106.40(b)(3) to clarify that it is the recipient's obligation to take the specific actions under paragraphs (b)(3)(i) through (vi) to promptly and effectively prevent sex discrimination and ensure equal access to the recipient's education program or activity once the student, or a person who has a legal right to act on behalf of the student, notifies the Title IX Coordinator of the student's pregnancy or related conditions. The Department has further revised § 106.40(b)(3) to clarify that the Title IX Coordinator must coordinate these actions.

5. Section 106.40(b)(3)(i) Pregnancy or Related Conditions—Responsibility To Provide Information About Recipient Obligations

Comments: Commenters expressed several reasons for supporting the proposed requirement at § 106.40(b)(3) and (3)(i) that once a student, or a person who has a legal right to act on that student's behalf, notifies the Title IX Coordinator of the student's pregnancy or related conditions, the Title IX Coordinator must inform the student of the recipient's obligations related to pregnancy or related conditions. Commenters' reasons included that the provision would clarify recipients' responsibilities to these students and assist recipients in providing them equal access to education; remove barriers to education; and be consistent with similar notice and antidiscrimination laws in many States. Commenters noted that the requirement is particularly important considering restrictive State abortion laws that may drive up the numbers of students who are pregnant or experiencing pregnancy-related conditions. Commenters noted that even though Title IX has long prohibited discrimination against pregnant and parenting students as sex discrimination, many students and employees are unaware of their rights. Several commenters shared personal accounts of how their lack of awareness of their rights as pregnant or parenting students led them to lose instructional time and other educational opportunities.

Some commenters asked whether instead of, or in addition to, the requirements of proposed § 106.40(b)(3) and (b)(3)(i), the Department could require recipients to communicate procedures related to pregnancy or related conditions through written procedures, or website or syllabus statements.

Some commenters raised concerns about students' privacy and, for example, urged that the regulations protect students from incurring civil or criminal penalties related to pregnancy or related conditions, and for clarification that disciplining or referring students to law enforcement on these bases violates Title IX.

Some commenters suggested revising proposed § 106.40(b)(3) for what commenters viewed as consistency with Section 504 and the ADA, for example, by only requiring the Title IX Coordinator to inform a student of their rights or take other action after a student follows internal processes and asks for assistance related to pregnancy or related conditions; or using a single process for students with disabilities and students who are pregnant and experiencing pregnancy-related conditions.

Other commenters asked the Department to revise the proposed regulations to require that recipients tailor the information they are required to provide to a student's specific request, for example, by excluding lactation information when a student reports miscarriage.

Because the proposed regulations listed the application of grievance procedures under § 106.45, and if applicable § 106.46, as one of several required topics for the Title IX Coordinator to inform the student about upon notification of pregnancy, one commenter asked the Department to clarify with whom students should make a complaint and whether such procedures were prompt enough to address pregnancy issues.

Some commenters stated that the requirement to provide information would be burdensome and non-beneficial. Some commenters believed the provision exceeds the scope of Title IX and requires congressional authorization.

Other commenters asked the Department to undertake a separate rulemaking to address students who are pregnant or experiencing pregnancy-related conditions, referring to the complexity of issues relating to pregnancy, student privacy, and risk to recipients.

Discussion: The Department agrees with commenters who emphasized the importance of the proposed requirements regarding steps a recipient must take upon notice of a student's pregnancy or related conditions, including informing the student of the recipient's obligations to prevent discrimination and ensure equal access. The Department agrees with commenters' statements that informing a student of the recipient's obligations directly will remove barriers to education and increase the likelihood of a student successfully remaining in school.

The Department acknowledges the variety of alternative or supplemental approaches commenters shared, by which students could receive information about the recipient's obligations under § 106.40(b)(3)(i)—including through written procedures or website or syllabus statements—which some commenters also felt would minimize the burden on recipients. As noted above, the Department does not think that website or syllabi-type notifications, which are not directed at the individual student, are alone sufficient to ensure that students know about these important and time-sensitive Title IX rights. However, nothing in Title IX or this part prohibits recipients from posting information about the availability of pregnancy-related modifications on syllabi or websites.

Further, the Department agrees with the many commenters expressing concern about the privacy of student records and other information a recipient obtains related to Title IX compliance. In response to commenter concerns, the Department revised final § 106.44(j) to prohibit the disclosure of personally identifiable information obtained while carrying out a recipient's Title IX obligations, with some exceptions. To ensure that a student and their legal representative are aware of this provision, the Department has revised § 106.40(b)(3)(i) to require that the Title IX Coordinator inform them of this provision. The disclosure restrictions are explained more fully in the discussion of § 106.44(j). As explained in the discussion of final § 106.2 regarding the definition of ''pregnancy or related conditions'' and its application to termination of pregnancy, a recipient may not punish or retaliate against a student solely for seeking or obtaining an abortion.

Responding to the comment that a recipient should provide a student

information about their rights only once they ask for assistance and exhaust the remainder of a recipient's administrative requirements, the Department declines to do so for the same reasons discussed in connection with a similar comment regarding § 106.40(b)(2). Specifically, § 106.40(b)(3)(i) does not require students or their families to have any advance knowledge of a recipient's available supports, or to invoke specific words or requests, for the recipient to be required to provide them with information about the recipient's obligations under Title IX to students experiencing pregnancy or pregnancy-related conditions. This approach ensures that members of a recipient's community have access to necessary support; promotes the right of the student and the student's legal representatives to determine if, when, and what information to share with a recipient regarding a student's pregnancy or related conditions; and maximizes administrative efficiency by recognizing that the Title IX Coordinator is best positioned to coordinate the efficient provision of information. For these reasons, the recipient should inform the student or person with a legal right to act on the student's behalf of the student's relevant rights as soon as they notify the Title IX Coordinator of the student's pregnancy or related conditions to ensure that the student (and their legal representative, as applicable) has complete and timely information. The Department notes that this paragraph discusses only the obligation of the recipient to ensure that the Title IX Coordinator provides information to a student or the person who has a legal right to act on behalf of the student, upon notification of pregnancy under § 106.40(b)(3)(i). The separate responsibility of the recipient to ensure that all employees provide information about the Title IX Coordinator to a student or their legal representative regarding pregnancy or related conditions, when the student or their legal representative informs any employee of the student's pregnancy or related conditions, is addressed in the discussion of § 106.40(b)(2).

The Department understands the commenter's interest in allowing a recipient to have a single process, or similar processes, to address both pregnancy and disability. When recipients can use the same or similar processes for pregnancy and disability in a manner that is consistent with the requirements of these final Title IX regulations and applicable disability laws, recipients may do so. For example, the same staff member may be assigned to provide students with notice of their rights related to pregnancy and disability; however, staff in this role must comply with § 106.40(b)(3)(i) in addition to any other relevant requirements under Section 504, the ADA, or other applicable disability laws, and the Title IX Coordinator must retain ultimate oversight over the recipient's responsibilities under Title IX and this part, consistent with § 106.8(a)(1).

Additionally, the Department declines the proposal to limit the information a recipient must provide to a student upon notice of the student's pregnancy or related conditions. It is essential that a recipient inform the student, and the student's legal representative, as applicable, of the recipient's obligations under §§ 106.40(b)(1)–(5) and 106.44(j) and provide the recipient's notice of nondiscrimination under § 106.8(c)(1) for several reasons. First, doing so will provide the student with the broadest possible amount of information upon which to make informed choices about next steps, including information about reasonable modifications, voluntary leave, access to lactation space, the general right not to be discriminated against on the basis of pregnancy or related conditions, and limits on certifications to participate in the recipient's education program or activity. Second, the regulations will relieve the recipient of having to decide unilaterally and subjectively what information should be shared. Third, the regulations will prevent a recipient from depriving a student of information based on a staff member's own misjudgment or lack of awareness about the student's particular pregnancy or needs. For example, a student who has miscarried may need or want information about access to a lactation space, because a student can lactate following miscarriage and may wish to use such a space to express breast milk. Requiring a recipient to provide information about all of a recipient's obligations under §§ 106.40(b)(1)–(5) and 106.44(j) and to provide the recipient's notice of nondiscrimination under § 106.8(c)(1) does not obligate students to take any action after receiving the information but empowers students to make the most appropriate choices based on their own unique needs.

In connection with the commenter's question regarding the application of grievance procedures under § 106.45, and if applicable § 106.46, to pregnancy-related issues, and resolving pregnancy-related matters quickly, the Department clarifies that these procedures still apply. However, for simplicity, rather than list a number of discrete items that the recipient must disclose to the student as it did in the proposed regulations, the Department revised final § 106.40(b)(3)(i) to state that the recipient must inform the student and their legal representative (as applicable) of the recipient's obligations under §§ 106.40(b)(1)–(5) and 106.44(j) and provide the recipient's notice of nondiscrimination under § 106.8(c)(1). The notice of nondiscrimination under § 106.8(c)(1) contains the recipient's nondiscrimination statement and contact information for the Title IX Coordinator, explains how to locate the recipient's Title IX policy and grievance procedures, and provides information about how to report sex discrimination.

Further explaining how the final regulations function to resolve concerns of pregnancy-related discrimination, the Department notes that if a student notifies the recipient of the recipient's failure to implement a reasonable modification or make a lactation space available, a recipient is required to take additional steps consistent with § 106.44(f)(1) to comply with its Title IX obligation to ensure that its education program or activity is free from discrimination on the basis of sex. Such steps will vary based on the facts and circumstances. For example, if a complaint is made, a recipient's grievance procedures under § 106.45 (and § 106.46, if the situation arises at a postsecondary institution and involves sex-based harassment), would guide the recipient's investigation and resolution of the complaint. If there is a determination that sex discrimination occurred, the Title IX Coordinator must coordinate the provision and implementation of remedies to a complainant and take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity. *See* § 106.45(h)(3). Additionally, consistent with § 106.44(g), a student may need and a recipient must provide supportive measures, as appropriate, to restore or preserve access to the recipient's education program or activity in the absence of a complaint or during the pendency of grievance procedures. Finally, responding to concerns about timeliness of a recipient's response to issues regarding reasonable modifications, the Department emphasizes that under § 106.40(b)(3), a recipient always remains responsible for taking prompt and effective steps to prevent sex discrimination once the Title IX Coordinator is notified of a

student's pregnancy or related conditions, including through timely steps such as the provision of reasonable modifications, leave, and lactation space. Likewise, a recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity—such as a complaint that actions required under § 106.40(b)(3) have not been appropriately taken—must respond promptly and effectively under § 106.44(a) and (f)(1).

The Department disagrees that the requirements of final § 106.40(b)(3) or (3)(i) are unduly costly or burdensome. Specifically, the requirement that a recipient inform the student of its obligations under § 106.40(b)(3)(i) could be done in the context of a single conversation, or, if appropriate to the age and ability of the student, in a standardized written communication. The Department explains in detail the potential costs and benefits of the final regulations related to pregnancy or related conditions in the *Regulatory Impact Analysis.*

Moreover, the Department disagrees that the provision is beyond the scope of the Department's authority under Title IX or requires separate congressional authorization. The Supreme Court has recognized that the Department has broad regulatory authority under Title IX to issue regulations that it determines will best effectuate the purpose of Title IX, and to require recipients to take administrative actions to effectuate the nondiscrimination mandate of Title IX. *See Gebser,* 524 U.S. at 292; 20 U.S.C. 1682. Since 1975, the Department has required recipients to provide students with information about their rights under Title IX. *See, e.g.,* 40 FR 24128 (codified at 45 CFR 86.8 (1975)); 34 CFR 106.8(c) (current). Section 106.40(b)(3)(i) expands upon this longstanding requirement in a manner that is tailored to a student's need for information in the relevant circumstance. Ensuring that students (or those who have a legal right to act on their behalf) have information about the reasonable modifications to which they are entitled is necessary to effectuate that mandate. In addition, the Department declines to conduct a separate rulemaking related to pregnancy or related conditions. The Department's clarification of the pregnancy-related regulations under Title IX at this time, aided by the input of commenters, is justified and appropriate. That the provisions related to pregnancy discrimination in the final regulations were proposed alongside other provisions implementing Title IX in no way diminished the public's notice of, and ability to comment on, those proposed provisions.

The Department notes that it has added ''Responsibility to provide information about recipient obligations'' as the title of this provision to assist readers in locating the topic more easily.

Changes: The Department has revised § 106.40(b)(3)(i) to require the recipient to provide information about the recipient's obligations under §§ 106.40(b)(1) through (5) and 106.44(j), in addition to providing the recipient's notice of nondiscrimination under § 106.8(c)(1). The Department further added a title to § 106.40(b)(3)(i) of ''Responsibility to provide information about recipient obligations.''

6. Section 106.40(b)(3)(ii) Pregnancy or Related Conditions—Reasonable Modifications

General Support

Comments: The Department notes that proposed § 106.40(b)(3)(ii) and (b)(4) have been revised and redesignated as § 106.40(b)(3)(ii) in the final regulations to consolidate into one paragraph provisions regarding a recipient's obligation to provide a student with reasonable modifications based on pregnancy or related conditions, and the following comment summaries and discussion refer to these provisions as § 106.40(b)(3)(ii).

Multiple commenters supported reasonable modifications for a student who is pregnant or experiencing pregnancy-related conditions as appropriate and necessary to allow such a student to succeed educationally. Several commenters stated that the reasonable modifications provision would clarify the protections that a recipient must provide to a student who is pregnant or experiencing pregnancy-related conditions and how a student can request reasonable modifications because of pregnancy or related conditions. Some commenters stated that pregnant students' civil rights are violated in ways other than outright exclusion such as by not providing necessary supports. Some commenters also noted that the proposed regulations would be consistent with many State antidiscrimination laws related to pregnancy. Several commenters supported § 106.40(b)(3)(ii) as particularly important for certain groups. Some commenters asked that the final regulations use terminology that provides reasonable modifications to all students based on pregnancy or related conditions.

Several commenters provided examples of how recipients' denials of reasonable modifications have forced students who are pregnant or experiencing pregnancy-related conditions to choose between their health and education, including a recipient or school official refusing to modify an exam schedule or grading policy when a student gave birth during final exams, denying a student's request for a larger desk, failing to accommodate a student's need to take lactation breaks, requiring a student to return to school days after having an emergency cesarean section despite not being able to drive or carry books, telling a student with a high-risk pregnancy to schedule medical appointments outside of class time despite having a note from their physician, encouraging a student to drop a course due to pregnancy, refusing to provide academic adjustments or excused absences, and denying basic modifications to protect pregnant students' health, including additional bathroom breaks and access to remote instruction or previously recorded classes.

Some commenters appreciated the reasonable modification provision because students who are pregnant or experiencing pregnancy-related conditions are often overlooked in discussions of a recipient's Title IX obligations. One commenter asserted that a student who is pregnant or experiencing pregnancy-related conditions will often need only modest accommodations and stated that when a recipient refuses to make these modifications, a student's education and health suffer.

Discussion: The reasonable modification provision of the final regulations under § 106.40(b)(3)(ii) will better fulfill Title IX's mandate with respect to students who are pregnant or experiencing pregnancy-related conditions. The specific examples provided by commenters are compelling, and together with the Department's Title IX enforcement experience, affirm the importance of this provision.

The Department agrees that recipients have the obligation under Title IX to provide reasonable modifications to policies, practices, or procedures for students who are pregnant or experiencing pregnancy-related conditions and that clarifying this responsibility will facilitate compliance with the nondiscrimination mandate of the statute. Accordingly, the Department has revised the proposed regulations to clarify that a recipient is ultimately responsible for taking specific actions to facilitate the reasonable modification

process when a student notifies the Title IX Coordinator that they are pregnant or experiencing pregnancy-related conditions.

Changes: Proposed § 106.40(b)(4) has been revised, consolidated with proposed § 106.40(b)(3)(ii), and redesignated as § 106.40(b)(3)(ii)(A)–(C) in the final regulations to list in one paragraph the recipient's obligations to a student regarding reasonable modifications for pregnancy or related conditions. Final § 106.40(b)(3) now states that the Title IX Coordinator must coordinate actions under paragraphs (b)(3)(i) through (vi), and final § 106.40(b)(3)(ii) now specifically states that a recipient must make reasonable modifications to the recipient's policies, practices, or procedures as necessary to prevent sex discrimination and ensure equal access to the recipient's education program or activity.

Process for Providing Reasonable Modifications

Comments: The Department notes that proposed § 106.40(b)(4)(i)–(iii) have been revised and redesignated as § 106.40(b)(3)(ii)(A)–(C) in the final regulations, and the following comment summaries and discussion refer to the provision as § 106.40(b)(3)(ii)(A)–(C).

Some commenters supported the Department's proposed process for providing students with reasonable modifications because of pregnancy or related conditions, because it would prevent a recipient from forcing a student to take leave or to accept a particular modification. One commenter stated that § 106.40(b)(3)(ii)(A) would properly place the burden on the recipient to show that a modification would fundamentally alter a program or activity and would still require the recipient to identify a suitable alternative modification. Another commenter believed that the required interactive process would facilitate student self-advocacy and foster collaboration between the student and recipient.

In contrast, several commenters expressed concern that the proposed regulations would encourage a recipient to deny a student's requested modification. One commenter, a legal services provider, characterized the proposed regulations as a regression from the Department's prior guidance, and cited the U.S. Dep't of Educ., Office for Civil Rights, Supporting the Academic Success of Pregnant and Parenting Students Under Title IX of the Education Amendments of 1972 (June 2013) (2013 Pregnancy Pamphlet), *https://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.pdf,* which, the commenter stated, required a recipient to excuse any medically necessary absence and was implemented by recipients nationwide for decades. The commenter stated that they often receive calls from students who were denied minimal time off from school, such as missing two or three classes in a semester, even while facing grave health complications and staying caught up on coursework. Another commenter asked the Department to clarify whether a student has any burden in identifying how a recipient could implement a requested modification.

Several commenters asked the Department to clarify how leave that would fall under reasonable modifications—such as intermittent absences to attend medical appointments, time to address lactation needs, or bathroom breaks—would be handled. Among other things, they asked for clarification about how to ensure that students would not be penalized for accessing such modifications; what discretion a recipient has to deny such absences or breaks because they are ''reasonable modifications'' under § 106.40(b)(3)(ii) rather than absences that must be granted under § 106.40(b)(3)(iv); and whether the final regulations adopt a presumption that such absences or breaks are reasonable modifications.

Other commenters asked for clarification on how reasonable modifications because of pregnancy or related conditions should be implemented, including whether ''reasonable'' means that a modification cannot impose an excessive burden on the recipient regardless of whether it would fundamentally alter the education program or activity. Some commenters asserted that § 106.40(b)(3)(ii) would not articulate any standard by which a student must demonstrate, or a recipient must evaluate, what reasonable modification a student needs to prevent discrimination and ensure equal access to an education program or activity. Another commenter asked the Department to confirm that recipients have flexibility in providing modifications to students who are pregnant or are experiencing pregnancy-related conditions. Commenters asked the Department to clarify when a request for a modification is properly denied and a recipient's obligations in such a circumstance.

Some commenters urged the Department to modify the regulations to require a recipient to identify an alternate modification that would meet the student's needs if a requested modification is unavailable or ineffective. Other commenters recommended that the Department clarify that if a modification is ineffective or fundamentally alters an education program or activity, the recipient must engage in a good faith, interactive dialogue to identify another modification that would meet the student's needs.

Finally, some commenters urged the Department to modify the regulations to explicitly prohibit a recipient from forcing a student to accept an unwanted or unneeded modification. They stated that such a provision was necessary because it is unclear whether the use of ''voluntary'' in the proposed regulations refers to a student's voluntary acceptance of a modification or a recipient's voluntary provision of a modification.

Discussion: As stated in the July 2022 NPRM, 87 FR 41521, and as the Department reaffirms here, providing a student with the option of reasonable modifications to the recipient's policies, practices, or procedures because of pregnancy or related conditions is essential to preventing pregnancy-based discrimination and to ensuring equal access to a recipient's education program or activity. The Department acknowledges commenters who asserted that § 106.40(b)(3)(ii) should prevent a recipient from forcing a student to accept a particular modification, should place the burden of demonstrating that a particular modification would fundamentally alter the nature of an education program or activity on the recipient before denying a requested modification, and should require consultation with the student before a recipient offers or implements a particular modification. The Department clarifies and confirms that the final regulations operate consistently with these suggestions.

As discussed in the July 2022 NPRM and clarified in the final regulations, when considering the range of available reasonable modifications, a recipient must consider a student's needs on an individualized basis, as situations will vary based on unique factors such as the age of the student, the type of education program or activity, the student's health needs, and other circumstances. 87 FR 41522–23. Under the final regulations, a recipient is required to consider all reasonable modifications based on pregnancy or related conditions as necessary to prevent sex discrimination and ensure equal access to the recipient's education program or activity in each student's case rather than adopt a generalized approach for all students who are pregnant or who are experiencing pregnancy-related

conditions. *See* § 106.40(b)(3)(ii)(A). While the recipient's obligations are initiated when the student or person who has a legal right to act on behalf of the student notifies the Title IX Coordinator of the student's pregnancy or related conditions, it is not incumbent on the student or the person with a legal right to act on behalf of the student to identify or request a specific possible reasonable modification. *See* 87 FR 41524. Instead, if a student seeks a reasonable modification, a recipient must consult with the student to determine the student's individualized needs and offer options that will best prevent sex discrimination and ensure equal access. *See* § 106.40(b)(3)(ii)(A); 87 FR 41524. Identifying a reasonable modification will be a collaborative effort between the student and the recipient, but, under § 106.40(b)(3) and (3)(ii)(A) and (B), it will be the recipient's duty to offer any reasonable modifications, and—if accepted by the student—promptly and effectively implement them. *See* 87 FR 41524. As noted, the Department's final regulations ensure that a student will receive a modification only on a voluntary basis, and that a student cannot be required to accept a particular modification. *See* § 106.40(b)(3)(ii)(A), (B); 87 FR 41524. The student can decide whether to accept the reasonable modification offered by the recipient, request an alternative reasonable modification, or remain in their program under the status quo. *See* § 106.40(b)(3)(ii)(A)–(B).

Further, the Department clarifies that if there are a range of reasonable modifications that are appropriate to a student's individualized needs under the circumstances that prevent sex discrimination and ensure equal access to the education program or activity, § 106.40(b)(3)(ii) affords a recipient discretion to offer a student the full range of options or to choose to offer one or more preferred options. If a student declines an offered reasonable modification that is based on the student's individualized needs and that would prevent sex discrimination and ensure equal access, the recipient is not required to determine whether there are other reasonable modifications based on that specific need, even if there are other reasonable modifications that could be offered. A recipient would, however, be responsible to offer and make reasonable modifications consistent with final § 106.40(b)(3)(ii)(A) and (B) if any new or additional needs arise.

As discussed in the July 2022 NPRM and further clarified in the text of final § 106.40(b)(3)(ii)(A), a modification that a recipient can demonstrate would fundamentally alter the nature of its education program or activity is not a reasonable modification. *See* 87 FR 41523; *see also Alexander* v. *Choate,* 469 U.S. 287, 300 (1985) (detailing ''fundamental alteration[s]'' in the Section 504 context). The recipient has the burden of demonstrating that a modification fundamentally alters the nature of the recipient's education program or activity or is otherwise unreasonable. A recipient has no obligation to offer or make such an unreasonable modification under final § 106.40(b)(3)(ii)(A).

Demonstrating that a particular or requested action is not a reasonable modification does not, however, relieve a recipient of its obligation to otherwise comply with § 106.40(b)(3)(ii)(A) and (B) by offering, and if the student accepts, implementing reasonable modifications to policies, practices, or procedures as necessary to prevent sex discrimination and ensure equal access to the recipient's education program or activity. Because § 106.40(b)(3)(ii) requires a recipient to consider the provision of a modification based on each student's individualized needs, the determination whether a modification is reasonable will necessarily be a fact-specific inquiry that considers, for example, whether the student has a preferred modification, whether alternative modifications exist, and the feasibility and effectiveness of the modification in addressing the student's specific needs.

Jurisprudence outlining modifications that would be unreasonable or rise to the level of a fundamental alteration to the nature of the program in the educational and disability context is illustrative. For example, courts have found a requested modification to fundamentally alter a recipient's education program or activity if it would completely waive requirements that demonstrate mastery of a particular field of study, *see Brief* v. *Albert Einstein Coll. of Med.,* 423 F. App'x 88, 91–92 (2d Cir. 2011) (citing *Powell* v. *Nat'l Bd. of Med. Exam'rs,* 364 F.3d 79, 88 (2d Cir. 2004)); *Zukle* v. *Regents of Univ. of Calif.,* 166 F.3d 1041, 1051 (9th Cir. 1999); *Kaltenberger* v. *Ohio Coll. of Podiatric Med.,* 162 F.3d 432, 436–37 (6th Cir. 1998); or jeopardize an institution's accreditation, *see Harnett* v. *Fielding Graduate Inst.,* 400 F. Supp. 2d 570, 580 (S.D.N.Y. 2005), *aff'd in part, rev'd in part & remanded,* 198 F. App'x 89 (2d Cir. 2006).

Similarly, courts have held that modifications that would completely waive requirements that demonstrate academic competency, such as clinical components or examinations, were unreasonable. *McGuinness* v. *Univ. of N.M. Sch. of Med.,* 170 F.3d 974, 979 (10th Cir. 1998); *Doherty* v. *S. Coll. of Optometry,* 862 F.2d 570, 575 (6th Cir. 1988) (holding that waiver of requirement that demonstrated proficiency was not a reasonable modification); *Darian* v. *Univ. of Mass. Bos.,* 980 F. Supp. 77, 89–90 (D. Mass. 1997) (finding a student's request to not see patients or attend required clinical program to be unreasonable). In contrast, courts have indicated that a school may reasonably accommodate a student with a disability by allowing a student to defer or make up an examination at a later time, permitting a student to repeat one or more classes, providing a student with tutoring, taped lectures, and the like, and allowing a student to take untimed examinations, *see Wynne* v. *Tufts Univ. Sch. of Med. (Wynne II),* 976 F.2d 791, 795–96 (1st Cir. 1992); modifying a student's seating arrangement, *see Nathanson* v. *Med. Coll. of Pa.,* 926 F.2d 1368, 1385 (3d Cir. 1991); or reducing or modifying a student's duties in a required clinical course, or deferring to another semester completion of a program's clinical requirement, *see Darian,* 980 F. Supp. at 88–89. As a general matter, the Department notes that in the context of Federal disability law, courts have distinguished between modifications that are reasonable and those that rise to the level of a fundamental alteration to the nature of the program by analyzing whether the modification would waive academic requirements rather than providing a student another means to comply with academic requirements. The 2008 amendments to the ADA also affirm that consideration of academic requirements fits within the reasonable modifications framework. *See* 42 U.S.C. 12201(f) (''Nothing in this chapter alters the provision of section [12182] (b)(2)(A)(ii) [. . .] specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.'').

This case law is consistent with the examples of reasonable modifications that were identified in the July 2022 NPRM, such as providing a student who must be intermittently absent from class to attend morning prenatal appointments with the opportunity to

make up lost class time without penalty or offering the student the opportunity to switch to a comparable course that met in the afternoon (as long as either arrangement would be appropriate to the pregnant student's individualized need and would not fundamentally alter the nature of the recipient's education program or activity). 87 FR 41524. In contrast, a student's request to waive their entire senior year and graduate without those credits would likely be a fundamental alteration of the nature of the recipient's program. *Id.* But a recipient would still be required to offer reasonable modifications sufficient to prevent sex discrimination and ensure equal access to its education program or activity, such as by allowing the student to complete the required number of credits at a slower pace or granting an extension to complete certain tests or assignments. *Id.* Consistent with this framework, many of the modifications referenced by commenters—such as allowing a student to miss class to attend medical appointments with the opportunity to make up exams or coursework, allowing a student to take lactation or bathroom breaks during class without penalty, or providing a larger desk—would be more akin to modifications that provide students an alternative means to access an education program or activity rather than a complete waiver of academic requirements. And it would likely follow that a recipient would have difficulty demonstrating that such modifications would fundamentally alter the nature of its education program or activity or otherwise be unreasonable.

For these reasons, the Department disagrees with commenters' assertion that § 106.40(b)(3)(ii) encourages recipients to deny reasonable modification requests. Rather, consistent with cases construing Federal disability law and the examples provided in the July 2022 NPRM, recipients must meet a rigorous standard to demonstrate that a particular or requested modification under § 106.40(b)(3)(ii)(A) would be a fundamental alteration to the nature of a program or activity. To be sure, in the context of Federal disability law, courts have afforded recipients some deference in ''genuine academic decisions,'' *Wynne* v. *Tufts Univ. Sch. of Med. (Wynne I),* 932 F.2d 19, 25 (1st Cir. 1991), such as those involving a request to waive a particular academic program requirement. But they have emphasized that such deference is not the same as the sort of ''broad judicial deference'' that courts use when applying the ''rational basis test.'' *Id.* And courts have only accorded deference to these concerns upon a showing that an academic institution has ''conscientiously carried out'' its obligation to ''seek suitable means of reasonably accommodating'' the needs of a person with a disability. *Id.* at 25–26. Courts have also indicated that new approaches or technological advances may further weaken the deference a recipient is due in its assessment that a reasonable modification would negatively impact genuine academic decisions. *Id.* at 26 (citing *Se. Comm. Coll.* v. *Davis,* 442 U.S. 397, 412 (1979)). The Department anticipates similar standards will apply when assessing whether a modification is ''reasonable'' under § 106.40(b)(3)(ii).

In the event a particular modification would result in a fundamental alteration, the Department acknowledges the concerns voiced by commenters that a recipient could interpret the proposed regulations as allowing a recipient to deny a student's request for modifications completely without any further obligation to prevent sex discrimination and to ensure equal access for a student who is pregnant or experiencing pregnancy-related conditions. To address such concerns, the Department has revised § 106.40(b)(3)(ii)(A) to clarify that a modification that a recipient can demonstrate would fundamentally alter the nature of its education program or activity is not a reasonable modification. Accordingly, demonstrating a particular modification would be a fundamental alteration does not relieve a recipient of its obligation under § 106.40(b)(3)(ii)(A) to otherwise consult with the student, determine whether there are reasonable modifications based on the student's individualized needs, offer such reasonable modifications and, if the student accepts, make such reasonable modifications that sufficiently prevent sex discrimination and ensure equal access.

The Department disagrees that § 106.40(b)(3)(ii) will retreat from previously issued guidance regarding voluntary leaves of absence for pregnancy or related conditions. A recipient's obligation to provide reasonable modifications to a student for pregnancy or related conditions under § 106.40(b)(3)(ii) is separate and distinct from its longstanding obligation—preserved in final § 106.40(b)(3)(iv)—to provide a voluntary leave of absence to a student for pregnancy or related conditions. As explained below in the discussion of § 106.40(b)(3)(iv), that provision provides a basic framework for determining leave due to a student's pregnancy or related conditions. But if a student requests leave that exceeds this framework, the recipient should consider the amount of leave the student requests in excess of that required under § 106.40(b)(3)(iv) as a request for a reasonable modification under § 106.40(b)(3)(ii). *See* 87 FR 41521 (providing examples of circumstances in which leave that exceeds the medically necessary time would be a reasonable modification, such as when the medically necessary leave would end in the middle of a college semester).

Changes: Proposed § 106.40(b)(4) has been revised, consolidated with proposed § 106.40(b)(3)(ii), and redesignated as § 106.40(b)(3)(ii)(A)–(C) in the final regulations. Final § 106.40(b)(3)(ii)(A) now states that a recipient must make reasonable modifications to its policies, practices, or procedures as necessary to prevent sex discrimination and ensure equal access to the recipient's education program or activity; that each modification must be based on a student's individualized needs; that the recipient must consult with the student when determining what modifications are required; and that a modification that a recipient can demonstrate would fundamentally alter the nature of its education program or activity is not a reasonable modification. Section 106.40(b)(3)(ii)(B) now states that a student has discretion whether to accept or decline an offered modification; and that, if the student accepts the offered modification, the recipient must implement the modification.

Inclusive List of Reasonable Modifications

Comments: The Department notes that proposed § 106.40(b)(4)(iii) has been revised and redesignated as § 106.40(b)(3)(ii)(C) in the final regulations, and the following comment summaries and discussion refer to the provision as § 106.40(b)(3)(ii)(C).

One commenter supported § 106.40(b)(3)(ii)(C) because it would provide critical guidance to recipients. Some commenters asked the Department to add various specific examples of modifications or require supplemental services, such as medical care. One commenter recommended that the Department add ''or laboratory work'' after ''coursework.'' Some commenters asked the Department to revise, rather than add to, the list of potential modifications. For example, one commenter suggested that instead of ''homebound'' instruction, the regulations should refer to online

educational programs or other home-based educational services.

Another commenter urged the Department to move ''intermittent absences to attend medical appointments'' from § 106.40(b)(3)(ii)(C) to § 106.40(b)(3)(iv), which relates to voluntary leaves of absence because of pregnancy or related conditions, and clarify that such intermittent absences or voluntary leaves of absence may include pre- and postnatal appointments, as well as bed rest and leave to recover from childbirth or related conditions such as mastitis, or otherwise clarify that a recipient must provide reasonable modifications to an absence policy after childbirth.

Discussion: The Department agrees that § 106.40(b)(3)(ii)(C) will provide critical guidance to recipients. The Department has revised this provision to clarify that online education need not be homebound and to be consistent with final § 106.40(b)(3)(vi), which references certain modifications and is explained in more detail in the discussion of § 106.40(b)(3)(vi), to clarify that breaks from class may be provided to attend to lactation, eating, drinking, using the restroom, or other needs associated with pregnancy or related conditions.

The Department declines to make other revisions to § 106.40(b)(3)(ii)(C) suggested by commenters, including the request to move ''intermittent absences to attend medical appointments'' to § 106.40(b)(3)(iv). As explained above, a recipient's obligation to provide reasonable modifications to a student for pregnancy or related conditions under § 106.40(b)(3)(ii) is separate and distinct from its longstanding obligation to provide a voluntary leave of absence to a student for pregnancy or related conditions, which is codified at § 106.40(b)(3)(iv) in the final regulations. The Department further emphasizes that the regulation's use of the introductory phrase ''[m]ay include but are not limited to'' confirms that the list of possible reasonable modifications is non-exhaustive and broadly inclusive. Section 106.40(b)(3)(ii)(C) includes reasonable modifications that are typical, unlikely to result in a fundamental alteration to the nature of a recipient's education program or activity, and effective in preventing sex discrimination and ensuring equal access for students who are pregnant or experiencing pregnancy-related conditions. For additional clarity, the Department has added the reasonable modifications of breaks to eat, drink, or use the restroom, allowing a student to sit or stand, and allowing a student to carry or keep water nearby. As discussed above, whether a particular or requested modification is reasonable is a fact-specific inquiry that must be individualized to the student in the context of the recipient's education program or activity. Nothing in these regulations prevents a student from requesting or a recipient from affirmatively offering a particular modification, including those suggested by commenters, such as tutoring, supplemental instruction, academic counseling, homework assistance, changes in course load, modification of a school or sport uniform policy, or other modifications that would apply to an athletic or extracurricular context.

As the Department indicated in the July 2022 NPRM, 87 FR 41524, reasonable modifications for a student based on pregnancy or related conditions include many possible options. A student's options for reasonable modifications because of pregnancy or related conditions will not be limited or defined by the fact that the recipient has never had occasion to provide a particular modification to any other student in the past. Further, as explained above, it is not incumbent on the student to propose or suggest any particular reasonable modification in order for the recipient to offer reasonable modifications with the student's input. Additionally, because § 106.40(b)(3)(ii)(A) requires a recipient to consider the provision of a modification on a basis individualized to each student's pregnancy or related condition and needs, a recipient may consider a variety of factors when offering reasonable modifications, such as whether the student has a preferred modification, whether alternative modifications exist, and the feasibility of a modification. However, the Department reiterates that a recipient ultimately has discretion in what reasonable modifications it offers if there is more than one reasonable modification that would address the student's individualized needs, prevent sex discrimination, and ensure equal access to the recipient's education program or activity. Additionally, a recipient has the burden of demonstrating that a particular modification would fundamentally alter the nature of its education program.

Changes: Proposed § 106.40(b)(4)(iii) has been revised and redesignated as § 106.40(b)(3)(ii)(C). The Department has revised the redesignated non-exhaustive list of examples in § 106.40(b)(3)(ii)(C) for consistency with final § 106.40(b)(3)(vi); to clarify that breaks from class may be provided to attend to lactation or other health needs associated with pregnancy or related conditions, including eating, drinking, or using the restroom; and to delete ''other'' from the phrase ''online or other homebound education'' to clarify that online education need not be homebound.

Title IX Coordinator's Role

Comments: Some commenters supported the proposed regulations—which would have required that reasonable modifications because of pregnancy or related conditions ''be effectively implemented, coordinated, and documented by the Title IX Coordinator''—because they would have made clear that the Title IX Coordinator has the authority and responsibility to ensure that reasonable modifications are actually provided to students.

In contrast, other commenters expressed concern that the proposed regulations would have (1) hindered the effectiveness of other departments within a recipient that typically address student requests for disability-related accommodations; (2) been inconsistent with proposed § 106.40(b)(5) (redesignated in the final regulations as § 106.40(b)(4)), which requires comparable treatment to temporary disabilities or conditions; (3) overburdened the Title IX Coordinator; and (4) failed to take into account the expertise and resources most recipients allocate to offices that provide accommodations for students with disabilities. Some commenters noted that other departments within a recipient may also play a role in providing accommodations or be better positioned than the Title IX Coordinator to do so, including academic affairs, student life, enrollment, and campus health services.

Some commenters urged the Department to clarify instances in which the Title IX Coordinator should consult with or defer to disabilities services staff, a student's Section 504 team, or a student's IEP team when the Title IX Coordinator is facilitating a reasonable modification because of pregnancy or related conditions, in order to increase coordinated compliance under Title IX and Federal disability laws.

Some commenters recommended a variety of revisions to the proposed regulations to decrease the role of the Title IX Coordinator in implementing reasonable modifications. Other commenters urged the Department to revise the proposed regulations to make clear that a recipient, not the Title IX Coordinator, is responsible for requests related to reasonable modifications or leaves of absence.

Discussion: The Department agrees with commenters that the recipient, not

the Title IX Coordinator, is ultimately responsible for implementing requests for reasonable modifications and other specific actions the recipient must take under final § 106.40(b)(3)(ii)–(vi). Accordingly, the Department has revised § 106.40(b)(3) to clarify that it is the recipient's responsibility to take, and the Title IX Coordinator's responsibility to coordinate, these actions, including the provision of reasonable modifications because of pregnancy or related conditions. Additionally, the final regulations expressly permit a recipient or a Title IX Coordinator to delegate specific duties as appropriate, provided the Title IX Coordinator retains ultimate oversight to ensure the recipient's consistent compliance under Title IX and the regulations. *See* discussion of § 106.8(a). Consistent with these revisions, and as noted in a similar discussion above regarding § 106.40(b)(3) generally, a recipient may delegate the provision of reasonable modifications because of pregnancy or related conditions to other personnel beyond the Title IX Coordinator.

Permission to delegate responsibilities to designees enables a recipient to assign duties to personnel who are best positioned to perform them, to address actual or perceived conflicts of interest, and to align with the recipient's administrative structure. For example, as long as the Title IX Coordinator retains oversight and a recipient's process for providing reasonable modifications because of pregnancy or related conditions is consistent with § 106.40(b)(3)(ii), a recipient may delegate responsibilities under that process to any staff or departments as appropriate, including those who support students with disabilities.[83] The Department declines to further limit the Title IX Coordinator's role in coordinating reasonable modifications because of pregnancy or related conditions, however. The Title IX Coordinator has unique and specific knowledge of a recipient's obligations to prevent sex discrimination and ensure equal access that must inform the implementation of § 106.40(b)(3)(ii), even if certain portions of the process are delegated to other employees or departments acting with the Title IX Coordinator's oversight. Additionally, the Title IX Coordinator can serve as a critical point of contact for students or provide other support to coordinate multiple departments or employees tasked with implementing reasonable modifications, such as communicating approved modifications to the student and any relevant staff members or ensuring that all other staff members involved in carrying out the modifications are performing their roles.

Revising the regulatory text to state that the Title IX Coordinator's role is to coordinate, rather than exclusively to implement, emphasizes the opportunity for the Title IX Coordinator to delegate and decreases the likelihood that reasonable modification requests overburden the Title IX Coordinator with duties better suited for other personnel. Additionally, the Department has also removed the proposed requirement for the Title IX Coordinator to ''document'' reasonable modifications to decrease administrative burdens on the Title IX Coordinator and address privacy concerns related to such documentation. The Department emphasizes that while a recipient must comply with the final regulations regarding reasonable modifications, the reasonable modification provision does not require a recipient to maintain documentation of compliance with § 106.40(b)(3)(ii). While a recipient may choose to voluntarily maintain such records, those records would be subject to § 106.44(j) of the final regulations, which prohibits the disclosure of personally identifiable information obtained in the course of complying with this part with some exceptions. The disclosure restrictions are explained more fully in the discussion of § 106.44(j).

The Department declines to require a recipient to consult with disabilities support staff in every case related to the provision of reasonable modifications because of pregnancy or related conditions. While doing so may be prudent in some cases, in other cases it will be unnecessary, inappropriate, or inefficient, and whether it is required will be a fact-specific determination. For example, if a high school student with a disability that affects mobility requests a dress code modification for gym class due to pregnancy, this may not impact the student's placement such that coordination with the student's IEP or Section 504 team is required. However, if a student with ADHD requests a six-week, medically necessary leave from high school to recover from childbirth, the student's IEP or Section 504 team would likely have to convene to discuss how to provide the student appropriate education during this period, beyond or in combination with any reasonable modifications the student is entitled to under Title IX. The Department also declines to mandate that a Title IX Coordinator coordinate with disabilities support staff or a student's IEP or Section 504 team because it will better serve a student's privacy interests in circumstances in which a student does not wish to disclose information related to their pregnancy or pregnancy-related condition to their IEP or Section 504 team. For example, a high school student with a vision disability who requests breaks from class to address lactation needs may not wish to share the reason for the breaks beyond the Title IX Coordinator if the disability has no connection to the pregnancy.

Nothing in the final regulations prevents a recipient from adopting additional mechanisms to coordinate compliance with relevant laws to maximize protection from discrimination and minimize the potential for redundancy or unnecessary burden on a recipient's students or employees.

Changes: Proposed § 106.40(b)(4) has been revised, consolidated with proposed § 106.40(b)(3)(ii), and redesignated as § 106.40(b)(3)(ii)(A)–(C) in the final regulations, and the requirement for the Title IX Coordinator to implement and document reasonable modifications has been removed. Final § 106.40(b)(3) now states that the Title IX Coordinator must coordinate actions under paragraphs (b)(3)(i) through (vi). Final § 106.40(b)(3)(ii) now specifically states that a recipient must make reasonable modifications to the recipient's policies, practices, or procedures as necessary to prevent sex discrimination and ensure equal access to the recipient's education program or activity.

Termination of Pregnancy

Comments: The Department notes that proposed § 106.40(b)(3)(ii), (iii), and (4) have been revised and redesignated as § 106.40(b)(3)(ii) and (iv) in the final regulations, and the following comment summaries and discussion refer to these provisions as § 106.40(b)(3)(ii) and (iv).

Some commenters supported reasonable modifications and voluntary leaves of absence because of pregnancy or related conditions as helpful to students in understanding their options for educational access. Several commenters asked the Department to clarify a recipient's obligation to provide reasonable modifications or a leave of absence for complications arising from termination of pregnancy or for out-of-State travel for health care related to pregnancy or related conditions. Other commenters asked that the reasonable modifications provision state that recipients would not be required to provide, pay for, or refer a student for an abortion or any abortion-related services. Some

[83] Such a delegation would not affect the legal determination whether a student has a disability.

commenters asked the Department to clarify or issue guidance on a recipient's obligations regarding disclosure of information related to modifications sought or provided to a student to access an abortion.

Discussion: The Department acknowledges the perspective of commenters who described the importance of the proposed provisions requiring reasonable modifications and voluntary leaves of absence and appreciates the opportunity to clarify a recipient's distinct obligations under these two provisions in the final regulations. Under § 106.40(b)(3)(ii), a recipient must provide a student who is pregnant or experiencing pregnancy-related conditions with reasonable modifications as necessary to prevent sex discrimination and ensure equal access to an education program or activity. Under § 106.40(b)(3)(iv), a recipient must allow a student who is pregnant or experiencing pregnancy-related conditions to voluntarily take a leave of absence from the recipient's education program or activity to cover, at a minimum, the time deemed medically necessary by the student's licensed healthcare provider. As explained more fully above in the discussion of the definition of ''pregnancy or related conditions'' in § 106.2, ''pregnancy or related conditions'' includes pregnancy, childbirth, termination of pregnancy, or lactation, as well as related medical conditions and periods of recovery.

As detailed above in the discussion of the definition of ''pregnancy or related conditions'' in § 106.2, 20 U.S.C. 1688 states that Title IX's general nondiscrimination mandate cannot ''require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion.'' The Department does not view a recipient's reasonable modification of its policies, practices, and procedures when necessary due to a student's termination of pregnancy under § 106.40(b)(3)(ii) or allowing a voluntary leave of absence under § 106.40(b)(3)(iv), as running afoul of section 1688. Such modifications or leave are not ''benefits or services'' under 20 U.S.C. 1688. *See* 134 Cong. Rec. H565–02 (daily ed. Mar. 2, 1988) (describing the abortion neutrality provision as limited to ''the performance of or payment for abortion''). The modifications required under § 106.40(b)(3)(ii) do not require any recipient to fund or perform abortions. Rather, modifications required under § 106.40(b)(3)(ii) are specifically related to non-discriminatory access to a recipient's education program or activity and could include, for example, access to online or homebound instruction during recovery from termination of pregnancy; or allowing extra time to complete an exam or coursework for a student who needs to travel out of State to receive specialized care for a high-risk pregnancy.

Further, section 1688 contains a self-limitation; the second sentence indicates that the first must not be ''construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.'' Thus, it is clear that section 1688 does not justify such penalties, which constitute prohibited sex discrimination under section 1681. For purposes of complying with Title IX, schools may presume that individuals seeking reasonable modifications, voluntary leaves of absence, or comparable treatment to other temporary medical conditions related to an abortion intend to obtain a legal abortion. Students can legally terminate a pregnancy either in their State or by traveling to another State where the abortion is lawful. In addition, questions about when an abortion is lawful under State law often involve complex medical and factual considerations that fall well outside the expertise of educational institutions, making recipients ill equipped to assess the legality of an abortion. In response to requests for reasonable modifications, leaves of absence, or comparable treatment, recipients have no education-related need to access information about how or where a student will obtain medical treatment or for other personal health-related information related to termination of a pregnancy.

The Department notes that recipients routinely provide reasonable modifications or accommodations for a wide array of temporary medical conditions (including illness, injury, or medical procedures) without requesting sensitive and specific healthcare information from students about the origin or timeline of such a condition, or about how, where, by whom, or in what manner the condition will be treated. Nothing in these regulations requires a different approach in the abortion context. Were a recipient to treat requests for reasonable modifications for abortion care differently than they do requests for reasonable modifications for other temporary medical conditions with respect to the information students must provide to accompany such requests, such treatment could contravene the broad nondiscrimination mandate in section 1681, as discussed above. Asking a student for such personal information in the course of providing reasonable modifications or comparable treatment may constitute sex discrimination—particularly if the inquiry is informed by sex stereotypes (*e.g.,* questions about whether the student is married or the circumstances surrounding the pregnancy) or could constitute different treatment (*e.g.,* if a recipient would not ask a student how they became disabled or specific questions about treatment of their disability, but asks a student how they became pregnant or specific questions about treatment of their pregnancy, including potential termination). And asking unnecessary and invasive questions could compromise student privacy in a manner that could chill students from seeking reasonable modifications or comparable treatment that they are entitled to under these regulations, which may also contravene Title IX.

In such a scenario, section 1688 would not justify the discrimination because requiring a recipient to apply the same information gathering policies across temporary medical conditions is not requiring a ''benefit or service'' related to abortion. More specific questions and issues related to a recipient's compliance with both Title IX and State law, including when preemption issues may arise, must be considered on a case-by-case basis given the fact-specific nature of the inquiry. Likewise, section 1688 does not preclude the requirement under § 106.40(b)(3)(iv) that a recipient must allow a student to take a voluntary leave of absence for as long as medically necessary for pregnancy or related conditions, including termination of pregnancy. Such a leave of absence is not a benefit or service relating to abortion, particularly when the recipient makes leave generally available to ensure that students with a variety of pregnancy-related (and non-pregnancy related) conditions can continue to access the recipient's education program or activity.

The Department will offer technical assistance, as appropriate, the scope of which will be determined in the future, to promote compliance with these final regulations.

Changes: None.

Interaction With Other Federal Laws

Comments: The Department notes that proposed § 106.40(b)(3)(ii) and (4) have been revised and redesignated as § 106.40(b)(3)(ii) in the final regulations, and the following comment summaries

and discussion refer to these provisions as § 106.40(b)(3)(ii).

One commenter supported § 106.40(b)(3)(ii) because it would clarify that a recipient has other obligations regarding pregnancy or related conditions beyond student and employee health plans and benefits. The commenter asserted that recipients are familiar with the Department's proposed process for pregnancy-related reasonable modifications because they have similar obligations under Title II of the ADA, and that familiarity will facilitate compliance with the proposed regulations.

Another commenter asked the Department to explicitly state that a pregnancy-related condition need not qualify as a disability under the ADA to qualify for a reasonable modification under Title IX.

In contrast, some commenters asserted that the provision of reasonable modifications because of pregnancy or related conditions would exceed the Department's authority under Title IX because the modifications would address disability discrimination. Specifically, the commenters argued that the proposed reasonable modification requirements would go beyond prohibiting different treatment to requiring a recipient to affirmatively provide modifications based on pregnancy or related conditions. The commenters asserted that this requirement would give preferential treatment to a student based on sex in violation of Title IX.

Some commenters also argued that because pregnancy or related conditions generally are not disabilities under the ADA or Section 504, the proposed regulations would impermissibly use Title IX to expand a student's rights and a recipient's obligations under disability law. These commenters further asserted that the requirement to affirmatively notify a student of available modifications and the procedures to determine whether to provide a modification would differ from those outlined in the ADA and Section 504.

Some commenters argued that because Title IX is modeled after Title VII and proposed § 106.40(b)(3)(ii) would provide more protections to a student who is pregnant or experiencing pregnancy-related conditions than a similarly situated employee would be provided under Title VII, the proposed regulations would exceed and conflict with Title VII.

Finally, one commenter asked for clarification about how proposed § 106.40 would interact with other parts of Title IX, the PDA, Section 504, and the ADA. The commenter also asked for clarification about the differences between a recipient's obligations toward pregnant students and employees, how § 106.40 would apply to a student-employee, and whether there is a distinction based on whether the individual is primarily a student (*e.g.,* undergraduate students with part-time campus-based jobs) or primarily an employee (*e.g.,* employees who may be enrolled in one or two classes at a time) and the context for the sex discrimination reported. This commenter observed that § 106.46(b) addresses this issue regarding sex-based harassment grievance procedures.

Discussion: The Department agrees that § 106.40(b)(3)(ii) will clarify that a recipient has obligations that extend beyond student health plans and benefits for students who are pregnant or experiencing pregnancy-related conditions. Additionally, the Department agrees that similarities between § 106.40(b)(3)(ii) and Title II of the ADA will facilitate compliance for recipients.

The Department disagrees that § 106.40(b)(3)(ii) exceeds the Department's authority under Title IX or provides preferential treatment to a student based on sex in violation of Title IX. Since 1975, consistent with the Department's broad statutory authority to issue regulations prohibiting sex discrimination, the Title IX regulations have included provisions that require a recipient to take proactive steps to ensure equal treatment and access for students who are pregnant or experiencing pregnancy-related conditions that differ from what accommodations are provided to other students, including students with disabilities. *See* 40 FR 24128 (codified at 45 CFR 86.40(b)(1), (5) (1975)); 34 CFR 106.40(b)(1), (5) (current); 20 U.S.C. 1682. The provision of reasonable modifications based on pregnancy or related conditions is not preferential treatment based on sex, but rather measures that are necessary to prevent sex discrimination and ensure equal access to a recipient's education program or activity for students who are pregnant or experiencing pregnancy-related conditions. A recipient's denial of reasonable modifications for a student based on pregnancy or related conditions uniquely deprives that student of an educational opportunity of which they would not otherwise be deprived, but for their sex.

Moreover, the Department disagrees with commenters' assertion that § 106.40(b)(3)(ii) impermissibly uses Title IX to expand a student's rights or a recipient's obligations under disability law. As some commenters and the July 2022 NPRM noted—and as the Department clarifies here—pregnancy itself is not a disability. 87 FR 41523. Therefore, a recipient's obligation to provide reasonable modifications because of pregnancy or related conditions under § 106.40(b)(3)(ii) is distinct from its obligation to provide reasonable modifications because of a disability under Section 504 or the ADA. Further, whether a pregnancy-related condition is categorized as a disability under Section 504 or the ADA has no effect on a recipient's separate obligation to provide reasonable modifications under § 106.40(b)(3)(ii). 87 FR 41525. The Department clarifies that nothing in § 106.40(b)(3)(ii) obviates a recipient's separate obligation to comply with other applicable civil rights law, including the ADA, Section 504, Title VII as amended by the PDA, or the Pregnant Workers Fairness Act (PWFA), codified at 42 U.S.C. 2000gg *et seq.,* which has become law since the issuance of the July 2022 NPRM.

The Department disagrees that the obligation to provide reasonable modifications because of pregnancy or related conditions conflicts with the obligation to provide reasonable modifications for a disability. As indicated in the July 2022 NPRM, the framework for reasonable modifications because of pregnancy or related conditions is similar to the framework of Title II of the ADA, and the approach of § 106.40(b)(3)(ii) will invite collaboration between the student and the recipient to determine what reasonable modifications are required considering the student's individualized needs, a process that is similar to the one used to identify the reasonable modifications or reasonable accommodations that must be implemented under the ADA. *See* 87 FR 41523. The Department expects that this framework not only will be most effective in ensuring equal access and preventing sex discrimination as required by Title IX, but also will be familiar to most recipients and thus will be relatively straightforward to adopt and implement for students who are pregnant or experiencing pregnancy-related conditions. As such, the Department declines to remove the requirement to provide reasonable modifications because of pregnancy or related conditions.

The Department disagrees with the assertion that providing unique protections to students under Title IX necessarily conflicts with Title VII. As explained in the July 2022 NPRM, the treatment of pregnancy-related discrimination under the PDA, the ACA, and other statutes enacted since 1975

informs, but does not dictate, the Department's understanding of discrimination on the basis of sex under Title IX. 87 FR 41394. Title IX regulations have long included protections and requirements that are unique to the context of education programs and activities. *See generally* 40 FR 24128 (1975). For example, the provision of a voluntary leave of absence to a student or employee for pregnancy and certain related conditions (34 CFR 106.40(b)(5) (current) and 34 CFR 106.57(d) (current)) are longstanding requirements in Title IX regulations that have no corollary in Title VII. Further, in response to a commenter's request to clarify how § 106.40(b)(3)(ii) and this part would interact with the PDA, Section 504, and the ADA, explaining all the ways that Title IX may interact with these laws is too extensive to summarize and beyond the scope of this rulemaking,

Additionally, under § 106.40(b)(3)(ii), a recipient is obligated to provide reasonable modifications to a student, defined in § 106.2 as ''a person who has gained admission,'' who is pregnant or experiencing pregnancy-related conditions. The recipient has this obligation regardless of whether the student is also an employee of the recipient. The primary purpose of reasonable modifications under Title IX is to ensure that pregnancy or related conditions do not deny educational opportunities or disrupt a student's academic progress, regardless of whether the student is enrolled full-time, part-time, or in only one or two classes. Consequently, if an employee is enrolled in the recipient's education program or activity, the recipient must offer and make reasonable modifications sufficient to allow the employee to continue their educational progress as a student consistent with § 106.40(b)(3)(ii). Additionally, the Department clarifies that a recipient must comply with grievance procedures outlined in § 106.45, and if applicable § 106.46, for any complaint that alleges a recipient failed to take specific action under § 106.40(b)(3), regardless of whether the student is also an employee. Final § 106.46(b) further discusses the application of grievance procedures to a sex-based harassment complaint, which may include pregnancy harassment, that involves a postsecondary student-employee. *See* discussion of § 106.46(b).

Changes: None.

Request To Extend Reasonable Modifications to Applicants

Comments: The Department notes that proposed § 106.40(b)(3)(ii) and (4) have been revised and redesignated as § 106.40(b)(3)(ii) in the final regulations, and the following comment summaries and discussion refer to these provisions as § 106.40(b)(3)(ii).

Some commenters recommended that the Department revise proposed § 106.40(b)(3)(ii) to state that an applicant for admission has the right to a reasonable modification to ensure that pregnancy or related conditions do not act as a barrier to entering a recipient's education program or activity, as well as to align with other civil rights laws.

Discussion: The Department declines to require a recipient to apply § 106.40(b)(3)(ii) to applicants for reasons discussed in more detail in the discussion of § 106.21(c)(1).

Changes: None.

Terminology

Comments: The Department notes that proposed § 106.40(b)(3)(ii) and (4) have been revised and redesignated as § 106.40(b)(3)(ii) in the final regulations, and the following comment summaries and discussion refer to these provisions as § 106.40(b)(3)(ii).

Some commenters recommended that the Department replace the term ''reasonable modifications'' with the term ''reasonable accommodations'' because, they stated, it would be less confusing and more appropriate for the context. Some commenters asserted that ''modification'' implies a change to what a student is expected to do while ''accommodation'' implies a support or service to help a student do an expected task. The commenters asserted that ''accommodation'' describes a broader range of support that a recipient may provide to a student who is pregnant or experiencing pregnancy-related conditions. In contrast, another commenter stated that a ''modification'' to a policy, practice, or procedure seems more permanent and implies that it would be changed for all students.

Discussion: While the Department acknowledges commenters' concerns about the term ''reasonable modifications'' and its meaning, the term is appropriate and straightforward. Final § 106.40(b)(3)(ii) clearly sets out the purpose of reasonable modifications and the very broad range of individual modifications that a recipient may provide based on the circumstances. Under the final regulations, a recipient can implement a reasonable modification for just one student, such as a modification that is provided to just the student who is pregnant or experiencing pregnancy-related conditions, or implement a broader policy or procedural change that affects many students, including the student who is pregnant or experiencing pregnancy-related conditions; for example, implementing a student's reasonable modification request for an extension on an assignment by extending the deadline for all students in the class. Additionally, the regulatory framework from which § 106.40(b)(3)(ii) primarily draws—but is not identical to—and with which many recipients must comply under Title II of the ADA uses the term ''reasonable modifications.'' 28 CFR 35.130(b)(7). Therefore, using the term ''reasonable modifications'' is less confusing and more appropriate than any other term.

Changes: None.

Cost-Benefit Analysis

Comments: The Department notes that proposed § 106.40(b)(3)(ii) and (4) have been redesignated as § 106.40(b)(3)(ii) in the final regulations, and the following comment summaries and discussion refer to these provisions as § 106.40(b)(3)(ii).

One commenter objected to proposed § 106.40(b)(3)(ii) because, the commenter asserted, the Department did not consider what reasonable modifications would be required, aside from lactation spaces and leave; the financial costs of such modifications; how providing a modification could negatively impact or be unfair to another student, such as delayed or longer times for test taking; or any reasonable modifications required for parents or fathers.

Discussion: The commenter overstates the increased costs or burdens for implementing reasonable modifications unrelated to lactation and leave. As noted in the July 2022 NPRM, recipients have existing obligations that are similar to those under § 106.40(b)(3)(ii), which require a recipient to make modest modifications to a policy, practice, or procedure, such as providing a student a larger desk, allowing more frequent bathroom breaks, or permitting temporary access to elevators. 87 FR 41560.

The Department declines to extend reasonable modifications to individuals other than students who are pregnant or experiencing pregnancy-related conditions, because such students have unique sex-based needs and requiring reasonable modifications for that population is necessary for ensuring equal access to a recipient's education program or activity and preventing sex discrimination. The Department notes

that, even though recipients are not required to extend reasonable modifications beyond the student who is pregnant or experiencing a pregnancy-related condition, any rules related to a student's parental, family, or marital status cannot treat students differently based on sex. A policy that allowed for leave for only students of one sex to, for example, provide bonding time ''for the natural caregiver''—rather than leave to recover from childbirth—would be based on impermissible sex stereotypes in violation of Title IX. Nothing in Title IX prevents a recipient from offering reasonable modifications or leave to parents or caregivers, provided the recipient does not treat students differently on the basis of sex.

Further, the Department disagrees with the implication that the costs or burdens of § 106.40(b)(3)(ii) would not be justified by the benefits of clarifying a recipient's obligation to provide, and ensuring that students are able to access, reasonable modifications and voluntary leaves of absence for pregnancy or related conditions. The Department views the final regulations as an effective means of preventing sex discrimination and ensuring equal access to a recipient's education program or activity for students who are pregnant or experiencing pregnancy-related conditions. Although there are limited data quantifying the economic impacts of sex discrimination, the Department's review of public comments shows that such barriers can prevent students from obtaining a high school diploma, pursuing higher education, or obtaining a postsecondary degree, which limits their economic opportunities and may have long-term or generational impacts. A more detailed discussion and analysis of the costs and benefits of provisions related to reasonable modifications in these final regulations is included in the *Regulatory Impact Analysis* discussion of pregnancy or related conditions.

Changes: None.

7. Sections 106.40(b)(1) and 106.40(b)(3)(iii) Pregnancy or Related Conditions—Voluntary Access to Separate and Comparable Portion of Program or Activity

Comments: The Department notes that proposed § 106.40(b)(3)(i)(C) has been redesignated as § 106.40(b)(3)(iii) in the final regulations, and the following comment summaries and discussion generally refer to this provision as § 106.40(b)(3)(iii).

Some commenters appreciated that the provisions in the proposed regulations at § 106.40(b)(1) and (3)(iii) would preserve the existing and longstanding requirement that participation in any separate program based on pregnancy or related conditions must be voluntary and that such programs must be comparable to those offered to students who are not pregnant and do not have related conditions.

Some commenters cited examples of pregnant students, particularly those in high school, being coerced or pressured into inferior alternative education programs. A group of commenters provided examples from their own experiences and reported that, when educators or counselors learn of a student's pregnancy or parental status, they often pressure the student to attend an alternate school of lower quality that offers fewer options for courses and extracurricular activities or force the student to withdraw from the recipient's education program or activity altogether instead of offering support to help them continue their education.

Some commenters urged the Department to change the proposed regulatory language to explicitly prohibit a recipient from forcing a student who is pregnant or is experiencing a pregnancy-related condition to participate in a separate portion of the recipient's education program or activity. Some commenters requested that the Department alter the standard in proposed § 106.40(b)(1) and require separate programs to be ''substantially equal'' instead of ''comparable.'' Some commenters suggested that the Department specify that such programs must be substantially equal ''in purpose, scope, and quality'' to those offered to students who are not pregnant or parenting. One commenter suggested that the Department incorporate into its standard the factors outlined in the current regulations regarding single-sex classes at § 106.34(b)(3) to evaluate whether a program offered to pregnant students is substantially equal.

Other commenters requested that the Department change proposed § 106.40(b)(1) to apply to parenting students.

Discussion: The Department disagrees that the regulations need to be revised to state that a recipient must not force a student who is pregnant or experiencing pregnancy-related conditions to participate in a separate portion of its education program or activity or to further define the terms in the proposed regulations. Under final § 106.40(b)(1) and (3)(iii), a recipient does not engage in prohibited discrimination when it allows a student who is pregnant or experiencing pregnancy-related conditions to participate voluntarily in a separate portion of the recipient's education program or activity. Indeed, since the Department's Title IX regulations were originally promulgated in 1975, they have required that such admittance be ''completely voluntary on the part of the student[.]'' 40 FR 24128 (codified at 45 CFR 86.40(b)(3) (1975)); *see also* 34 CFR 106.40(b)(3) (current). The Department clarifies here that the use of the word ''voluntarily'' means that recipients must not coerce or pressure any student to participate in such separate programs. This is consistent with OCR's public education documents regarding Title IX and pregnant and parenting students, issued first in 1991 and again in 2013, which explained the Department's policy that the regulations prohibited a recipient from requiring or pressuring a student to participate in a separate program for pregnant students. *See* 2013 Pregnancy Pamphlet at 7; U.S. Dep't of Educ., Office for Civil Rights, Teenage Pregnancy and Parenthood Issues Under Title IX of the Education Amendments of 1972, at 6 (1991) (1991 Pregnancy Pamphlet), *https://files.eric.ed.gov/fulltext/ED345152.pdf.* Because a student's participation in a separate portion of its education program or activity under final § 106.40(b)(1) and (3)(iii) on the basis of pregnancy or related conditions is voluntary, a recipient may neither coerce nor pressure such a student to participate. For these reasons, the alternate definitions or constructions offered by commenters are unnecessary.

Additionally, the Department declines the commenters' suggestion to require any voluntary and separate portion of a recipient's education program or activity to be ''substantially equal'' instead of ''comparable.'' The requirement that a separate program for pregnant students be ''comparable'' has been in the regulations as part of current § 106.40(b)(3) since they were originally promulgated in 1975, and OCR has interpreted the term, as it is generally understood, to mean of equivalent quality or similar such that it is capable of comparison. 40 FR 24128 (codified at 45 CFR 86.40(b)(3) (1975)); *see also* 34 CFR 106.40(b)(3) (current). As OCR explained in 1991, the comparability requirement means that voluntary alternative programs must provide ''educational quality and academic offerings similar to those in the regular program.'' 1991 Pregnancy Pamphlet, at 7. And in 2013 the Department further explained that, for example, an alternative program providing only a vocational track with no opportunity for

advanced academic or college-preparatory classes would not meet the comparability standard. *See* 2013 Pregnancy Pamphlet, at 7. The Department clarifies that the term ''comparable'' refers to all aspects of a student's access to educational opportunity.

There may be legitimate, nondiscriminatory reasons that a temporary program for students who are pregnant or are experiencing related conditions could not be substantially the same as the permanent academic program offered to all students. For example, while an online portion of a recipient's program in some cases may not be considered substantially equal in quality to in-person instruction (because, for example, it lacks certain extracurricular activities or opportunities for social interaction that a traditional program would have), such an option might offer a pregnant student who is confined to bed rest a comparable alternative that would keep them engaged in school for a specific timeframe and be preferable to remaining completely out of school. Likewise, an alternative program geared toward pregnant students may exceed the offerings of a recipient's general curriculum, for example by including parenting classes to support the needs of this specific population. A determination about such programs would depend on the facts and circumstances, but the Department generally considers these types of supplemental courses or services to be allowed under the § 106.40(b)(1) and (3)(iii) ''comparable'' standard. Shifting to a ''substantially equal'' standard could suggest that they are impermissible.

The Department declines the commenter's suggestion to incorporate into final § 106.40(b)(1) and (3)(iii) the factors for single-sex classes under current § 106.34(b)(3). Doing so could inaccurately imply that any ''separate portion'' of a recipient's education program or activity subject to § 106.40(b)(1) and (3)(iii) is always single-sex. However, the Department agrees that the § 106.34(b)(3) factors are nevertheless helpful and relevant to explain how the Department interprets comparability under final § 106.40(b)(1) and (3)(iii). Accordingly, the Department clarifies that in determining whether such ''separate portion'' of a recipient's education program or activity under final § 106.40(b)(1) and (3)(iii) is ''comparable'' to that offered to students who are not pregnant and do not have related conditions, the Department considers, as appropriate, factors including the policies and criteria of admission; the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology; the qualifications of the instructors; and the quality, accessibility, and availability of facilities and resources provided to the class.

For clarity, rather than stating that a recipient may permit a student based on pregnancy or related conditions to participate voluntarily in a separate and comparable portion of its education program or activity as outlined above and set out in proposed § 106.40(b)(1), the Department has revised the second sentence of final § 106.40(b)(1) to state that such a voluntary and comparable placement is not prohibited discrimination. This revision will increase coherence within § 106.40(b)(1) and emphasize that a recipient may allow the type of enrollment described without running afoul of the regulation's general prohibition on discrimination based on pregnancy or related conditions in the same provision.

The Department acknowledges the suggestion that the Department revise § 106.40(b)(1) to apply to parenting students. The Department notes that under the final regulations, treating parenting students differently based on sex is prohibited, *see* § 106.40(a), as is discriminating against parenting students and employees based on sex stereotypes about the proper roles of mothers and fathers, *see* § 106.10. The Department will consider the need for the suggested revision, and the cost and administrative burden it may place on recipients, in future rulemakings.

Changes: For stylistic consistency with other references to ''voluntary'' in the final regulations, the Department has replaced ''participate voluntarily'' in § 106.40(b)(1) with ''voluntarily participate.'' The Department has further replaced the words ''may permit'' with the words ''does not engage in prohibited discrimination when it allows[.]''

8. Section 106.40(b)(3)(iv) Pregnancy or Related Conditions—Voluntary Leaves of Absence

General

Comments: The Department notes that proposed § 106.40(b)(3)(ii), (iii), and (4) have been revised and redesignated as § 106.40(b)(3)(ii) and (iv) in the final regulations, and the following comment summaries and discussion refer to these provisions as § 106.40(b)(3)(ii) and (iv).

Some commenters supported proposed § 106.40(b)(3)(iv) because it would ensure a recipient's absence policy does not affect a student's access to its education program or activity due to pregnancy or related conditions. One group of commenters shared personal experiences of being penalized for pregnancy-related absences, including a student who was given a failing grade because she was in the hospital recovering from a miscarriage during final exams and a postsecondary student who was told to return to school to take exams, days after giving birth, against her doctor's recommendation. Other commenters shared experiences of feeling pressured to return to an education program or activity before they were physically capable or against medical advice, such as inducing labor to avoid missing a class or seeking a release from a doctor to return sooner than what is advised for a surgery as complicated as a cesarean section.

Some commenters supported proposed § 106.40(b)(3)(iv) because it would ensure leave is based on medical necessity and require a student to be restored to the same status upon return. One commenter said that this provision is needed based on a survey, which found that pregnant students are typically out of school from four to six weeks after childbirth but receive no academic instruction or connection to teachers or school; that students who return to school often struggle to make up for lost instruction time; and that students are unaware of the supports available to them in school to maintain access to educational opportunities.

Some commenters urged the Department to modify language related to reinstatement after a leave of absence, such as defining ''academic status'' in § 106.40(b)(3)(iv) and acknowledging that reinstatement in a particular semester may depend on the program in which the student is enrolled.

Another commenter stated that the Department should be as specific as possible regarding student-athletes, to prevent a recipient from penalizing a student-athlete for pregnancy or related conditions during a leave of absence.

Some commenters asked the Department to clarify the timeline for when a student is to be reinstated to the academic status that they held prior to taking leave consistent with § 106.40(b)(3)(iv). Another commenter asked the Department to clarify the term ''leave of absence'' in § 106.40(b)(3)(iv) as it applied to an elementary school or secondary school, because attendance is compulsory in these grades.

Discussion: The Department agrees that § 106.40(b)(3)(iv) will afford equal

opportunity and clarify a recipient's obligation to allow a student to take a voluntary leave of absence related to pregnancy or related conditions for, at a minimum, a period that is deemed medically necessary by their healthcare provider. The Department is persuaded by the perspective offered by several commenters regarding their experiences with recipients' absence policies that effectively punished or caused students who were pregnant or experiencing pregnancy-related conditions to stop participating in an education program or activity. These experiences further demonstrate the importance of § 106.40(b)(3)(iv).

The Department declines to further define ''academic status'' or ''leave of absence'' or adopt commenters' other suggested modifications to § 106.40(b)(3)(iv). As explained in greater detail in the July 2022 NPRM, a student's right to take leave for pregnancy or related conditions has been included in the Title IX regulations since 1975, and, like the proposed regulations, the final regulations are consistent with the Department's longstanding interpretation of Title IX regulations. *See* 87 FR 41521; 40 FR 24128 (codified at 45 CFR 86.40(b)(5) (1975)); *see also* 34 CFR 106.40(b)(5) (current); 1991 Pregnancy Pamphlet, at 6; 2013 Pregnancy Pamphlet, at 5. Moreover, the Department's view is that reinstating a student to the academic status that the student held when voluntary leave began, consistent with § 106.40(b)(3)(iv), necessarily will require a recipient to provide a student a meaningful opportunity and reasonable time to make up any coursework or exams missed while on leave. This position accords with the Department's view of the current Title IX regulations as stated in the 2013 Pregnancy Pamphlet, at 10, and these final regulations incorporate that position. Additionally, as discussed in more detail above, a recipient has a distinct and separate obligation under § 106.40(b)(3)(ii) to consult with the student to offer and implement reasonable modifications that meet the student's individualized needs to prevent sex discrimination and ensure equal access. A recipient must meet its obligations under § 106.40(b)(3) in all parts of its education program or activity, including programs that grant professional degrees or certifications or are subject to licensure requirements.

The Department declines to specify how a recipient's obligation to allow a student to take a voluntary leave of absence under § 106.40(b)(3)(iv) interacts with compulsory attendance requirements for students in elementary school or secondary school. This is a fact-specific inquiry that depends on the specifics of a State or local law and whether the application of such law conflicts with a recipient's obligations under Title IX or its regulations, consistent with the preemption provision at § 106.6(b). For a more detailed explanation of preemption in the final regulations, see the discussion of § 106.6(b).

The Department clarifies that, consistent with the existing regulations, a recipient may not preclude a student from participating in any part of an education program or activity due to pregnancy or related conditions under final § 106.40(b)(1). This prohibition extends to athletic and other extracurricular opportunities. Additionally, as noted in the July 2022 NPRM, the Department recognizes that if a student elects to take a voluntary leave of absence under § 106.40(b)(3)(iv), in some instances, an extracurricular activity, event, or program will have ended by the time a student returns from leave or the student may not be able to participate due to timing or other logistical reasons. 87 FR 41521. Therefore, although the final regulations create a presumption that a student returning from leave should be reinstated to the same extracurricular status, there may be some limited instances when exact reinstatement would not be administratively possible or practicable under the circumstances. Beyond these general principles, the Department declines to further specify the application of § 106.40(b)(3)(iv) to student athletes because this is a fact-specific determination best made on a case-by-case basis.

Similarly, the Department declines to further specify timelines for reinstatement after a leave of absence because this is also a fact-intensive inquiry that must be determined on a case-by-case basis. However, the Department has revised the final regulations to further clarify that any leave of absence must be voluntary on the part of the student and that the medically necessary period is only a minimum requirement. In addition, § 106.40(b)(3)(iv) clarifies that to the extent a student qualifies for leave under a recipient's leave policy for students that allows a greater period of time than the medically necessary period, the recipient must permit the student to take leave under that policy instead, if the student chooses. When a student needs additional time beyond that available under § 106.40(b)(3)(iv), the recipient should consider such a request under the reasonable modification standard of § 106.40(b)(3)(ii).

Changes: The Department has redesignated proposed § 106.40(b)(3)(iii) as § 106.40(b)(3)(iv) in the final regulations and made revisions to clarify further that ''voluntary'' refers to a student's decision to take a leave of absence, and that a recipient needs to allow a student to take leave under a leave policy that allows for a greater period of time than what is medically necessary only if the student qualifies for leave under that policy.

Implementation

Comments: Some commenters requested clarification of whether an admitted student would be entitled to a pregnancy-related leave of absence before the start of classes. Specifically, commenters asked how the proposed regulations would operate if an admitted student needed to miss the first few weeks of class due to pregnancy or related conditions. Commenters reported that many recipients currently require admitted students who need a leave of absence before the start of classes to withdraw and reapply to the recipient's education program or activity, which could impede their academic progress if a class is only offered once a year.

Some commenters asserted that the Department should further modify or clarify § 106.40(b)(3)(ii) and (iv) considering enrollment practices and leave policies at postsecondary institutions related to financial aid eligibility. Specifically, commenters interpreted financial aid regulations as limiting the amount of leave a student may take to one leave of absence for up to 180 days per academic year, and only after completion of at least one semester. Some commenters also stated that if a student goes over this limit or has not completed one semester, many recipients' leave policies require the student to withdraw from the recipient's education program or activity and reapply for admission—regardless of whether the leave of absence is due to pregnancy or related conditions. One commenter indicated that the proposed leave provision raises questions about who would be responsible for any additional expenses incurred as a result of a student taking medically necessary leave, such as additional student loan and interest expenses when a student postpones reenrollment to accommodate a structured cohort program, particularly in clinical healthcare programs. Other commenters urged the Department to require a recipient to maintain the student's access to benefits while on leave, such as housing,

financial aid, scholarships, and health care, on the grounds that a student can lose access to these benefits if required to withdraw or deregister while on medically necessary leave.

Discussion: The Department's definition of ''student'' in its Title IX regulations, which dates to 1975, is broad and includes anyone admitted to a recipient institution. *See* 40 FR 24128 (codified at 45 CFR 86.2(q) (1975) (defining student to mean ''a person who has gained admission'')); 34 CFR 106.2(r) (current) (same definition); § 106.2 (same definition). Under final § 106.40(b)(3)(iv), a recipient must allow a student to take a voluntary leave of absence from the recipient's education program or activity to cover, at minimum, the period of time deemed medically necessary by the student's healthcare provider. Therefore, any admitted or enrolled student would qualify for a voluntary leave of absence for pregnancy or related conditions. A recipient may not require a student who needs a leave of absence due to pregnancy or related conditions prior to the school year starting or in the first few weeks of classes to withdraw and reapply to the education program or activity because doing so would be inconsistent with § 106.40(b)(3)(iv). To the extent that a recipient maintains a general policy requiring that all students who need a leave of absence prior to the school year starting or in the first few weeks of classes must withdraw and reapply, a student who requires such a leave due to pregnancy or related conditions must be exempted from such a general policy in order for the recipient to comply with § 106.40(b)(3)(iv). To the extent a student needs leave that exceeds the period of time deemed medically necessary by the student's healthcare provider, a recipient must determine whether there is a reasonable modification under § 106.40(b)(3)(ii). With respect to general information about a recipient's obligations under § 106.40(b)(3)(iv) and requirements of the Federal Student Aid program as it may relate to a recipient's leave policy, as discussed more fully above, § 106.40(b)(3)(iv) requires a recipient to excuse a student's absences due to pregnancy or related conditions for as long as the student's healthcare provider deems the absences to be medically necessary. The recipient must allow the student to return to the same academic status held as before medical leave began, which must include giving the opportunity to make up any missed work. A recipient may also offer the student alternatives to making up missed work, especially after longer periods of leave. Consistent with § 106.40(b)(4), a recipient is not permitted to adopt or apply a medical leave policy that treats a student who withdraws from school due to pregnancy or related conditions worse than a student who withdraws from school due to any other temporary medical condition.

The Federal student financial programs authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV), are administered by the Department's Federal Student Aid office. 20 U.S.C. 1070a. Under the Department's regulations related to Title IV at 34 CFR 668.22(a)(1), if a student who has received Title IV grant or loan funds withdraws from an education program or activity after beginning attendance, the amount of Title IV grant or loan assistance earned by the student must be determined. If the amount the recipient receives on behalf of the student is greater than the amount earned, the unearned funds must be returned to the Department. *See generally* 34 CFR 668.22. This is often referred to as the ''return to Title IV'' funds calculation. However, a recipient's Title IX obligation to provide a voluntary leave of absence for pregnancy or related conditions does not necessarily require a recipient to meet its obligations under Title IV in a manner that disadvantages a student who requests such leave. For example, the Title IV regulations at 34 CFR 668.22(d)(1) explain that a recipient does not have to treat a leave of absence as a withdrawal for Title IV purposes, if it is an approved leave of absence and meets the requirements in 34 CFR 668.22(d)(1)(i)–(viii). If a leave of absence meets these requirements, it is considered a temporary interruption and is not counted as a withdrawal for Title IV purposes, so the recipient is not required to perform the ''return to Title IV'' calculation and return unearned funds to the Department, and there cannot be unearned Title IV aid due from the student.

If a pregnant student's healthcare provider deems a leave of absence medically necessary, the recipient would be required by Title IX to grant the academic leave of absence for as long as the student's healthcare provider deems it medically necessary. *See* 34 CFR 106.40(b)(3)(iv). The Title IV regulations governing approved leave of absences are only applicable with regard to the process the recipient must have in place to determine whether or not the student's leave of absence is considered a withdrawal for Title IV purposes. Depending on the facts of the case and, in particular, the length of the pregnant student's academic leave of absence, such a leave of absence under § 106.40(b)(3)(iv) may also qualify as an approved leave of absence for Title IV purposes. Determination of whether it qualifies depends on the application of the factors specified in 34 CFR 668.22(d)(1)(i)–(vii). In addition, the Title IV regulations governing the return of funds do not prohibit a school from developing its own refund policy, consistent with the Title IX requirements described above. If the length of the leave of absence for pregnancy or related conditions in combination with any other approved leaves of absence will exceed 180 days in a 12-month period, *see id.* § 668.22(d)(1)(vi), the recipient would be required to calculate the earned and unearned portions of Title IV assistance and follow the other requirements in 34 CFR 668.22.

Changes: None.

Relation to Reasonable Modifications

Comments: One commenter asked the Department to clarify what discretion a recipient has in implementing voluntary leaves of absence under proposed § 106.40(b)(3)(iv) if leave would fundamentally alter the recipient's education program or activity, such as when a sequenced curriculum would require a student to take leave for a period that is longer than medically necessary or more than the amount of leave desired by the student.

Discussion: The Department clarifies that the inquiry related to fundamental alteration relates to reasonable modifications under § 106.40(b)(3)(ii). As such, it has no bearing on a recipient's obligation to allow a voluntary leave of absence for pregnancy or related conditions under § 106.40(b)(3)(iv). Since 1975, a recipient has had an obligation to allow a student to take a voluntary leave of absence for as long as deemed medically necessary for pregnancy or related conditions and to reinstate the student to the same status held before leave was taken. 40 FR 24128 (codified at 45 CFR 86.40(b)(5) (1975)); *see also* 34 CFR 106.40(b)(5) (current). Consistent with longstanding regulations and the need to ensure access to education for students who are pregnant or experiencing pregnancy-related conditions, § 106.40(b)(3)(iv) requires a recipient to, at a minimum, offer and provide such leave and reinstatement, regardless of whether the recipient believes that such leave and reinstatement would fundamentally alter the nature of the recipient's education program or activity. A

recipient otherwise has discretion in how it administers voluntary leaves of absence, as long as implementation is consistent with § 106.40(b)(3)(iv), Title IX, and this part, including the requirement to treat pregnancy or related conditions in the same manner and under the same medical leave policies as any other temporary medical condition under § 106.40(b)(4) and the general prohibition on discrimination based on pregnancy or related conditions under § 106.40(b)(1).

The Department preserved the requirement to offer voluntary leaves of absence for pregnancy or related conditions in the final regulations because it is widely known that most persons experiencing pregnancy or related conditions will need to take some medically necessary leave—most commonly after childbirth or termination of pregnancy, although some common pregnancy-related conditions may require a person to take a leave of absence during a pregnancy, such as preeclampsia or placenta previa. As a result, the ability to take voluntary leaves of absence is critical to ensuring pregnancy or related conditions do not deprive students of equal educational opportunities. Allowing a student to take leave and preserve their status in an education program advances Title IX's nondiscrimination objectives much more effectively than, for example, requiring a student to withdraw from a program and then go through the administratively burdensome and costly process of reenrolling in the future. Further, pregnancy is inherently time-limited and affects a segment of the general population based on sex. As such, § 106.40(b)(3)(iv) sets forth a simple and straightforward process that recipients can apply consistently with minimal administrative burdens to fulfill Title IX's mandate to prevent sex discrimination and ensure equal access to students who are pregnant or experiencing pregnancy-related conditions.

Changes: None.

Determination of Leave Period

Comments: The Department notes that proposed § 106.40(b)(3)(iii) has been revised and redesignated as § 106.40(b)(3)(iv) in the final regulations, and the following comment summaries and discussion refer to this provision as § 106.40(b)(3)(iv).

Several commenters supported language in § 106.40(b)(3)(iv) that would allow any licensed healthcare provider to verify medically necessary leave. Some commenters stated that this change would recognize that a student may be under the care of a provider who is not a physician, such as a nurse practitioner, midwife, doula, registered nurse, or lactation consultant. Some commenters stated this language would recognize that contemporary medical standards commonly allow advanced practice clinicians to provide care and that not every student has easy access to a physician, particularly students from economically disadvantaged backgrounds.

One commenter highlighted the credentials and prevalence of nurse practitioners in health care. The commenter also stated that proposed § 106.40(b)(3)(iv) would be consistent with recommendations from the National Academies of Science, Engineering, and Medicine, World Health Organization, U.S. Department of Health and Human Services, Federal Trade Commission, and several nonprofit policy organizations.

Discussion: The Department agrees with the perspective provided by commenters who stated the language in § 106.40(b)(3)(iv) would reflect contemporary medical standards, which recognize that a student may be under the care of a licensed healthcare provider who is not a physician. The Department also agrees with comments noting that students may not have ready and affordable access to physician care due to economic, geographic, or many other reasons. Finally, the Department acknowledges, and its conclusions are reinforced by, the supportive information regarding the qualifications of nurse practitioners to provide high-quality, cost-effective care, particularly in rural or economically disadvantaged areas.

Given commenters' interests in including a wide array of healthcare providers under the provision and not overburdening recipients or students with technical requirements regarding licensure, the Department clarifies that the term ''licensed'' in final § 106.40(b)(3)(iv) broadly encompasses any healthcare professional who is qualified to practice in their State. Recognizing that some students may travel for needed healthcare (because, for instance, the care they need is not available locally or they receive care in their home State during a break), final § 106.40(b)(3)(iv) does not require recipients to verify licensure or otherwise understand varying licensure requirements for different healthcare professions within and between the States, which could be onerous, inefficient, and confusing.

Changes: The Department has redesignated proposed § 106.40(b)(3)(iii) as § 106.40(b)(3)(iv) in the final regulations and revised the provision to clarify that the licensed healthcare provider who determines a medically necessary absence need not be a physician.

9. Section 106.40(b)(3)(v) Pregnancy or Related Conditions—Lactation Space

Comments: The Department notes that proposed § 106.40(b)(3)(iv) has been revised and redesignated as § 106.40(b)(3)(v) in the final regulations, and the following comment summaries and discussion refer to this provision as § 106.40(b)(3)(v).

Commenters generally supported the requirement that a recipient provide a private space and breaks for a student who is lactating and appreciated that § 106.40(b)(3)(v) would require a lactation space be clean and usable for both breastfeeding and pumping. Commenters asserted that the lack of a lactation space in a recipient's education program or activity is an issue that affects many students, impairs the health of students who are lactating and their children, interrupts learning and other educational opportunities, and increases absences due to illness.

A group of commenters noted that requiring a recipient to provide a lactation space helps support students' choices related to the health and nutrition of their child. The group of commenters provided examples of recipient practices that they reported were inconsistent and insufficient for students who are lactating, including a mother who was so discouraged by her school's failure to provide a lactation space that she almost disenrolled; a student who delayed obtaining her degree because her postsecondary institution did not provide a lactation space; and another student who stated that her school did not allow her to pump, which caused her to stop producing milk. The commenters noted that because each pumping session can take between fifteen to forty minutes, a lactation space is important to maintain access to a recipient's education program or activity. Many commenters noted that without a designated, private lactation space, a student who is pregnant or experiencing pregnancy-related conditions may resort to pumping in places such as a car, janitor's closet, or bathroom stall. Commenters added that a lack of privacy for students may lead to sexual harassment, bullying, stress-induced interruptions that could affect the student's ability to produce milk, inconvenience, and feelings of isolation. Commenters also asserted that requiring a recipient to provide a lactation space that is not a bathroom will make the

process of breastfeeding, pumping, and filling bottles more hygienic.

Further, several commenters stated that § 106.40(b)(3)(v) would significantly improve public health and be consistent with recommendations from the World Health Organization related to breastfeeding. Other commenters stated that § 106.40(b)(3)(v) would improve the health of students by minimizing obstacles to expressing breast milk and allowing students to reap the health benefits of breastfeeding, including a reduced long-term risk of diabetes, cardiovascular disease, and breast or ovarian cancer. Commenters also noted that an inability to express milk as frequently as every few hours often leads to pain, illness, infection, and reduced milk supply, and can result in an eventual inability to continue nursing. Commenters stated that a student's ability to breastfeed or express breast milk became even more important due to nationwide shortages in baby formula in 2022 and 2023.

Many commenters stated that providing a lactation space is a widely recognized accommodation that has been acknowledged by administrative agencies, Federal courts, and legal scholars to be consistent with other laws, such as the ACA, the FLSA, and State laws. Commenters asserted that because a recipient must follow these laws, compliance with § 106.40(b)(3)(v) would not be burdensome.

In contrast, one commenter asserted that § 106.40(b)(3)(v) would exceed the scope of Title IX, while another commenter asserted that the proposed regulation's cost-benefit analysis was insufficient. One commenter expressed concern that § 106.40(b)(3)(v) may be unworkable for a small elementary school or secondary school where space is limited and urged the Department to allow a recipient flexibility in complying with this requirement in final regulations.

Other commenters urged the Department to modify § 106.40(b)(3)(v) to require a recipient to equip a lactation space with a chair, flat surface, electrical outlet, running water, and a refrigerator or cooler to store expressed milk. These commenters also stated that a lactation space should be in reasonable proximity to a student's specific place of study.

Some commenters asked the Department to clarify where lactation spaces must be located, the required number of lactation spaces based on certain factors, and whether a recipient is required to make lactation spaces accessible during evenings and weekends. One commenter asked whether a recipient is required to construct new lactation spaces or features to comply with § 106.40(b)(3)(v). Some commenters expressed concern about how the administration of a lactation space would be handled if multiple students needed to access the space simultaneously.

Some commenters recommended that the Department change § 106.40(b)(3)(v) to state that a student has a right to express milk or breastfeed in a place other than a designated lactation space, such as in an office, at a childcare facility, or in a public space to be consistent with State or local laws that allow a person to breastfeed in any place they are otherwise allowed to be.

In contrast, other commenters asked the Department to clarify the circumstances in which a student in an elementary school or secondary school would be allowed to breastfeed a child in a lactation space and how the student's ability to breastfeed would change depending on whether the school had onsite childcare. One commenter suggested that the Department remove the words ''or breastfeeding'' from § 106.40(b)(3)(v) because the term implied an obligation to accommodate the presence of an infant in a recipient's education program or activity, which the commenter stated may not be safe or practicable in all circumstances.

Some commenters urged the Department to clarify that the requirement to provide lactation space is an obligation of the recipient, rather than a personal obligation of the Title IX Coordinator. Other commenters suggested that the Department revise the language to use terms such as ''express milk'' and ''nursing'' to be more inclusive of all students.

Some commenters urged the Department to require a recipient to treat breaks to use a lactation space, including those during class and exams, as well as travel time to reach the lactation space, as medically necessary absences for which medical documentation specifying when or how long someone must express milk is not required. Commenters stated that many students have difficulty accessing healthcare and that it would be overly burdensome to require lactating students to document lactation needs, which are common with pregnancy or related conditions and easily anticipated.

Discussion: The Department agrees that § 106.40(b)(3)(v) will help students who are lactating maintain access to an education program or activity by improving those students' ability to pursue their education while lactating. Having reviewed and considered all comments received, the Department concludes that without § 106.40(b)(3)(v), a student who is lactating would likely face significant barriers to participating in and benefiting from a recipient's education program or activity. These barriers can easily lead to adverse educational consequences as well, causing a student to miss or drop out of school and lose access to a recipient's education program or activity due to their lactation needs.

Further, the Department disagrees that § 106.40(b)(3)(v) exceeds the Department's authority. Congress has authorized the Department to issue regulations to effectuate Title IX's prohibition on sex discrimination in education programs or activities that receive Federal financial assistance consistent with achievement of the objectives of the statute. *See* 20 U.S.C. 1682; *Gebser,* 524 U.S. at 292. Additionally, Title IX regulations have long included provisions that require a recipient to take proactive steps to ensure equal treatment and access for students who are pregnant or experiencing pregnancy-related conditions. *See* 34 CFR 106.40(b)(5) (current). As discussed above and in the July 2022 NPRM, these requirements are part and parcel of ensuring that Title IX's nondiscrimination requirements are met, as the failure to take these steps often reflects sex-based stereotypes about the roles of men and women, sex-based indifference to the needs of this population, animus, or a failure to accommodate conditions associated with women as effectively as those associated with men. *See* 87 FR 41513. The assurance of access to clean, private, and secure lactation spaces in § 106.40(b)(3)(v) represents an appropriate application of existing Title IX principles to better effectuate the statute considering the complaints received by OCR in recent years, and the well-demonstrated, practical needs of lactating students.

Moreover, the Department carefully considered not only benefits but also costs and the abilities of recipients to provide lactation space. As explained in the July 2022 NPRM, the Department anticipates that a recipient would be able to comply with § 106.40(b)(3)(v) using existing space at minimal cost, partly because there is no requirement that a lactation space be a particular size or shape or include particular structural features. *See* 87 FR 41560. Accordingly, recipients are not required to construct new lactation spaces if an existing space otherwise meets the requirements of § 106.40(b)(3)(v). And while § 106.40(b)(3)(v) may result in increased

demand for lactation space or break time, such demand likely will vary over time, based on the composition of the student population at any time, which further reduces the potential impact to a recipient. Further, these costs are justified by the benefits of requiring a recipient to provide an appropriate space for a student who is lactating, including allowing student-parents to remain in school during the early months or years of a child's life, which helps eliminate a sex-based barrier to education. Although there are limited data quantifying the economic impacts of sex discrimination, the Department's review of public comments shows that such barriers can prevent students from obtaining a high school diploma, pursuing higher education, or obtaining a postsecondary degree, which limits their economic opportunities and may have long-term or generational impacts. A more detailed discussion and analysis of the costs and benefits of these final regulations is included in the *Regulatory Impact Analysis.*

Similarly, the assertion that a small elementary school, secondary school, or other recipient would be unable to comply with § 106.40(b)(3)(v) is speculative. At the time of the July 2022 NPRM, nearly all recipients were already required to provide a similar lactation space for non-exempt employees under a provision of the FLSA, 29 U.S.C. 207(r)(1). This provision has since been replaced by the PUMP Act, 29 U.S.C. 218d, which expanded the requirement to provide lactation space to most exempt employees as well. In addition, many recipients are required to provide the same for employees generally under many State laws. *See* 87 FR 41559 (collecting State laws). Nothing in the final regulations prohibits a recipient from complying with § 106.40(b)(3)(v) by ensuring a student who is lactating can access an existing employee lactation space or other space that otherwise meets the requirements of § 106.40(b)(3)(v).

The Department acknowledges concerns voiced by commenters that certain factors, including the location and other restrictions on the use of lactation spaces, could effectively make them inaccessible to a student who is lactating. Accordingly, the Department has revised § 106.40(b)(3)(v) to clarify that a recipient must ensure that a student can access a lactation space, rather than merely ensuring the availability of one.

Section 106.40(b)(3)(v) requires that a recipient ensure a student's access to a lactation space that ''may be used'' for pumping or breastfeeding as needed. The Department emphasizes that, as with all the requirements under final § 106.40(b)(3), the recipient's provision of lactation space must be prompt and effective to prevent sex discrimination and ensure equal access to the recipient's education program or activity. Whether the lactation space a recipient provides meets these standards is best determined on a case-by-case basis, but generally means that the space is functional, appropriate, and safe for the student's use. The Department however declines to adopt additional specific requirements about the size and setup of lactation spaces for students at this time to preserve recipient flexibility and to be able to review the degree of and obstacles to compliance with other Federal lactation laws. Section 106.40(b)(3)(v) sets minimum standards for a recipient's lactation space and nothing in the final regulations prohibits a recipient from offering additional features in its lactation space to increase functionality and comfort, either as reasonable modifications under § 106.40(b)(3)(ii) or otherwise. Likewise, the final regulations do not preempt State or local laws that require lactation spaces to have certain features, such as a chair, a flat surface, an electrical outlet, running water, or a refrigerated place to store expressed milk. The Department will take commenters' suggestions under consideration for possible technical assistance.

The Department also declines to remove references to breastfeeding from § 106.40(b)(3)(v). This provision is focused solely on what may take place in the lactation space that a recipient must make accessible to its students. To further clarify, if a student is already permitted to bring their child into the recipient's education program or activity (*e.g.,* through onsite childcare, a recipient's visitor policy, or a State or local law), they may use lactation spaces for breastfeeding instead of pumping. Moreover, nothing in the final regulations precludes a lactating student or employee from expressing breast milk or breastfeeding outside of the recipient's designated lactation spaces if a State or local law allows it.

Additionally, to ensure clarity in the implementation of the final regulations, the Department declines commenters' suggestion to revise the terminology used in § 106.40(b)(3)(v) but emphasizes that a recipient must ensure that any student who is lactating can voluntarily access a lactation space that complies with § 106.40(b)(3)(v) regardless of a student's gender identity or gender expression. Moreover, nothing in the final regulations prohibits a recipient from using any of the terminology suggested by commenters in its communications with students.

The Department clarifies that whether a recipient must make a lactation space accessible to a student in the evenings or on weekends depends on a variety of factors, including whether an inability to access a lactation space would frustrate a lactating student's ability to participate in the recipient's education program or activity, which may include extracurricular activities or attendance at school-related events in the evenings or on weekends. As long as the lactation space complies with the requirements of § 106.40(b)(3)(v), a recipient has discretion in where a lactation space is located; the number of lactation spaces; and how it handles the administration of a lactation space, including managing access to lactation spaces for multiple students, which may include suggestions proposed by commenters such as signage, a scheduling system, or a multi-person space separated by partitions that are shielded from view and free from intrusion from others.

The Department agrees with commenters that the recipient, not the Title IX Coordinator, is ultimately responsible for ensuring that a student can access a lactation space. Accordingly, the Department has revised § 106.40(b)(3) to clarify that it is the recipient's responsibility to take, and the Title IX Coordinator's responsibility to coordinate, specific actions under § 106.40(b)(3), including a student's access to a lactation space. For further explanation of the role of the Title IX Coordinator in connection with student pregnancy or related conditions, see the discussion of § 106.40(b)(3).

The Department agrees that as a general matter, medical documentation is unnecessary for a recipient to provide access to a lactation space and unduly burdensome to the student, particularly given the fact that many students lack access to or do not obtain maternity care.[84] As such, it would be difficult for

[84] *See* Christina Brigance et al., March of Dimes, *Nowhere to Go: Maternity Care Deserts Across the U.S,* at 4–5 (2022), *https://www.marchofdimes.org/sites/default/files/2022-10/2022_Maternity_Care_Report.pdf* (reporting that approximately 12 percent of births in the United States occur in counties with limited or no access to maternity care and 4.7 million women live in counties with limited maternity care access); Presidential Task Force of Redefining the Postpartum Visit, Committee on Obstetric Practice, American College of Obstetricians and Gynecologists Committee Opinion No. 736: Optimizing Postpartum Care (May 2018), *https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/05/optimizing-postpartum-care* (finding that as many as 40% of women do not attend a postpartum visit and that attendance rates are lower among populations with limited resources, which contributes to health disparities).

many lactating students to obtain medical documentation—especially on an ongoing basis—as a condition of accessing a lactation space. Accordingly, the Department has added § 106.40(b)(3)(vi) to the final regulations to clarify that a recipient must not require a student to provide supporting documentation to confirm lactation needs in connection with, for example, reasonable modifications or to gain access to a lactation space. For further explanation of the limitation on recipient requests for supporting documentation, see the discussion of § 106.40(b)(3)(vi).

Changes: The Department has redesignated proposed § 106.40(b)(3)(iv) as § 106.40(b)(3)(v) in the final regulations. Final § 106.40(b)(3) now states that the Title IX Coordinator must coordinate actions under paragraphs (b)(3)(i) through (vi), and § 106.40(b)(3)(v) now states that a recipient must ensure that the student can access a lactation space.

10. Section 106.40(b)(3)(vi) Pregnancy or Related Conditions—Limitation on Supporting Documentation

Comments: The Department notes that proposed § 106.40(b)(3)(ii) and (4) have been redesignated as § 106.40(b)(3)(ii) in the final regulations, and the following comment summaries and discussion refer to these provisions as § 106.40(b)(3)(ii).

Several commenters urged the Department to state in the final regulations that medical documentation is frequently or typically unnecessary for a recipient to provide a requested modification, while other commenters expressed concern that the proposed regulations would be silent as to whether a recipient can require such supporting documentation. The commenters stated that requiring documentation for modifications such as increased bathroom breaks, a larger desk, or lactation accommodations would be unnecessarily burdensome for a student and could be used to harass or retaliate against a student who is pregnant or experiencing pregnancy-related conditions. One commenter, a legal service provider, shared that they regularly receive calls about recipients requiring students to obtain medical documentation on short notice and at significant expense, which often delays or prevents a student from receiving these modifications, even when the need is obvious.

Discussion: The Department agrees that as a general matter medical documentation is unnecessary for a recipient to determine the reasonable modifications it will offer for pregnancy or related conditions, or to take the specific actions identified under § 106.40(b)(3)(ii) through (v), including providing access to a lactation space. Accordingly, the Department has added § 106.40(b)(3)(vi) to the final regulations to clarify that a recipient must not require supporting documentation under § 106.40(b)(3)(ii) through (v) unless the documentation is necessary and reasonable under the circumstances for the recipient to determine the reasonable modifications to offer or other specific actions to take. As discussed below, the Department has also included in final § 106.40(b)(3)(vi) a non-exhaustive list of situations in which it would not be necessary and reasonable for a recipient to require a student to provide supporting documentation and in which a recipient is therefore prohibited from requiring documentation.

For several important reasons, the Department emphasizes that the final regulations do not require a recipient to seek supporting documentation from a student who seeks specific action under § 106.40(b)(3)(ii) through (v) in any circumstances. First, the Department notes that students who are pregnant or experiencing pregnancy-related conditions may need modifications before they have had any medical appointments. For example, some students may experience morning sickness and nausea early in their pregnancies and need modifications such as late arrival, breaks during class, or access to online instruction. Second, as discussed above, the Department further recognizes that it may be difficult for a student who is pregnant or experiencing pregnancy-related conditions to obtain an immediate appointment with a healthcare provider early in a pregnancy due to lack of access.[85] For example, according to one study, almost a quarter of women who gave birth did not receive prenatal care during their first trimester.[86] Finally, even for students who have access to medical care, needs may develop between scheduled medical appointments, such that requiring documentation in those situations would increase the cost to the student and could require them to take additional leave in order to obtain the documentation. For example, early in a pregnancy when medical appointments tend to be less frequent, a student could develop increasingly severe morning sickness in between medical appointments that warrants reasonable modifications that cannot wait until the next medical appointment, by which time the severeness of the morning sickness may or may not have abated.

Accordingly, consistent with § 106.40(b)(3)(ii)'s emphasis on the importance of ensuring consultation with a student to meet their individualized needs in a prompt and effective manner, a recipient may simply discuss with the student the nature of the pregnancy-related need and the desired modification or action without requesting supporting documentation. In virtually all situations, proceeding without documentation, or based on a student's self-attestation of their needs, will be the least burdensome for the student and enable the recipient to meet the student's needs fastest.

When a recipient chooses to require supporting documentation, however, clearly defined limits on such requests are critical to ensure that recipients do not overburden students or frustrate Title IX's purpose. Thus, final § 106.40(b)(3)(vi) makes clear that a recipient's ability to require supporting documentation is restricted under final § 106.40(b)(3)(vi), which provides that the documentation must be only that which is necessary and reasonable under the circumstances for the recipient to determine the reasonable modifications to make or whether to take additional specific actions under § 106.40(b)(3)(ii) through (v). Necessary and reasonable documentation generally includes no more than is sufficient to confirm—in a manner that is fair to the student under the circumstances—that a student has a need related to pregnancy or related conditions that requires a reasonable modification or other specific action under § 106.40(b)(3)(ii) through (v).

For example, if a student requests a reasonable modification in the form of access to online or homebound

[85] *See* Christina Brigance et al., March of Dimes, *Nowhere to Go: Maternity Care Deserts Across the U.S,* at 4–5 (2022), *https://www.marchofdimes.org/sites/default/files/2022-10/2022_Maternity_Care_Report.pdf.* Even where such care exists, it is not typically offered or accessed in the earliest weeks of pregnancy. *See* Am. Pregnancy Ass'n, Your First Prenatal Visit, *https://americanpregnancy.org/healthy-pregnancy/planning/first-prenatal-visit/* (last visited Mar. 12, 2024) (stating that the first prenatal visit for individuals who did not meet with their health care provider pre-pregnancy is generally around 8 weeks after their last menstrual period); Boston Med. Ctr., Newly Pregnant?, *https://www.bmc.org/newly-pregnant* (last visited Mar. 12, 2024) (stating that the first prenatal appointment will be scheduled between the 8th and 12th weeks of pregnancy).

[86] Joyce A. Martin et al., Ctrs. for Disease Control & Prevention, *Births in the United States, 2019,* 2 (Oct. 2020), *https://www.cdc.gov/nchs/data/databriefs/db387-H.pdf* (indicating that, in 2019, almost 23 percent of women who gave birth did not receive prenatal care during the first trimester).

education to follow their healthcare provider's recommendation of bed rest during the student's pregnancy, it may be necessary and reasonable under the circumstances for a recipient to require documentation from the student's healthcare provider to support a student's reasonable modification request (*i.e.,* that the student is or will be on medically ordered bed rest during their pregnancy). However, in this case, it would not be necessary and reasonable for a recipient to require additional supporting documentation to verify the pregnancy itself or other unrelated medical details regarding the pregnancy (such as the date of the student's last menstrual cycle, or whether fetal development is appropriate)—particularly if the student has already provided self-confirmation of the pregnancy.

A recipient may not justify the denial of a reasonable modification or other specific action under § 106.40(b)(3)(ii) through (v) based on the lack of documentation if its request for documentation does not comport with § 106.40(b)(3)(vi).

To provide further clarity, § 106.40(b)(3)(vi) includes a non-exhaustive list of situations in which it would not be necessary and reasonable for a recipient to require a student to provide supporting documentation and in which a recipient therefore may not require documentation. These situations are not all mutually exclusive; several may apply at the same time to bar a recipient from requesting documentation depending on the circumstances.

First, it is not necessary and reasonable for the recipient to require supporting documentation when the student's need for a specific action under paragraphs (b)(3)(ii) through (v) is obvious. Depending on the nature of the need, a need may be obvious based on the student's self-confirmation of pregnancy or related conditions, or a pregnancy or related condition that is itself physically obvious. For example, when a student states or confirms they are pregnant and asks for a different size uniform, the need for the uniform modification to accommodate the pregnancy is obvious (regardless of whether the recipient agrees that the student's pregnancy is easily noticeable), and the recipient may not require supporting documentation. However, if a student states or confirms that they are pregnant or experiencing pregnancy-related conditions (or the fact of pregnancy is apparent in some other way), but the need related to the pregnancy or related conditions or parameters of a potential reasonable modification is not obvious, the recipient may only request documentation relevant to the reasonable modification. For example, if a student states or confirms that they are pregnant and asks to avoid lifting heavy objects during their clinical placement, it may be necessary and reasonable for the recipient to request documentation about the need such as the extent of the lifting restriction and its expected duration. However, if a student provides such documentation but it omits confirmation of the pregnancy itself, it would not be necessary and reasonable for the recipient to request further documentation because the student's self-confirmation is enough to establish pregnancy under § 106.40(b)(3).

Second, it is not necessary and reasonable for the recipient to require documentation when the student has previously provided the recipient with sufficient supporting documentation—in other words, when the student has already provided the recipient with sufficient information to substantiate that the student has a need related to pregnancy or related conditions and needs a modification of the recipient's policy, practice, or procedure. For example, if a student already provided documentation that they need to be periodically late to class for the next two months because of morning sickness, it would not be necessary and reasonable for the recipient to require the student to provide a new note when the student requests a reasonable modification to leave class early for a prenatal appointment. Such a requirement would be onerous for the student, could deter them from requesting reasonable modifications or other specific actions to ensure equal access and prevent sex discrimination under § 106.40(b)(3)(ii) through (v), and could potentially infringe on a student's privacy related to treatment of their pregnancy or related conditions. As another example, if a pregnant student provided documentation of gestational diabetes to support modifications of eating in class and needing leave for frequent medical appointments, the recipient must not require the student to re-submit documentation of gestational diabetes if the condition progresses and the student later needs a new modification, such as breaks to administer insulin. In such a case, it may be necessary and reasonable for the recipient to request documentation to confirm information not already covered by the prior documentation, such as the need to take breaks during class, as opposed to re-confirming the underlying condition itself. However, the Department reiterates that nothing in these final regulations require a recipient to seek any documentation to determine what reasonable modifications to offer, and that offering and making reasonable modifications absent such documentation will be the least burdensome for the student and enable the recipient to meet the student's needs fastest.

Third, it is not necessary and reasonable for a recipient to require documentation when a student states or confirms that they are pregnant or are experiencing pregnancy-related conditions and asks for the following reasonable modifications: (1) carrying or keeping water nearby and drinking; (2) using a bigger desk; (3) sitting or standing; or (4) taking breaks to eat, drink, or use the restroom. It is not necessary and reasonable to require documentation, beyond self-attestation, when a student is pregnant or experiencing pregnancy-related conditions and seeks one of the four listed modifications because these are a small set of commonly sought modifications that are widely known to be needed during a pregnancy and for which documentation would not be easily obtainable or necessary. As noted above, particularly early in pregnancy, students are less likely to have sought or been able to obtain an appointment with a healthcare provider for their pregnancy. Further, they may not be able to obtain an appointment with a healthcare provider repeatedly on short notice for every need, as each becomes apparent. This position is consistent with the overarching goal of Title IX to ensure equal access and that a student is not deprived of educational opportunities due to pregnancy or related conditions.

A fourth example in § 106.40(b)(3)(vi)'s non-exhaustive list of when it is not necessary and reasonable to require documentation involves a student's lactation needs. Usually, beginning around or shortly after birth, lactation occurs. As it is uncommon to obtain medical documentation regarding the initiation of lactation (absent a related medical condition, like mastitis), the Department has determined that it is not necessary and reasonable for a recipient to require documentation regarding lactation or pumping. And as a practical matter, the Department notes that healthcare providers may not be able to provide documentation regarding whether a student is pumping, nor the types of modifications needed to pump breast milk. The Department notes that not all students can or choose to breastfeed after childbirth, and that those who do

elect to breastfeed do so for widely varying lengths of time. Although the final regulations state that it is not necessary and reasonable for a recipient to require supporting documentation for lactation or pumping, a recipient will not violate the final regulations simply by asking the student whether they require a lactation space while in the recipient's education program or activity, which a recipient is required to allow a student to access under § 106.40(b)(3)(v). Student confirmation—or a simple request to access a recipient's lactation space—is sufficient confirmation.

A fifth example in § 106.40(b)(3)(vi)'s non-exhaustive list of when it is not necessary and reasonable to require documentation is when the specific action under paragraphs (b)(3)(ii) through (v) is available to students for reasons other than pregnancy or related conditions without submitting supporting documentation. For example, if a recipient has a policy or practice of only requiring a student to submit supporting documentation if they miss three or more class periods, it would not be necessary and reasonable for the recipient to require supporting documentation from a student who requests to miss less than three class periods for postpartum medical appointments. Conversely, if a recipient has a policy or practice of requiring documentation that is not consistent with § 106.40(b)(3)(vi), and a student requests specific action under paragraphs (b)(3)(ii) through (v) that implicates such a policy or practice, the limitation on supporting documentation in these final regulations would apply.

Changes: The Department has added § 106.40(b)(3)(vi) to state that a recipient must not require supporting documentation under § 106.40(b)(3)(ii) through (v) unless the documentation is necessary and reasonable for the recipient to determine the reasonable modifications to make or whether to take additional specific actions under paragraphs (b)(3)(ii) through (v). The Department has also included a non-exhaustive list of situations when requiring supporting documentation is not necessary and reasonable, including when the student's need for a specific action under paragraphs (b)(3)(ii) through (v) is obvious, such as when a student who is pregnant needs a uniform; when the student has previously provided the recipient with sufficient supporting documentation; when the reasonable modification because of pregnancy or related conditions at issue is allowing a student to carry or keep water near and drink, use a bigger desk, sit or stand, or take breaks to eat, drink, or use the restroom; when the student has lactation needs; and when the specific action under paragraphs (b)(3)(ii) through (v) is available to students for reasons other than pregnancy or related conditions without submitting supporting documentation.

11. Section 106.40(b)(4) Pregnancy or Related Conditions—Comparable Treatment to Other Temporary Medical Conditions

Comparable Treatment to Other Temporary Medical Conditions

Comments: The Department notes that proposed § 106.40(b)(5) has been redesignated as § 106.40(b)(4) in the final regulations, and the following comment summaries and discussion refer to the provision as § 106.40(b)(4).

One commenter supported proposed § 106.40(b)(4), but recommended revisions to avoid the inference that a recipient should treat pregnancy as a temporary disability, which the commenter asserted conflicts with disability law. The commenter suggested that the Department amend the provision to clarify that a recipient should treat a condition or complication related to pregnancy, but not the pregnancy itself, as a temporary disability. Another commenter supported adding the phrase ''or physical condition'' to the provision, stating that recipients should be required to treat pregnant students or those with related conditions comparably to how they treat students with another temporary physical condition, whether or not it rises to the level of a disability.

Discussion: The Department acknowledges commenters' support and notes that the final regulations at § 106.40(b)(4) will require a recipient to treat pregnancy or related conditions comparably to how it treats other temporary medical conditions when also consistent with a student's rights under § 106.40(b)(3).

The Department acknowledges the commenter's concern that the text of § 106.40(b)(4), as proposed, suggested that pregnancy standing alone was a disability. The Department emphasizes, as explicitly stated in the July 2022 NPRM, that while some conditions or complications related to pregnancy might qualify as a disability under Section 504 or the ADA, pregnancy itself is not a disability. 87 FR 41523. If someone who is pregnant or experiencing pregnancy-related conditions has a disability, the individual is protected from discrimination under Section 504 and the ADA, whether or not the disability is related to pregnancy.

Regarding § 106.40(b)(4), the Department agrees with the commenter that it is important to make clear that the provision applies regardless of whether pregnancy-related conditions qualify as disabilities under Section 504 or the ADA. The Department has also determined that the proposed provision's reference to ''pregnancy or related conditions or any temporary disability resulting therefrom'' contained a redundancy: the phrase ''or any temporary disability resulting therefrom.'' Because the term ''pregnancy or related conditions'' as defined in § 106.2 would include any medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation, or recovery from any of those conditions, the term would necessarily include any such resulting disabilities. The definition of ''pregnancy or related conditions'' in the final regulations is adequate in scope for the purpose of § 106.40(b)(4) without the term ''temporary disability.''

To address these concerns, the Department revised some of the language in § 106.40(b)(4) of the final regulations compared to the proposed regulations. Specifically, the Department changed the phrase ''in the same manner and under the same policies as *any other temporary disability or physical condition*'' in the proposed regulations to ''in the same manner and under the same policies *as any other temporary medical condition*'' in the final regulations (emphases added). The Department changed ''physical condition'' to ''medical condition'' to clarify that the proper comparator with respect to a medical or hospital benefit, service, plan, or policy is not limited to conditions that are only physical in nature, and includes, for example, psychological or emotional conditions.

This revision will eliminate an inference that pregnancy standing alone is a disability and emphasize that pregnancy-related conditions do not need to qualify as disabilities for § 106.40(b)(4) to apply. The revision will also clarify coverage in cases in which a recipient does not have any medical or hospital benefit, service, plan, or policy related to temporary disabilities, but may have such benefits, services, plans, or policies related to temporary medical conditions generally. The Department notes that a recipient's ''benefits, services, plans, or policies'' with respect to temporary medical conditions may be subsumed within its ''benefits, services, plans, or policies''

related to disabilities, or they may be separate.

Changes: The Department has redesignated proposed § 106.40(b)(5) as § 106.40(b)(4) in the final regulations. In § 106.40(b)(4) of the final regulations, the Department has removed the references to ''disability'' and ''disabilities'' from the provision and revised the term ''physical condition'' to ''medical condition.'' Final § 106.40(b)(4) now states that, to the extent consistent with paragraph (b)(3), a recipient must treat pregnancy or related conditions in the same manner and under the same policies as any other temporary medical condition with respect to any medical or hospital benefit, service, plan, or policy the recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's education program or activity.

Intersection With Disability Law

Comments: The Department notes that proposed § 106.40(b)(5) has been redesignated as § 106.40(b)(4) in the final regulations, and the following comment summaries and discussion refer to the provision as § 106.40(b)(4).

One commenter conveyed that because of the difference between § 106.40(b)(4) and disability law, the way a temporary disability is handled by a recipient would not necessarily align with the proposed reasonable modifications because of pregnancy, and in some cases, recipients will not be able to comply with both standards. The commenter recommended that the Department either clarify its requirement that a recipient treat pregnancy or related conditions as it would any other temporary disability or modify the requirement to provide greater flexibility for a recipient to address the needs of students who are pregnant or have related conditions.

Discussion: The Department acknowledges the commenter's concern that a difference in the requirements of Title IX and relevant disability laws may, at times, require a recipient to maintain different processes or reach different results when addressing pregnancy or related conditions versus disabilities, and that this may cause confusion. In response to the commenter's suggestions, the Department clarifies in the final regulations when a recipient must apply different rules as between pregnancy or related conditions and other kinds of temporary medical conditions, and when they should be treated the same. As proposed, the comparability provision would have applied to the extent the matter was ''not otherwise addressed'' under § 106.40(b)(3). To add clarity, the Department revises § 106.40(b)(4) in the final regulations to state the provision applies only ''to the extent consistent with'' a recipient's obligations under § 106.40(b)(3).

The Department interprets ''consistent with'' to mean that § 106.40(b)(4) applies when doing so would not deny or limit any person's rights or the recipient's obligations under § 106.40(b)(3). In other words, § 106.40(b)(3) provides a floor beneath which a recipient's treatment of pregnancy and pregnancy-related conditions may not fall, even if the recipient provides lesser protections for students with non-pregnancy related temporary medical conditions. A recipient must be able to meet its responsibilities under § 106.40(b)(3) to take specific actions, such as providing reasonable modifications, leave, and access to lactation space. When consistent with these obligations, a recipient must further apply § 106.40(b)(4) and treat pregnancy or related conditions in the same manner and under the same policies as other temporary medical conditions. As noted above, a recipient's ''benefits, services, plans, or policies'' with respect to temporary medical conditions may be subsumed within its ''benefits, services, plans, or policies'' related to disabilities, or they may be separate.

For example, if a student requires breaks during class to attend to pregnancy-related health needs, the recipient must provide reasonable modifications consistent with § 106.40(b)(3)(ii). However, a recipient must additionally consider how students with other temporary medical conditions are treated under § 106.40(b)(4) with respect to any medical or hospital benefit, service, plan, or policy it maintains. To the extent that the recipient maintains a medical or disability policy that provides breaks to students with temporary medical conditions that is more generous (for example, providing longer or more frequent breaks) than what it has provided to the pregnant student as a reasonable modification, the recipient must apply this more generous policy to the pregnant student. If its policy for non-pregnancy-related temporary medical conditions is less generous than what it is required to provide to the pregnant student as a reasonable modification, however (for example, by disallowing breaks absent emergency circumstances), the recipient must not apply this policy to the pregnant student because it would deprive the student of rights under § 106.40(b)(3)(ii) and be inconsistent with the recipient's obligations under § 106.40(b)(3). There is no conflict between these final regulations and a student's rights under the ADA or Section 504, because if a student's pregnancy-related condition qualifies as a disability and the recipient's disability policy provides a more generous result, that will have to be provided to the student. Conversely, if the recipient's disability policy would provide a less generous result, the recipient will have to provide the student with the more generous benefit consistent with § 106.40(b)(3).

The Department notes that § 106.40(b)(4) also prohibits discriminatory recipient policies even if a particular individual does not request a reasonable modification. For example, if a recipient maintains a policy that allows students with disabilities, including temporary medical conditions that qualify as disabilities, to access free at-home tutoring, but states that the option is not available to pregnant students, the recipient will violate § 106.40(b)(4) because its policy treats pregnant students differently than students with other types of temporary medical conditions. This would be the case regardless of whether an individual student is pregnant and seeking access to tutoring as a reasonable modification under § 106.40(b)(3). *See* 2013 Pregnancy Pamphlet, at 6 (''Any special services provided to students who have temporary medical conditions must also be provided to a pregnant student . . . [so] if a school provides special services, such as homebound instruction or tutoring, for students who miss school because they have a temporary medical condition, it must do the same for a student who misses school because of pregnancy or childbirth.'').

The Department notes that a recipient's processes for pregnancy or related conditions may be different from those for other temporary medical conditions if treating the two identically would not be consistent with § 106.40(b)(3). For example, as noted by a commenter, the Title IX regulations since 1975 have required that voluntary leave for pregnancy or related conditions must be granted consistent with medical necessity. 40 FR 24128 (codified at 45 CFR 86.40(b)(5) (1975)); 34 CFR 106.40(b)(5) (current). The Department acknowledges that the process for obtaining leave may include additional steps were a student seeking it in connection with a temporary medical condition unrelated to pregnancy. However, to the extent that additional steps are necessary for voluntary leave in connection with a non-pregnancy-related temporary

medical condition, final § 106.40(b)(3)(iv) requires that a recipient permit voluntary leave for pregnancy or related conditions without requiring those additional steps. The Department views the requirements of the final regulations as necessary to prevent sex discrimination and ensure equal access related to pregnancy or related conditions. The final regulations sometimes provide a simpler process for pregnancy or related conditions than might be required under laws pertaining to disability because by its nature, pregnancy is inherently time-limited, and because, for most uncomplicated pregnancies, the types of supports that a student will need are similar and foreseeable. Disability rights laws address a wider range of medical conditions and therefore, a wider range of student needs and possible supports. Accordingly, the same level of flexibility need not be afforded to the recipient in the context of pregnancy or related conditions.

Changes: Proposed § 106.40(b)(5) has been redesignated as § 106.40(b)(4) in the final regulations and revised to state the provision applies only ''to the extent consistent with'' a recipient's obligations under § 106.40(b)(3).

''Medical or Hospital'' Limitation

Comments: The Department notes that proposed § 106.40(b)(5) has been revised and redesignated as § 106.40(b)(4) in the final regulations, and the following comment summaries and discussion refer to the provision as § 106.40(b)(4).

One commenter suggested that the Department remove the words ''medical or hospital'' that modified the words ''benefit, service, plan, or policy'' in proposed § 106.40(b)(4) because, the commenter said, the proposed provision is unclear in scope and removing any limitation would further Title IX's purpose without giving preferential treatment to one group of students based on their sex.

Discussion: The Department declines to alter the language of the regulations in the manner suggested and disagrees that § 106.40(b)(4) is unclear in scope. As the Department noted in the July 2022 NPRM, the current version of § 106.40(b)(4) has required a recipient to treat pregnancy or related conditions similarly to temporary disabilities with respect to any ''medical or hospital'' benefit, service, plan, or policy the recipient offers for students since the regulations were first promulgated in 1975. 87 FR 41523; 40 FR 24128 (codified at 45 CFR 86.40(b)(4) (1975)); 34 CFR 106.40(b)(4) (current). As the Department indicated in the July 2022 NPRM, *see* 87 FR 41523, there is a need for greater clarity regarding the reasonable modifications a recipient must make to prevent discrimination and ensure equal access for pregnant students and those experiencing related conditions, in part because the wording of the current version of § 106.40(b)(4) may have suggested that a recipient's responsibility extends only to medical or hospital benefits, services, plans, or policies. However, the reasonable modifications framework in final § 106.40(b)(3) alleviates the potential ambiguity in this section and achieves Title IX's nondiscrimination goal. As discussed above, the Department has further clarified the text of § 106.40(b)(4) to state that the provision will apply only when consistent with the recipient's obligations in § 106.40(b)(3).

Changes: None.

12. Section 106.40(b)(5) Pregnancy or Related Conditions—Certification To Participate

Comments: Some commenters supported the Department's proposed prohibition on a recipient requiring a pregnant student to certify physical ability before allowing the student's participation except under narrow circumstances. Commenters' reasons for support included: the need to counteract stereotypes regarding what is safe, appropriate, or possible for a pregnant student, which may lead a recipient to restrict or exclude a student from participation; ensuring students' equal access to physically intensive extracurricular activities or course-related placements in laboratories or medical facilities; and because the provision reasonably limits required certification only to courses or activities that included a physical component. Some commenters appreciated that the Department revised the provision to remove a prior reference to a student's emotional ability to participate, which the commenters found paternalistic, outdated, and stereotyping. Finally, some commenters supported the proposed provision's clarification to apply to certifications from healthcare providers in addition to physicians.

One commenter objected that the provision requiring a recipient to compare pregnant students to non-pregnant students, as opposed to students who are also receiving medical attention for a physical or emotional condition, was inconsistent with *Young* v. *United Parcel Service, Inc.,* 575 U.S. 206, 228 (2015). The same commenter argued the provision would require a recipient to allow pregnant students to engage in unsafe activities, potentially exposing the recipient to liability; surprise a recipient with medical emergencies that pregnant students are more likely to have than other students who are neither pregnant nor experiencing other medical conditions; and force a recipient to require every student to obtain a doctor's note to engage in a physical activity before it could lawfully require the same of a pregnant student. The same commenter suggested that it may be reasonable to limit the required certification to the question of whether the student is physically able to participate but that a student's emotional stability could be relevant in some narrow situations.

One commenter opposed the proposed provision because they felt a recipient and a coach should decide whether a pregnant student should participate on an athletic team. Another commenter supported the proposed regulations, provided the Department clarify that a recipient should treat pregnancy-related conditions or complications, but not the pregnancy itself, as temporary disabilities. A final commenter asked the Department to clarify the distinction between paragraphs (b)(5)(i) and (ii) of the proposed provision.

Discussion: The Department agrees with commenters that the provision will limit the burden on students who are pregnant or experiencing pregnancy-related conditions from unnecessary requests for documentation to remain in their classes and activities. The Department acknowledges comments that explained how recipient requests for such certifications are often driven by harmful and inaccurate stereotypes that may lead a recipient to exclude a student across a variety of educational settings. To clarify the protection of this provision further, the Department expanded the types of certifications subject to this prohibition to include those by non-healthcare providers and ''any other person.'' The Department clarifies that students who are pregnant or experiencing pregnancy-related conditions should not be subject to a certification of physical ability from a healthcare provider or any other person that the student is physically able to participate in the recipient's class, program, or extracurricular activity unless such certification requirement satisfies § 106.40(b)(5)(i)–(iii). A request for certification from someone other than a student's healthcare provider—such as a student's parent, legal representative, coach, administrator, or advisor—would also be burdensome and potentially subject a student with pregnancy or related conditions to different treatment if inconsistent with § 106.40(b)(5)(i)–(iii).

The Department disagrees that final § 106.40(b)(5) would require a recipient to allow a pregnant student to engage in unsafe activities or surprise a recipient with medical emergencies. While this provision is intended to ensure that a recipient does not subject a student who is pregnant or experiencing pregnancy-related conditions to discriminatory paperwork requirements, it does not dictate any decisions a recipient may make as to participation in a program or activity as those must be made on a case-by-case basis, depending on relevant facts and consistent with Title IX's nondiscrimination requirements in totality. Responding to a further commenter concern, the Department agrees that—as set forth in § 106.40(b)(5)—while there is no requirement under Title IX that a recipient obtain pre-participation certification from any student, to the extent that a recipient wishes to require such certification from a pregnant student, it must require the same of all students in a class, program, or extracurricular activity.

With respect to the difference between paragraphs (b)(5)(i) and (ii) of § 106.40, the Department explains that paragraph (b)(5)(i) pertains to the level of physical ability or health necessary to participate in each activity, such as walking at a fast pace for 20 minutes or lifting more than 50 pounds, and paragraph (b)(5)(ii) means that all students participating in the class or activity, even those who are not pregnant or experiencing related conditions, are asked to provide the same certification.

The Department agrees with commenters that removing the reference in the current regulations to a student's emotional ability to participate will underscore that a recipient should never assume that a student who is pregnant or experiencing pregnancy-related conditions is any less emotionally able to participate than any other student. If a recipient requires a certification of emotional ability from a student who is pregnant or experiencing pregnancy-related conditions, such certification is subject to the general prohibition on sex discrimination under § 106.31(a)(1), the prohibition on sex discrimination based on pregnancy or related conditions under § 106.40(b)(1), and the requirement to provide students with reasonable modifications because of pregnancy or related conditions under § 106.40(b)(3)(ii), among other relevant provisions of the final regulations. If the student has a pregnancy-related condition that qualifies as a disability, such certification may also be subject to Section 504 or the ADA.

Regarding the suggestion that a recipient and a coach should decide whether a pregnant student remains on a team, the Department reminds recipients that a recipient's decision regarding a pregnant student's participation must comply with all specific actions to prevent discrimination and ensure equal access set out in § 106.40(b)(3), including the provision of reasonable modifications. Additionally, to the extent consistent with any reasonable modifications or other student rights under § 106.40(b)(3), if a school maintains a medical or hospital benefit, service, plan, or policy related to temporary medical conditions that is relevant to a potential exclusion from a team, the recipient must also treat a pregnant student consistent with those plans or policies under § 106.40(b)(4). Excluding a student based on pregnancy is sex discrimination in violation of §§ 106.31(a)(1) and 106.40(b)(1).

The Department disagrees with the contention that a recipient should not have to treat students who are pregnant or experiencing pregnancy-related conditions like non-pregnant students for the purpose of determining whether they may be excluded from a recipient's education program or activity. In this case, the Department finds it to be a relevant and straightforward comparison to ensure that students are not being discriminated against due to pregnancy or related conditions. For example, because the provision requires all students to be treated the same, it will be easy for pregnant students to know whether a recipient is asking them for information different from the rest of the class or team and permit the pregnant students to take prompt action to enforce their rights.

The Department disagrees that the Supreme Court's decision in *Young* controverts this approach. *Young* involved an employer's denial of an employee's request for a pregnancy-related lifting restriction under Title VII, in which the Court concluded that there was a genuine dispute of material fact as to whether the employer provided more favorable treatment to at least some non-pregnant employees ''whose situation cannot reasonably be distinguished'' from the plaintiff. *Young,* 575 U.S. at 231. The Court's holding did not limit the universe of acceptable comparators to one specific type, such as only employees with non-pregnancy-related health restrictions or suggest that other possible comparators would not be allowed. *See id.* at 228. Likewise, in the context of final § 106.40(b)(5), the issue is that in most cases, a student who is pregnant or experiencing pregnancy-related conditions will have no limitation relevant to participation, making comparison to the general student population the most appropriate.

The Department further disagrees with the assertion that the provision prevents a recipient from requiring a student who is pregnant or experiencing pregnancy-related conditions from providing certification as to physical ability; to the contrary, the provision sets out clearly that a recipient may do so when (i) the certified level of physical ability or health is necessary for participation in the class, program, or extracurricular activity; (ii) the recipient requires such certification of all students participating in the class, program, or extracurricular activity; and (iii) the information obtained is not used as a basis for discrimination prohibited by the Title IX regulations. This provides the appropriate framework to ensure that a student who is pregnant or experiencing pregnancy-related conditions is asked for relevant information on equal footing with other students, while balancing a recipient's interest in student safety.

Further, the Department did not intend to suggest that pregnancy, standing alone, is a disability. The Department reemphasizes, as explicitly stated in the July 2022 NPRM, that while some conditions or complications related to pregnancy might qualify as a disability under Section 504 or the ADA, pregnancy itself is not a disability. 87 FR 41523. If someone who is pregnant or experiencing pregnancy-related conditions has a disability, the ADA or Section 504 may apply, whether or not the disability is related to pregnancy. However, the Department notes that, as explained more fully in the discussion of final § 106.40(b)(4), that provision requires a recipient, when consistent with § 106.40(b)(3), to treat students who are pregnant or experiencing pregnancy-related conditions in the same manner and under the same policies as any other temporary medical condition with respect to any medical or hospital benefit, service, plan, or policy.

Changes: The Department has redesignated proposed § 106.40(b)(6) as § 106.40(b)(5) in the final regulations, revised the provision to state that a recipient may not require a certification from a healthcare provider or any other person unless the certification satisfies § 106.40(b)(5)(i)–(iii), and made a technical change to make clear that a recipient's compliance is required.

D. Discrimination Based on an Employee's Parental, Family, Marital Status, Pregnancy, or Related Conditions

1. Section 106.51(b)(6) Employment—Granting and Return From Leaves

Comments: Some commenters asserted that proposed § 106.51(b)(6) was not necessary and should be addressed through sub-regulatory guidance but did not object to the proposed changes.

Discussion: Changing the language in § 106.51(b)(6) from ''leave for pregnancy, childbirth, false pregnancy, termination of pregnancy'' to ''leave for pregnancy or related conditions'' is important to ensure § 106.51 is consistent with the definition of pregnancy or related conditions in § 106.2 and consistent with like changes in §§ 106.21, 106.40, and 106.57.

Changes: None.

2. Section 106.57 Parental, Family, or Marital Status; Pregnancy or Related Conditions

Comments: Some commenters opposed § 106.57 generally as inconsistent with Title IX and case law. Some commenters opposed proposed § 106.57 because they did not believe Title IX authorizes the Department to enact regulations governing employment. One commenter stated that they believed that the Department did not have jurisdiction over workplace concerns, including sex discrimination and hiring decisions, which they believed to be solely under the authority of the EEOC and a recipient's human resources department.

One commenter suggested that, because Title IX protects any ''person,'' the Department should clarify that its protections extend beyond traditional employees to other workers, such as independent contractors.

Discussion: The Department disagrees with the assertion that § 106.57 is contrary to case law. Most of the provisions in § 106.57 have been part of the Title IX regulations for nearly half a century. 40 FR 24128 (codified at 45 CFR 86.57 (1975)); 34 CFR 106.57 (current). The Department was unable to find, and commenters did not provide, any case law holding that current § 106.57 exceeded the authority granted by Congress for the Department to issue regulations to effectuate Title IX's prohibition on sex discrimination in education programs or activities that receive Federal financial assistance consistent with achievement of the objectives of the statute. *See* 20 U.S.C. 1682. To the extent commenters raised similar objections with regard to specific aspects of § 106.57, those comments are addressed in the discussion of the applicable subsections below.

In addition, contrary to commenters' assertions, § 106.57 does not exceed the scope of the Department's congressionally delegated authority under Title IX. The Supreme Court has recognized that the Department has broad regulatory authority under Title IX to issue regulations that it determines will best effectuate the purpose of Title IX and to require recipients to take administrative actions to effectuate the nondiscrimination mandate of Title IX. *See, e.g., Gebser,* 524 U.S. at 292; 20 U.S.C. 1682. Title IX provides that ''no person'' shall be subjected to sex discrimination under any education program or activity receiving Federal financial assistance, and Title IX has long been understood to prohibit discrimination against recipients' employees. *See, e.g., N. Haven Bd. of Educ.,* 456 U.S. at 530. As the Department noted in the July 2022 NPRM, 87 FR 41527, ensuring equal access to employment in the education sector was a central purpose of Title IX at the time of its passage. *See* 118 Cong. Rec. 5810 (paper by Dr. Bernice Sandler printed in the record with unanimous consent, explaining that employers in the education sector often refused to hire women because of concerns about absenteeism due to family obligations, even though the Women's Bureau of the Department of Labor found that ''men lose more time off the job because of hernias than do women because of childbirth and pregnancy'').

Finally, given the wide variety of arrangements and circumstances across recipients and variations in applicable State employment laws, recipients are best positioned to determine who is an ''employee.'' The Department declines to mandate at this time that all independent contractors be covered by § 106.57 because more information would be needed before making such a change, particularly given the possible cost, administrative burden, and interplay with common law principles and other legal requirements. The Department notes that to the extent a contractor is an employee of the recipient, the contractor will be entitled to the protections of § 106.57. In addition, nothing within the final regulations prohibits a recipient from choosing to cover independent contractors under § 106.57 if the recipient believes such protection will further its compliance with these final regulations.

Changes: None.

3. Section 106.57(a) Parental, Family, or Marital Status

Comments: Some commenters supported the proposed regulations related to the rights of employees not to be discriminated against based on sex regarding their parental, family, or marital status. Some commenters urged the Department to add greater protections for parenting employees, including reasonable modifications for parenting employees. Some commenters shared personal stories of recipients asking women whether their children would interfere with their employment responsibilities, while men were not asked similar questions.

In contrast, the Department also received feedback that protections for parenting employees should not be included because, the commenters argued, parents are not a protected class and being a parent detracts from a person's ability to perform their employment duties.

Discussion: The Department acknowledges commenters' support of the regulatory provisions regarding sex discrimination based on employees' parental, family, and marital status. As explained in the discussion of § 106.40(a) regarding parenting students and § 106.21 regarding applicants for admission, the Department declines to require a recipient to provide reasonable modifications to parenting employees or applicants for employment at this time. In the future, the Department could consider whether modifications for parenting employees are necessary to effectuate the nondiscrimination mandate of Title IX. However, the Department again notes that a recipient is prohibited from treating parenting employees or applicants for employment differently based on sex under § 106.57(a)(1) and from discriminating against them based on sex stereotypes under § 106.10.

The Department disagrees with the commenters asking to remove § 106.57(a)(1) based on an assertion that parents are not a protected class, because the prohibition on discrimination against parenting employees is limited to different treatment based on sex, and sex is a protected class under Title IX. In addition, sex discrimination in the treatment of parenting employees has been covered by the Title IX regulations for nearly 50 years and continues to be necessary to effectuate Title IX's nondiscrimination mandate. *See* 40 FR 24128 (codified at 45 CFR 86.57(a) (1975)); 34 CFR 106.57(a) (current).

The Department has, however, decided to make three small changes to

the text of final § 106.57(a) compared to the proposed regulations. Upon review, the Department has determined that replacing the word ''apply'' with ''implement'' in § 106.57(a) will improve clarity consistent with similar revisions in final §§ 106.21(c)(2)(i) and 106.40(a). The Department also has decided to replace the word ''shall'' with the word ''must'' consistent with the other final regulations but does not intend any decrease in coverage. The Department has also replaced the word ''Which'' in § 106.57(a)(2) with the word ''That'' for clarity.

Changes: Section 106.57(a) has been revised to substitute the word ''implement'' for the word ''apply'' and to substitute the word ''must'' for the word ''shall.'' Section 106.57(a)(2) has been revised to substitute the word ''That'' for the word ''Which.''

4. Section 106.57(b) Pregnancy or Related Conditions

Comments: Some commenters expressed support for the prohibition on discrimination on the basis of ''pregnancy or related conditions'' in proposed § 106.57(b), explaining that it is consistent with Title IX's mandate to prohibit sex discrimination and would improve employment opportunities for pregnant and parenting teachers and narrow the wage gap between men and women. Other commenters expressed support for the language in proposed § 106.57(b) prohibiting discrimination against employees based on ''current, potential, or past'' pregnancy or related conditions, adding that such protection will create a more welcoming environment for pregnant employees because educators historically have been fired or excluded from the classroom when they became pregnant, and they continue to face discrimination and barriers to receiving workplace accommodations for pregnancy-related medical issues. Some commenters described personal stories of pregnancy-related discrimination in the workplace and being pushed out of the workplace due to pregnancy or termination of pregnancy. Some commenters appreciated the explicit protection for ''potential'' pregnancy, stating it will protect people who are attempting to get pregnant.

Other commenters asked the Department to change the proposed regulations to require reasonable modifications for employees based on pregnancy or related conditions as the proposed regulations would for students, instead of making accommodations dependent on what is provided to employees with temporary disabilities. Some commenters stated that reasonable modifications for employees are particularly important given the fast-paced nature of the school environment to make sure employees can work while pregnant and after pregnancy. Some commenters stated that, like the Department's proposal to require that recipients provide lactation time and space to employees, clearly defined rights to reasonable modifications are essential to prevent different treatment based on sex in the workplace and that, absent reasonable modifications, employees may have no choice but to leave their employment. Some commenters stated that matching employees' rights with students' rights with respect to reasonable modifications for pregnancy or related conditions would reduce the burden and complexity of compliance on recipients. These commenters opined that recipients are already familiar with the ''reasonable accommodation'' framework and structure from its use in the disability context under Title II of the ADA.

Some commenters observed that many students, particularly at postsecondary institutions, are also paid employees of the recipient. Some commenters argued that it would be illogical to, for example, guarantee a pregnant student access to a stool to rest while studying in their science lab, but not to provide the same modification to that student while they perform work as a receptionist for the science department. These commenters maintained that in both contexts, the modification is necessary to ensure that the student can fully access the educational environment.

Discussion: The Department acknowledges the support expressed for the protections in proposed § 106.57(b) prohibiting discrimination against employees based on current, potential, or past pregnancy or related conditions, and agrees that this updated and comprehensive protection will address barriers to professional achievement and improve access to career opportunities.

The Department acknowledges commenters' suggestions about providing the same reasonable modifications to employees that are available to students. After careful consideration, the Department does not agree that reasonable modifications for employees are currently necessary to effectuate Title IX and ensure equal opportunity for recipient employees. The Department has reached that conclusion for several reasons.

First, considering recent new Federal legislation in this area, such as the PUMP Act and the PWFA, and a pending rulemaking that may address reasonable workplace accommodations for employees affected by pregnancy, childbirth, or related medical conditions, *see* 88 FR 54714, the Department declines to require reasonable modifications for employees at this time without the opportunity to more fully consider the interplay between Title IX and other employer obligations. In addition, many, if not most, of the pregnancy-related barriers employees face will be addressed by recipients in their compliance with the non-discrimination protections of § 106.57.

Second, as noted in the discussion of § 106.57(c) below, the obligation that a recipient treats an employee's pregnancy or related conditions as it treats other temporary medical conditions is more robust than the requirement that a recipient treat a student's pregnancy or related conditions comparably to other students' temporary medical conditions. Final § 106.40(b)(4) states that a recipient must treat a student's pregnancy or related conditions in the same manner and under the same policies as any other temporary medical condition with respect to any medical or hospital benefit, service, plan, or policy the recipient administers, operates, offers, or participates in. However, the language of § 106.57(c) is broader, stating that a recipient must treat an employee's pregnancy or related conditions as it does any other temporary medical conditions for all job-related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment. Accordingly, both § 106.40(b)(4) and the reasonable modification requirement in § 106.40(b)(3)(ii) are required to effectuate Title IX's nondiscrimination mandate with respect to pregnant students. But because § 106.57(c) standing alone is sufficiently broad to effectuate Title IX's nondiscrimination mandate with respect to employees who are pregnant or experiencing pregnancy-related conditions, it is unnecessary to also require recipients to provide reasonable modifications to pregnant employees without further study. And the Department disagrees with the suggestion that requiring reasonable modifications for employees because of pregnancy or related conditions under all circumstances is less burdensome than requiring reasonable modifications only to the extent that a recipient

provides the same modifications for other temporary medical conditions.

With respect to student-employees, the final regulations require that the recipient provide such students with reasonable modifications consistent with § 106.40(b)(3)(ii) as necessary to prevent sex discrimination and ensure equal access to the recipient's education program or activity. To the extent that a student's individualized, pregnancy-related needs impact their employment consistent with this standard, § 106.40(b)(3)(ii) provides the appropriate framework for a recipient to address such needs—in consultation with the student—in a manner that is flexible enough to respond to a wide variety of circumstances and types of employment. The Department agrees with the commenter that, depending on the circumstances, the provision may require reasonable modifications in connection with a student's on-campus employment when such employment is part of, or necessary to enable, access to the student's education program or activity. For further explanation of reasonable modifications with respect to students based on pregnancy or related conditions, see ''Interaction with Other Federal Laws'' in the discussion of § 106.40(b)(3)(ii).

Nothing in § 106.57 obviates a recipient's separate obligation to comply with other civil rights laws, including Title VII as amended by the PDA, Section 504, the ADA, and the PWFA, which has become law since the issuance of the July 2022 NPRM. *See* 34 CFR 106.6(a). The PWFA requires covered employers to make reasonable accommodations for a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship. Moreover, to the extent an employee's related condition qualifies as a disability, Section 504 or the ADA may apply, which may require the recipient to provide reasonable accommodations. And nothing in these regulations precludes a recipient from using its discretion and flexibility to provide reasonable accommodations to employees for whom pregnancy or related conditions present barriers to employment. For the same reasons, the Department also declines to require a recipient to provide reasonable modifications based on pregnancy or related conditions for applicants for employment with a recipient.

Finally, the Department has changed the word ''shall'' to ''must'' in § 106.57(b) and revised the phrase ''discriminate against or exclude from employment'' to remove the words ''or exclude from employment.'' The Department makes these changes for clarity and consistency with language in the remainder of the regulations but does not intend any decrease in coverage. As explained in the July 2022 NPRM with respect to an identical change to ''exclude'' language in § 106.21(c) pertaining to the treatment of pregnancy in admissions, the words ''exclude'' and ''excludes'' were used only occasionally in the current regulations to refer to discrimination and such intermittent use was confusing. 87 FR 41517. Throughout the final regulations, the Department interprets ''discriminate'' to encompass exclusion.

Changes: The Department has changed the word ''shall'' to ''must'' and deleted the words ''or exclude from employment'' from § 106.57(b).

5. Section 106.57(c) Comparable Treatment to Other Temporary Medical Conditions

Comments: Some commenters supported proposed § 106.57(c). One commenter expressed support for proposed § 106.57(c) but raised concerns that the regulatory text would imply that a recipient should treat pregnancy as a temporary disability, which the commenter argued is inconsistent with disability law and the Department's explanation in the July 2022 NPRM. Another commenter asked for clarification regarding the interaction of § 106.57(c), the PDA, Section 504, and the ADA.

Discussion: The Department emphasizes again here, as it explicitly stated in the July 2022 NPRM, that while some conditions or complications related to pregnancy might qualify as a disability under Section 504 or the ADA, pregnancy itself is not a disability. 87 FR 41523. The Department also reemphasizes that if an employee who is pregnant or experiencing related conditions also has a disability, the ADA and Section 504 may apply.

As the Department noted in the July 2022 NPRM, there are other Federal laws in addition to Title IX that may govern a recipient's responsibilities regarding pregnancy or related conditions in its workplace, including the ADA, Section 504, the FLSA, and the PDA which amended Title VII. *See* 87 FR 41394, 41514–15. In addition, since the July 2022 NPRM was issued, Congress passed the PWFA, which also pertains to pregnancy, childbirth, and related medical conditions in the workplace, and the PUMP Act, which pertains to lactation rights. The Department clarifies that nothing in § 106.57(c) obviates a recipient's separate obligation to comply with those other civil rights laws.

In addition, as noted above in the discussion of § 106.40(b)(4) with respect to students, the Department notes that the reference to ''pregnancy or related conditions or any temporary disability resulting therefrom'' contained a redundancy because the term ''pregnancy or related conditions'' as defined in § 106.2 includes any medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation, and recovery from any of those conditions. To address these concerns, the Department revised the language in § 106.57(c) of the final regulations to delete the term ''any temporary disability resulting therefrom'' and substitute the term ''temporary medical conditions'' for the remaining references to ''temporary disabilities'' and ''temporary disability.'' The Department's revisions will eliminate any possible inference that pregnancy standing alone is a disability. The Department did not, however, change the reference to ''payment of disability income'' in the list of job-related purposes in § 106.57(c), as that is a specific benefit that may be available to employees with disabilities. The Department is not aware of anything called ''medical conditions income,'' so changing that term to correspond with the changes to ''temporary disability'' and ''temporary disabilities'' would not make sense.

Changes: In § 106.57(c) of the final regulations, the Department has removed the phrase ''or any temporary disability resulting therefrom.'' Additionally, the Department has changed the other two references to ''temporary disability'' and ''temporary disabilities'' to ''temporary medical conditions.'' Final § 106.57(c) now states that a recipient must treat pregnancy or related conditions as any other temporary medical condition for all job-related purposes. Finally, the section header has been changed from ''Comparable treatment to temporary disabilities or conditions'' to ''Comparable treatment to other temporary medical conditions.''

6. Section 106.57(d) Voluntary Leaves of Absence

Comments: Some commenters supported proposed § 106.57(d) because it would require recipients to provide leave to employees who are affected by pregnancy-related medical conditions even if a recipient does not maintain a leave policy for its employees or if an employee does not have sufficient leave or accrued employment time to qualify for leave under the recipient's policy.

Some commenters asserted that employees should have a right to all medically necessary time off for pregnancy or related conditions, just as students do under § 106.40(b)(3)(iv), such as leave to recover from pregnancy-related health conditions, to attend related medical appointments, and to accommodate bed rest. Commenters asserted that it is unclear in proposed § 106.57(d) whether leave for a ''reasonable period of time'' would include leave for pregnancy-related medical appointments. Commenters also asked the Department to clarify that to the extent a recipient maintains a leave policy for employees that is more generous, the recipient must permit the employee to take leave under that policy instead. Several commenters maintained that depriving employees of the same right students have to voluntary leave would reinforce the stereotype that motherhood and work are incompatible, contrary to the purpose of Title IX.

Some commenters asked that the Department clarify that a recipient may not require a doctor's note or other medical documentation for breaks to attend to basic health needs, such as bathroom breaks. Other commenters suggested that the Department revise the section title of proposed § 106.57(d) from ''Pregnancy leave'' to ''Pregnancy and related conditions leave'' or ''Time off for pregnancy-related needs and leave'' to make it clear that the leave is available for childbirth and other medical conditions related to pregnancy.

Discussion: The Department acknowledges commenters' support for § 106.57(d) and their questions about its implementation. Section 106.57(d) requires a recipient—only if it does not have another leave policy or an employee does not have enough leave under the policy or has not worked there long enough to qualify—to treat pregnancy or related conditions as a justification for an employee's voluntary leave of absence for a reasonable period of time. After such time, the employee shall be reinstated to the status held when the leave began or to a comparable position without a negative effect on any right or privilege of employment. The pre-existing rule referred to ''pregnancy or related conditions'' for ''pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom,'' but these final regulations use ''pregnancy or related conditions'' instead; however, the substance of the provision remains the same.

Still, the Department understands that commenters had questions about the meaning of ''for a reasonable period of time'' and whether it is the same as the ''period of time deemed medically necessary'' referenced in § 106.40(b)(3)(iv) regarding voluntary leaves of absence for students. Determining what is a reasonable period of time under § 106.57(d) is a fact-specific inquiry that depends on the totality of the circumstances, including the period of time deemed medically necessary by an employee's healthcare provider. Considering recent new Federal legislation in this area, such as the PUMP Act and the PWFA, and a pending rulemaking that may address reasonable accommodations for employees who are pregnant or experiencing related conditions, *see* 88 FR 54714, the Department declines the commenters' suggestion to go further and mandate a blanket right to all medically necessary time off for employees at this time without the opportunity to more fully consider the interplay between Title IX and other employer obligations.

In response to commenters' concerns about an employee's ability to take advantage of a more generous leave policy, the Department further clarifies that § 106.57(d) only applies if the recipient does not maintain a leave policy for its employees or the employee has insufficient leave or accrued employment time to qualify for leave under the policy. Therefore, if a recipient maintains a leave policy for employees that is more generous than what is articulated in § 106.57(d), the recipient must permit the employee to take leave under that policy instead. And under § 106.57(c), a recipient must at least treat pregnancy or related conditions as it does any other temporary medical condition with respect to duration and extensions of leave. For example, if an employee with another temporary medical condition can take leave for medical appointments related to that condition, employees who are pregnant or have related conditions must be permitted to do so as well.

Although the Department declines to add to the final regulations a provision prohibiting a recipient from requiring a doctor's note or other medical documentation from employees for breaks to attend to basic health needs, such as bathroom breaks, the Department reminds recipients that such documentation may only be required for pregnancy or related conditions if it is required of all employees with temporary medical conditions. *See* § 106.57(c). Therefore, for example, if a recipient does not require an employee with a urinary tract infection to provide a doctor's note to take bathroom breaks more frequently than usual, it must not require such notes from employees who need more frequent bathroom breaks because of pregnancy or related conditions.

As for the title of the provision, the Department agrees with commenters that the title ''Pregnancy leave'' did not encompass the reach of the provision. As explained in the July 2022 NPRM, the Department proposed adding ''voluntary'' to modify ''leave of absence'' in the text of the provision to clarify that an employee must not be forced to take leave due to pregnancy or related conditions, but rather must have the right to choose whether to take leave. 87 FR 41527. For this reason, ''Voluntary leaves of absence'' is a suitable title for this provision.

Finally, the Department has changed the word ''shall'' to ''must'' in § 106.57(d) for consistency with language in the remainder of the regulations but does not intend any decrease in coverage.

Changes: The title of § 106.57(d) has been changed from ''Pregnancy leave'' to ''Voluntary leaves of absence,'' and in the text of the provision, the word ''shall'' has been changed to ''must.''

7. Section 106.57(e) Lactation Time and Space

General Support

Comments: Commenters expressed general support for the requirement in proposed § 106.57(e) that employees have a clean, private, non-bathroom lactation space and reasonable break time to express breast milk or breastfeed. Commenters stated that proposed § 106.57(e) would provide much-needed support for employees and would advance Title IX's non-discrimination goals because, they stated, pregnant educators historically were discriminated against, were fired or excluded from the classroom, and did not get paid parental leave, causing them to return to work before they were ready, and they had difficulty finding time to express breast milk or getting support from their employer to do so.

Some commenters noted that some educators had to pump in supply closets or cars while juggling schedules that made it extremely difficult to express breast milk on a regular basis and that securing break time is one of the biggest barriers faced by lactating employees in education. Some commenters noted that if a lactating employee does not express breast milk as needed, they may experience pain and end up with health complications including infection, or their milk supply will reduce, making it harder to continue breastfeeding. Therefore, commenters explained, a

lactating employee without adequate time and space to express breast milk will be forced to choose between their job and their health and that of their child.

Some commenters reported that thousands of recipients nationwide already provide their employees with lactation time and space, due to the ACA, State laws, and the rise in breastfeeding rates, and that others can learn from their peer institutions, suggesting that compliance with proposed § 106.57(e) is readily achievable.

Discussion: The Department acknowledges the commenters' variety of reasons for supporting § 106.57(e). In the final regulations, in response to comments and upon further review, the Department changed the language ''[a] recipient must ensure the availability of a lactation space'' to ''[a] recipient must ensure that an employee can access a lactation space'' to match the language adopted in final § 106.40(b)(3)(v), the corollary provision regarding student access to lactation space. As the Department explained above in the student context, for this provision to be effective a recipient must not only ensure that an appropriate lactation space is available but also that it is accessible to the employees who need it.

The Department agrees with commenters that the final regulations, by requiring access to time and space for lactating employees to breastfeed or express breast milk, will help recipients to fulfill Title IX's nondiscrimination goals of addressing sex discrimination in employment and ensuring that neither pregnancy nor its related conditions are barriers to equal opportunities in employment by recipients of Federal financial assistance. The Department also agrees with commenters that § 106.57(e) will help ensure that recipient employees do not have to choose between breastfeeding and staying in their jobs and that they can be productive in the workplace and avoid serious health complications. Finally, the Department agrees that compliance with § 106.57(e) should be achievable because so many recipients nationwide already provide their employees with lactation time and space, due to the ACA, State laws, and the rise in breastfeeding rates.

The Department notes that new Federal laws regarding lactation in the workplace, including the PWFA and the PUMP Act, both of which were passed after the issuance of the July 2022 NPRM, may also apply to recipients.

Changes: In final § 106.57(e)(2), the Department has changed ''[a] recipient must ensure the availability of a lactation space'' to ''[a] recipient must ensure that an employee can access a lactation space.''

Requests for Clarification Regarding Lactation Spaces

Comments: Some commenters expressed support for proposed § 106.57(e)(2)'s requirement that a recipient provide employee access to lactation space and requested that the Department provide more clarity by providing specifics such as the recommended location of lactation spaces, the number of spaces to be provided, whether they should have evening and weekend access, and how they must be equipped. Some commenters stated that the minimum requirements for a functional lactation space include a chair, a flat surface on which to place a pump, access to an electrical outlet, nearby access to running water, a refrigerator or other space in which an employee can store expressed milk, and reasonable proximity to an employee's specific place of work, and stated that the cost of implementing such requirements would be minimal because almost all recipients are already required to provide certain employees with a lactation space under the FLSA (as amended by the ACA) and a recipient may offer a common space for both students and employees.

In addition, some commenters asked the Department to state in the regulations and in supplemental guidance that if multiple students or employees need simultaneous access to a lactation space, the recipient should discuss various options with all parties to find a solution that meets their needs, such as using signage or a scheduling system, or installing partitions or screens in the space so it can be used by multiple persons at the same time.

Discussion: The final regulations at § 106.57(e) require recipients to ensure employees can voluntarily access a space other than a bathroom that is clean, shielded from view, free from intrusion from others, and may be used by an employee for expressing breast milk or breastfeeding as needed. This is the same as what recipients are required to provide for students under final § 106.40(b)(3)(v). Whether the lactation space a recipient provides meets the standards of § 106.57(e)—including that the space ''may be used'' for pumping and breastfeeding as needed—is best determined on a case-by-case basis, but generally means that the space is functional, appropriate, and safe for the employee's use. The Department declines to adopt additional specific requirements about the size and setup of lactation spaces for employees at this time to preserve recipient flexibility and to be able to review the degree of and obstacles to compliance with other Federal lactation laws.

The Department notes that there may be Federal, State, or local laws or regulations that contain more specific requirements regarding lactation spaces for employees, and the Department does not intend for these regulations to preempt those laws or regulations to the extent they provide employees with more rights regarding lactation spaces.

Regarding the request that the Department require lactation spaces to be reasonably close to the employee's specific place of work, the Department notes again that, in final § 106.57(e)(2), the Department changed the phrase ''ensure availability of'' to ''ensure that an employee can access'' a lactation space. This change was made in recognition of the fact that, for the provision of lactation space to be effective, a recipient must ensure not only that an appropriate lactation space is available but also that it is accessible to the employees who need it in the reasonable break time they must use it. If the lactation space is so far from an employee's workstation, office, or classroom that the employee cannot reasonably get there and back, breastfeed or pump, and store their expressed milk in the time given, the Department would not consider the space to be accessible to the employee. This change in text also parallels the revised language regarding student access to a lactation space in § 106.40(b)(3)(v).

To provide recipients flexibility, the Department also declines to mandate in the regulations any particular arrangement a recipient must follow in connection with a shared lactation space. However, the Department notes that even with multiple users a recipient must comply with its obligations under § 106.57(e)(2) with respect to each one. If multiple students or employees need simultaneous access to a lactation space, a recipient must develop a solution consistent with § 106.57(e)(2) that meets the needs of the users of the space. Such a solution might include, as commenters suggested, using signage or a scheduling system, or installing partitions or screens in the space so it can be used by multiple persons at the same time. Given the variety among recipients, the Department defers to a recipient to find a system that works best at its institution consistent with § 106.57(e)(2), taking into consideration the needs of its employees and students.

Changes: None.

Pumping and Breastfeeding

Comments: Some commenters opposed the inclusion of ''breastfeeding'' in this provision because they believed it goes beyond the obligations that exist currently in some other Federal, State, and local laws, arguing that this language implies that a recipient must accommodate the presence of nursing infants in its school or other recipient workplace, which may not be safe or feasible in all circumstances. Commenters asserted that a recipient should have discretion regarding such matters.

In contrast, some commenters urged the Department to explicitly state in the regulations that a lactating student or employee will still have the right to express breast milk or breastfeed outside of the designated lactation spaces, if they wish, consistent with laws in all 50 States, the District of Columbia, Puerto Rico, and the Virgin Islands that generally allow breastfeeding in public or private places. *See* National Conference of State Legislatures, State Breastfeeding Laws, *https://www.ncsl.org/research/health/breastfeeding-state-laws.aspx* (last visited Mar. 12, 2024).

Some commenters requested that the Department revise the language in § 106.57(e) to use terms such as ''express milk'' and ''nursing'' to be more inclusive of all employees.

Discussion: The Department acknowledges commenters' suggestions and understands their concerns but disagrees with the suggestion to remove references to breastfeeding from § 106.57(e). This provision is focused solely on what may take place in the lactation space that a recipient must make accessible to its employees, and the Department wants to be clear that an employee may use that space for breastfeeding instead of pumping if the employee has access to their child while at work. The Department is not suggesting that Title IX requires a recipient to allow nursing infants to be present in the rest of its school or other workplace. Whether or not an employee's child may be present in recipient spaces outside the lactation room is a fact-specific determination beyond the scope of this rulemaking, and the Department agrees with commenters that a wide variety of State and local laws may provide such rights and that recipients would be obligated to honor those rights as applicable. Nothing in these final regulations would preclude a lactating employee from expressing breast milk or breastfeeding outside of the recipient's designated lactation spaces if State and local laws allow it. The decision of where to pump or breastfeed is at the employee's discretion if it is consistent with all applicable laws and regulations.

Finally, the Department declines commenters' suggestion to revise the terminology used in § 106.57(e). Section 106.57(e) requires a recipient to ensure that any employee who is lactating can access a lactation space regardless of that employee's gender identity or gender expression and regardless of whether the employee plans to express milk via pumping or breastfeeding. Nothing in these final regulations prohibits a recipient from using different terminology to describe lactation spaces in its communications with employees.

Changes: None.

Other Requests for Clarification

Comments: One commenter raised a few issues they believed needed clarification regarding the intersection of proposed § 106.57(e) with employment-related rights regarding lactation spaces and break times, such as whether all claims regarding lactation rights now should be adjudicated under Title IX and whether employers need to add anything to employee handbooks about this matter. Some commenters requested that the Department prohibit a recipient from requiring an employee to get medical certification or documentation to get a lactation modification.

Discussion: In response to the commenter's question, all claims regarding lactation rights need not be adjudicated solely under Title IX. Employees can make a complaint pertaining to lactation under a recipient's Title IX grievance procedures if they wish. However, there is no requirement that an individual exhaust remedies under Title IX before pursuing a claim under another law in court or administratively. As the Department noted in the July 2022 NPRM, there are other Federal laws that govern employers' responsibilities regarding pregnancy or related conditions in the workplace including the PDA, which amended Title VII, and the ACA, which amended the FLSA. 87 FR 41514–41515. In addition, since the July 2022 NPRM was issued, Congress passed the PWFA and the PUMP Act, which also pertain to lactation in the workplace. There are State and local laws that may apply as well. Not all recipient employees will be covered by all of these laws, and whether an employee chooses to pursue a claim under Title IX will depend on the individual employee's circumstances.

In response to the question about whether a recipient must add information about lactation to employee handbooks, the Department notes that the final regulations do not require such notice standing alone; however, if the recipient provides notice of similar policies or benefits related to temporary medical conditions, the recipient will be required under § 106.57(c) to provide comparable notice related to lactation.

Regarding commenters' requests that the Department prohibit a recipient from requiring medical documentation for lactation needs, the Department has added § 106.40(b)(3)(vi) to the final regulations, which states, among other things, that a recipient may not require a student to provide supporting documentation related to lactation needs in connection with the provision of reasonable modifications or access to lactation space. Just as in the student context, the Department agrees with commenters that it is not reasonable for an employer to require documentation regarding employee lactation needs because the initiation of lactation after childbirth is nearly universal and the fact of lactation is obvious. However, considering recent new Federal legislation in this area, such as the PUMP Act and the PWFA, and a pending rulemaking that may address similar limits on medical documentation in the employee context, *see* 88 FR 54714, the Department declines to adopt similar language in § 106.57 at this time and believes that considering additional information would be appropriate before making this change, particularly given the interplay between Title IX and other employer obligations.

Changes: None.

8. Section 106.60 Pre-Employment Inquiries

Comments: Some commenters opposed proposed § 106.60 because they believe it exceeds the Department's authority and is inconsistent with Title IX and case law. Some commenters opposed proposed § 106.60(b) because they objected to the term ''self-identify,'' without providing additional information as to the reason.

Discussion: The Department disagrees with the assertion that § 106.60 exceeds the Department's authority or is contrary to case law. The provisions in § 106.60 have been part of the Title IX regulations since 1975. *See* 40 FR 24128 (codified at 45 CFR 86.60 (1975)). As discussed above, the Supreme Court has recognized that the Department has broad regulatory authority under Title IX to issue regulations that it determines will best effectuate the purpose of Title

IX and to require recipients to take administrative actions to effectuate the nondiscrimination mandate of Title IX. *See, e.g., Gebser,* 524 U.S. at 292. Regulations that ensure that employees are not discriminated against in the employment application process are consistent with this grant of authority. *See* 20 U.S.C. 1682. The Department was unable to find, and commenters did not provide, any case law to the contrary in connection with § 106.60.

Although the commenter did not provide sufficient information regarding the objection to ''self-identify'' for the Department to understand the commenter's concern, this term will assist both applicants and recipients by clarifying that recipients may ask applicants to identify their sex under certain conditions.

In addition, in § 106.60(a), the Department made a grammatical correction by adding the word ''a'' between the words ''make'' and ''pre-employment inquiry.''

Changes: Section 106.60(a) has been revised to add the word ''a'' before ''pre-employment inquiry.'' In § 106.60(b), the Department has made a technical change by inserting ''Title IX or'' for clarity and consistency.

IV. Title IX's Coverage of Sex Discrimination

A. Section 106.10 Scope

1. General

Comments: Some commenters expressed general support for proposed § 106.10's clarification of the scope of Title IX's prohibition on sex discrimination on the ground that it would help ensure that all students can learn and thrive in educational environments free from sex discrimination. Commenters stated that proposed § 106.10 would improve students' educational experiences by encouraging recipients to create inclusive, safe, and supportive learning environments and remedy discriminatory educational environments that have a negative effect on student mental health. Commenters asserted that proposed § 106.10 would help schools to better prevent and remedy sex discrimination against certain populations, including LGBTQI+ students and pregnant students, who, the commenters asserted, are disproportionately affected by discrimination. Commenters also shared research that commenters asserted shows that enumeration of bases of prohibited discrimination in school policies can reduce rates of bullying and suicidality among students.

Some commenters viewed proposed § 106.10 as necessary because LGBTQI+ and pregnant students and individuals lack clear protections in some schools. Other commenters noted proposed § 106.10 would alleviate threats, bullying, and harassment that students and employees experience in some schools. Commenters also asserted that individuals' right to be free from sex discrimination in education should not depend on the State in which they live or which school they attend.

Some commenters asserted that proposed § 106.10 conflicts with Title IX because it includes bases of discrimination that are not expressly referenced in the statute's text. Other commenters asserted that express coverage of the bases listed in proposed § 106.10 is consistent with the broad framing of the statute and court interpretations of Title IX.

Some commenters urged the Department to define ''sex.'' Some commenters argued that ''sex'' should be defined in biological terms, referring to male or female. Some commenters criticized the July 2022 NPRM for asserting that the term ''sex'' is not necessarily limited to a single component of an individual's anatomy or physiology and asserting that a definition is not necessary. Those commenters asserted that this position contradicts the history of the term, and asserted that ''sex'' is objective, immutable, innate, and biological. One commenter asserted that sexual orientation, gender identity, and transgender status are distinct concepts from sex and the word ''sex'' cannot fully encompass all of these terms at once.

Some commenters argued that proposed § 106.10 does not meet the conditions for rulemaking set out in Executive Order 12866, which directs Federal agencies to ''promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need.'' Some commenters said that the July 2022 NPRM lacked substantial evidence about the prevalence of discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

One commenter asserted that covering discrimination based on gender identity, sexual orientation, sex stereotypes, and sex characteristics would violate the Protection of Pupil Rights Amendment (PPRA), 20 U.S.C. 1232h. The commenter argued that recipients would have to ask a student about sex behavior or attitudes and religious practices to comply with the regulations.

Some commenters urged the Department to clarify or modify proposed § 106.10 to add examples of discrimination, including sex-based harassment, sexual violence and exploitation, and preventing a student from participating in an education program or activity consistent with their gender identity. Other commenters supported adding other terms to proposed § 106.10, including biological sex, gender norms, gender expression, intersex traits, and marital status. Some commenters urged the Department to clarify in § 106.10 that discrimination based on gender expression would be prohibited discrimination based on gender identity and sex stereotyping. Commenters also urged the Department to clarify that pay inequity based on sex is a form of sex discrimination; explicitly prohibit discrimination on the basis of ''actual or perceived'' protected classes; and clarify the application of proposed § 106.10 to digital or online harassment.

Some commenters expressed concern that proposed § 106.10 is vague and would make it difficult for recipients and the public to discern what constitutes sex discrimination (*e.g.,* one commenter objected to the Department's assertion that the bases listed in proposed § 106.10 are not exhaustive, arguing that this would deprive a school community of notice of what constitutes discrimination). Some commenters expressed concern that proposed § 106.10 could be arbitrarily or selectively enforced in the absence of clear, objective definitions of the terms used in the regulations (such as sex stereotypes, sexual orientation, gender identity, and sex). Some commenters expressed concern that terms used in the preamble are not defined (*e.g.,* transgender, intersex). Some commenters raised concerns about the term ''LGBTQI+,'' including that the identities represented by the acronym should not be conflated and that it may not encompass the full range of identities that individuals might have.

One commenter urged the Department to reopen the comment period to consider the impact of the pending Supreme Court decision in *303 Creative LLC* v. *Elenis,* No. 21–476.

Discussion: The Department agrees with commenters that § 106.10 will promote nondiscriminatory educational environments by clarifying the scope of Title IX's prohibition on sex discrimination and expects that § 106.10 will facilitate a consistent understanding of Title IX across the country.

The Department disagrees with commenters who argued that bases

specified in § 106.10 conflict with Title IX. As explained in the July 2022 NPRM, Title IX does not use the term ''on the basis of sex'' in a restrictive way, 87 FR 41531–32, and, as other commenters noted, many Federal courts have broadly interpreted the scope of prohibitions on sex discrimination in Title IX and other laws to cover the bases identified in § 106.10. *See, e.g., Bostock,* 590 U.S. at 659–62 (sexual orientation and gender identity); *Grabowski,* 69 F.4th at 1113 (sexual orientation); *Grimm,* 972 F.3d at 618–19 (sex characteristics and gender identity); *Whitaker By Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,* 858 F.3d 1034, 1049–50 (7th Cir. 2017) (gender identity), *abrogated on other grounds as recognized by Ill. Republican Party* v. *Pritzker,* 973 F.3d 760, 762 (7th Cir. 2020); *Price Waterhouse,* 490 U.S. at 251 (sex stereotypes); *Nevada Dep't of Hum. Res.* v. *Hibbs,* 538 U.S. 721, 736 (2003) (pregnancy). The text of Title IX unambiguously covers any sex discrimination, except to the extent excluded in certain statutory provisions, and the exceptions in the statute must be construed strictly. *See, e.g., Jackson,* 544 U.S. at 175 (''Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition.''); *Andrus* v. *Glover Constr. Co.,* 446 U.S. 608, 616–17 (1980) (''Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'').

As the Department explained in the July 2022 NPRM, providing a specific definition of ''sex'' for purposes of § 106.10 is unnecessary for these regulations. 87 FR 41531. As explained in more detail below in the discussions of each basis in § 106.10, discrimination on each of those bases is sex discrimination because each necessarily involves consideration of a person's sex, even if that term is understood to mean only physiological or ''biological distinctions between male and female,'' as the Supreme Court assumed in *Bostock.* 590 U.S. at 655. The Department described each of these bases, and the justification for including each, in the July 2022 NPRM, and they are addressed in more detail below. 87 FR 41531–34. The Department believes it is important to clarify that Title IX's prohibition on sex discrimination includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

Relatedly, the Department has determined it is not necessary to define each of the bases of discrimination listed in § 106.10 or other related terms used in the preamble. The Department has defined key terms as necessary in § 106.2. The Department disagrees that the terms in § 106.10 and the related terms in the preamble are vague. Rather, as explained in more detail below, they are well understood, informed by case law, and used widely in other laws and policies. To the extent that recipients want to further clarify the scope of discrimination under Title IX and these regulations, nothing in the final regulations prevents a recipient from adopting policies that include examples of prohibited conduct or providing training to its community on the scope of Title IX's coverage.

The Department disagrees that § 106.10 fails to comply with Executive Order 12866. The persistence of discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity each present a compelling public need, and this need is bolstered by commenters who discussed the prevalence of such discrimination. Section 106.10 will help ensure recipients, students, and other members of the public understand how the Department interprets the scope of Title IX's prohibition on sex discrimination. As described above, commenters provided many examples of discrimination on the bases in § 106.10 and the ways such discrimination impedes access to education, which is reinforced by OCR's enforcement experience.

The Department disagrees that prohibitions on discrimination based on gender identity, sexual orientation, sex stereotypes, and sex characteristics in these final regulations violate the PPRA. The PPRA requires parental consent (unless the student has turned 18 or is an emancipated minor) before an LEA may require, as part of an applicable program (or a program that the Department/Secretary of Education administers), a student to ''submit to a survey, analysis, or evaluation that reveals information concerning'' certain issues, including ''sex behavior or attitudes'' and ''religious practices, affiliations, or beliefs of the student or student's parent.'' 20 U.S.C. 1232h(b)(3) and (7). The PPRA also requires an LEA to develop and adopt policies, in consultation with parents, to provide arrangements to protect privacy in the event of the administration or distribution of a survey to a student containing such items, including direct notification to parents (or to a student if a student has turned 18 or is an emancipated minor) of the specific or approximate dates during the school year of the administration of such a survey and the opportunity to opt their children out of such a survey. 20 U.S.C. 1232h(c)(1)(B), (2)(B), (2)(C)(ii). Neither § 106.10 nor any other part of the final regulations requires a recipient to mandate that students disclose information about their sex behavior or attitudes or their or their parents' religious practices, affiliations, or beliefs or requires that an LEA administer surveys to students that contains questions on these topics. Further, § 106.6(g) reinforces any legal right of a parent or guardian to act on behalf of their child. The Department is committed to complying with the PPRA and expects LEAs to do the same.

The Department appreciates commenters' interest in ensuring that § 106.10 is sufficiently clear to adequately notify school communities of what constitutes unlawful discrimination. The Department disagrees that the structure of § 106.10 is impermissibly vague as it is common for laws, regulations, and policies to specify the bases of discrimination that are prohibited. Section 106.6(d) makes clear that nothing in the Title IX regulations requires a recipient to restrict rights guaranteed by the U.S. Constitution, such as by restricting constitutionally protected speech, and no other provision authorizes such actions. The Department maintains that the final regulations provide adequate notice of the scope of a recipient's legal obligations without purporting to specify outcomes for all scenarios and situations, many of which will turn on particular facts and circumstances. Other sections of the regulations address specific requirements and prohibitions.

The Department disagrees with commenters' suggestion to add specific forms of discrimination to § 106.10. The Department appreciates the opportunity to clarify that § 106.10 describes *bases* of discrimination that involve consideration of sex. Sex-based harassment and sexual violence, on the other hand, are examples of discriminatory conduct; they are not themselves ''bases'' of discrimination. These two concepts—the basis of the discrimination and the form that discrimination takes—are distinct and should remain separate in the final regulations. This distinction is reflected in the definition of ''sex-based harassment'' in § 106.2, which states that harassment on the basis of sex is a ''form'' of sex discrimination, and includes harassment on the ''bases'' listed in § 106.10. The Department

therefore also disagrees with commenters' suggestions to modify § 106.10 to address issues like pay inequity, various forms of sex-based harassment, or treating a person inconsistent with their gender identity, because those are not themselves ''bases'' that involve consideration of sex, but rather, are examples of ways that sex discrimination may occur.

The Department declines to add marital status to § 106.10 because Title IX does not prohibit discrimination based on marital status *per se,* as discrimination based on marital status does not necessarily require consideration of a person's sex. Title IX does, however, prohibit a recipient from applying rules concerning marital status that treat individuals differently on the basis of sex (*e.g.,* treating married women more or less favorably than married men, treating an unmarried mother worse than a married mother based on sex stereotypes, treating a man who is married to a man worse than a woman who is married to a man). *See* 34 CFR 106.21(c), 106.37(a)(3), 106.40(a), 106.57(a), 106.60.

While the Department appreciates commenters' suggestions for including additional overlapping bases in § 106.10, the Department declines those suggestions as unnecessary. For example, as discussed in the July 2022 NPRM and below, the Department interprets ''sex characteristics'' to include ''intersex traits,'' and therefore declines to add the latter term into the regulatory text. 87 FR 41532. Similarly, the Department does not find it necessary to add commenters' suggested bases such as ''gender norms'' and ''gender expression,'' as each of these is rooted in one or more of the bases already represented in § 106.10 and does not need to be set out separately.

The Department agrees that § 106.10 extends to discrimination based on a perceived status, whether the perception is accurate or not, but this conclusion is already apparent from the text of the statute and relevant case law. Courts have recognized that discrimination based on perceived characteristics violates Title VII. *See Abercrombie & Fitch Stores,* 575 U.S. at 773–74 (holding that to prove religious discrimination under Title VII a plaintiff need not show that the employer had actual knowledge that the plaintiff needed a religious accommodation as long as the plaintiff could show that the perceived need for an accommodation was a motivating factor in the employer's adverse decision); *Roberts* v. *Glenn Indus. Group, Inc.,* 998 F.3d 111, 120–21 (4th Cir. 2021) (holding that discrimination based on perceived sexual orientation violates Title VII's prohibition on sex discrimination); *Jones* v. *UPS Ground Freight,* 683 F.3d 1283, 1299, 1304 (11th Cir. 2012) (holding that plaintiff who alleged race discrimination based, in part, on the use of epithets associated with ethnic or racial groups that differed from the plaintiff's actual ethnicity or race could survive a motion for summary judgment); *EEOC* v. *WC&M Enters., Inc.,* 496 F.3d 393, 401 (5th Cir. 2007) (quoting EEOC guidelines that state Title VII does not require a showing ''that the alleged discriminator knew the particular national origin group to which the complainant belonged [because] it is enough to show that the complainant was treated differently because of [their] foreign accent, appearance, or physical characteristics''). And the Supreme Court and lower Federal courts often rely on interpretations of Title VII to inform interpretations of Title IX, rendering it appropriate to do so here. *See, e.g., Franklin,* 503 U.S. at 75; *Jennings,* 482 F.3d at 695; *Frazier,* 276 F.3d at 65–66; *Gossett,* 245 F.3d at 1176. Further, at least one circuit court of appeals has held that Title IX similarly bars sex discrimination on the basis of perceived sex. *See Grabowski,* 69 F.4th at 1113, 1116–18 (holding that Title IX bars sexual harassment on the basis of perceived sexual orientation) (citing *Bostock,* 590 U.S. 644; *Price Waterhouse,* 490 U.S. 228). In *Grabowski,* the Ninth Circuit noted that the harassment at issue stemmed from the perception that a male student was attracted to men, was motivated by the impermissible sex stereotype that men should be attracted only to women, and thus may not have occurred if the student was a different sex. *See id.* at 1116; *id.* at 1117 (citing *Price Waterhouse,* 490 U.S. at 250; *Nichols* v. *Azteca Restaurant Enters., Inc.,* 256 F.3d 864, 874 (9th Cir. 2001)). Accordingly, as noted in the July 2022 NPRM, Title IX's broad prohibition on discrimination ''on the basis of sex'' includes, at a minimum, discrimination against an individual on the basis of their perceived sex, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. 87 FR 41532. The inclusion of sex stereotypes in § 106.10 further underscores the point that Title IX covers discrimination based on one person's perception of another, whether or not those perceptions are accurate.

The Department disagrees that noting the bases listed in § 106.10 are not exhaustive deprives recipients of notice of what constitutes sex discrimination. The Department proposed adding the bases in § 106.10 as examples to clarify the scope of Title IX's coverage of sex discrimination, which includes any discrimination that depends in part on consideration of a person's sex. The bases listed in § 106.10 are intended to provide recipients notice of the broad scope of prohibited sex discrimination.

This preamble and the preamble to the July 2022 NPRM use terms such as ''LGBTQI+,'' ''transgender,'' and ''intersex,'' for purposes of convenience and explanation, but they do not appear in, and therefore need not be defined for purposes of applying, the final regulations because no rights and obligations under the final regulations depend on use of those terms. For example, the Department uses the term ''LGBTQI+'' as shorthand to describe ''students who are lesbian, gay, bisexual, transgender, queer, questioning, asexual, intersex, nonbinary, or describe their sex characteristics, sexual orientation, or gender identity in another similar way.'' 87 FR 41395. The Department understands the term ''transgender'' to refer to a person whose sex assigned at birth differs from their gender identity. The Department explained in the July 2022 NPRM that the term ''intersex'' ''generally describes people with variations in physical sex characteristics. These variations may involve anatomy, hormones, chromosomes, and other traits that differ from expectations generally associated with male and female bodies.'' 87 FR 41532.

The Department declines the commenter's suggestion to reopen the comment period to consider the impact of *303 Creative LLC* v. *Elenis,* 600 U.S. 570 (2023), because the decision did not address the education context and would not change the final regulations, which already specify that nothing in these regulations requires a recipient to restrict rights protected under the First Amendment.

Changes: None.

2. Authority To Enact Regulations on Sexual Orientation and Gender Identity Discrimination

Comments: Some commenters supported § 106.10, noting that Title IX provides express statutory authority for the Department to enact regulations that are ''consistent with the achievement of the objectives'' of Title IX. 20 U.S.C. 1682. Some commenters supported § 106.10 because it is consistent with the Supreme Court's description of Title IX in *North Haven Board of Education,* 456 U.S. at 521. Similarly, some commenters said proposed § 106.10

would be consistent with prior and current Department guidance and enforcement; Executive Orders 13803, 13985, 13988, 14021, and 14075; Title VII case law, including *Price Waterhouse, Oncale,* and *Bostock;* and Federal court decisions recognizing that Title IX's prohibition on sex discrimination includes discrimination based on sexual orientation and gender identity.

Other commenters asserted that Title IX's legislative history lacks reference to sexual orientation and gender identity and expressed concern that coverage of these bases of discrimination in proposed § 106.10 would be at odds with Title IX's original purpose, which commenters argued was to protect the interests of women and girls.[87] Commenters also asserted that § 106.10 reflects an unexplained departure from the Department's historical interpretation of Title IX and exceeds the Department's authority under Title IX.

Commenters argued that ''sex'' should be interpreted according to the ordinary public meaning of the term when Title IX was enacted, that ''sex'' was understood by contemporary dictionaries and courts to refer to physiological differences between males and females, that the use of the term ''gender identity'' was very limited at that time, and that the term ''gender'' has been used in contradistinction to ''sex.'' Some commenters said that Title IX's references to ''both sexes,'' 20 U.S.C. 1681(a)(2), and ''one sex'' and ''the other sex,'' 20 U.S.C. 1681(a)(8), are at odds with coverage of sexual orientation and gender identity discrimination.

Commenters also cited examples in which courts and the Department have declined to interpret sex discrimination laws to include sexual orientation and gender identity discrimination.

Some commenters expressed concern that proposed § 106.10 would circumvent Congress, which has declined to pass bills that would clarify that Title IX's coverage of sex discrimination encompasses gender identity discrimination. H.R. 1652, 113th Cong. (2013); S. 439, 114th Cong. (2015).

Some commenters asserted that Title IX's contractual nature demands a narrow reading of the law and that § 106.10 exceeds Congress's power to impose funding conditions under the Constitution's Spending Clause. The commenters said that recipients could reasonably have read Title IX as ambiguous as to whether it covered sexual orientation and gender identity discrimination when they accepted funds, that the Department may not impose post-acceptance or retroactive conditions on Federal funds, and that private recipients of Federal funds must have notice of their responsibilities.

Some commenters asserted that the Department's interpretation of Title IX to cover sexual orientation and gender identity discrimination readjusts the balance between State and Federal authority, implicating the Tenth Amendment, sets up potential conflicts with State laws, weakens local control of education, and undermines the Department's compliance with the Department of Education Organization Act, 20 U.S.C. 3403(b). Other commenters, in contrast, supported the inclusion of sexual orientation and gender identity in proposed § 106.10, in part because it would be consistent with other anti-discrimination laws and the anti-discrimination policies already in place at some recipients.

Some commenters also objected to the July 2022 NPRM's citation to OCR's Notice of Interpretation—Enforcement of Title IX with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock* v. *Clayton County,* 86 FR 32637 (June 22, 2021) (*Bostock* NOI), *https://www.govinfo.gov/content/pkg/FR-2021-06-22/pdf/2021-13058.pdf.* Commenters said the Department cannot rely on the *Bostock* NOI as authority for § 106.10 because the U.S. District Court for the Eastern District of Tennessee preliminarily enjoined the Department from enforcing it against twenty States. *See Tennessee* v. *U.S. Dep't of Educ.,* 615 F. Supp. 3d 807, 842 (E.D. Tenn. 2022).

Some commenters objected to the Department's reliance on Executive Orders 13988 and 14021.

Discussion: The Department agrees with commenters that, as explained in more detail below, § 106.10 is consistent with the Department's statutory authority under Title IX, prior and current Department guidance, various Executive Orders, and Federal case law precedents. The Department's authority to issue regulations governing equal opportunity to participate in an education program or activity is well established. 20 U.S.C. 1682; 20 U.S.C. 1221e–3; 20 U.S.C. 3474; Education Amendments of 1974 section 844.

The Department disagrees with commenters who argued that coverage of sexual orientation and gender identity discrimination is at odds with the purpose of Title IX. The purpose of Title IX, as shown from its text and structure, is to broadly prohibit sex discrimination. It has appropriately been applied in contexts that are covered by that broad prohibition, even if Congress did not specify those contexts when the law was passed. The Supreme Court has long recognized that statutory prohibitions on sex discrimination encompass sexual harassment, *Davis,* 526 U.S. at 647–48 (Title IX); *Gebser,* 524 U.S. at 281 (Title IX); *Harris,* 510 U.S. at 21 (Title VII); *Franklin,* 503 U.S. at 74–75 (Title IX); *Meritor Sav. Bank,* 477 U.S. at 64 (Title VII); retaliation, *Jackson,* 544 U.S. at 173–74 (Title IX); discrimination against men, *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC,* 462 U.S. 669, 682 (1983) (Title VII); and same-sex sexual harassment, *Oncale,* 523 U.S. at 79 (Title VII); *Frazier,* 276 F.3d at 66 (''*Oncale* is fully transferable to Title IX cases''). Justice Scalia, writing for a unanimous Supreme Court, recognized that same-sex sexual harassment constitutes sex discrimination under Title VII because ''statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'' *Oncale,* 523 U.S. at 79; *cf. Bostock,* 590 U.S. at 680–81 (rejecting employers' request that the Court base its decision on what the Court thinks is best instead of interpreting the underlying statute). The authority to address sexual orientation discrimination and gender identity discrimination as sex discrimination under Title IX, including supportive and contrary case law, is addressed in more detail in the separate discussion of those bases below.

The Department disagrees with commenters who asserted that the statute's use of the terms ''both sexes,'' ''one sex,'' and ''the other sex'' suggests that the statute does not cover sexual orientation and gender identity discrimination. As explained in the July 2022 NPRM, Title IX's coverage of discrimination based on sexual orientation and gender identity does not depend on whether sex is defined to encompass only certain biological characteristics. 87 FR 41531–32. Indeed, *Bostock's* reasoning dictates that, even assuming that ''sex'' refers to ''biological distinctions between male and female,'' discrimination against a person because

[87] One commenter argued that even though *Bostock* held that in 1964 Congress intended to cover sexual orientation and gender identity discrimination under Title VII, Congress's intent in passing Title IX must reflect Congress's understanding of sex discrimination in 1972, which the commenter asserted would not cover discrimination based on sexual orientation or gender identity.

they are gay or transgender is, in part, discrimination on the basis of sex. *See Bostock,* 590 U.S. at 659–62. The Department recognizes that some early Federal court decisions did not recognize sexual orientation and gender identity discrimination as sex discrimination, but many subsequent Federal court decisions have declined to extend those earlier decisions.[88] Some of these subsequent decisions cited intervening decisions of the U.S. Supreme Court, including *Bostock,* which recognized that Title VII's prohibition on sex discrimination encompasses sexual orientation and gender identity discrimination, and *Price Waterhouse,* 490 U.S. at 251, which recognized that Title VII's prohibition on sex discrimination encompasses discrimination based on a failure to conform to stereotypical gender norms.

Federal courts' more recent analyses of Title IX's coverage of sexual orientation and gender identity discrimination are more persuasive because they apply *Bostock* and *Price Waterhouse* and acknowledge the full scope of Title IX's prohibition on sex discrimination. *See, e.g., Grabowski,* 69 F.4th at 1113 (Title IX prohibits sexual orientation discrimination); *Grimm,* 972 F.3d at 616 (Title IX prohibits gender identity discrimination); *Whitaker,* 858 F.3d at 1049 (same); *cf. Adams* v. *Sch. Bd. of St. Johns Cnty.,* 57 F.4th 791, 808–09 (11th Cir. 2022) (recognizing that *Bostock* held that discrimination because a person is gay or transgender ''necessarily entails discrimination based on sex,'' but opining that this holding did not resolve the question of whether a school board's policy excluding transgender students from bathrooms consistent with their gender identity was otherwise permissible under Title IX).

Although Congress has not amended Title IX to clarify its application to sexual orientation and gender identity discrimination, the Department agrees with the Supreme Court that ''congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.'' *LTV Corp.,* 496 U.S. at 650 (citations and quotations omitted). The Department's interpretation of Title IX flows from the statute's ''plain terms,'' *see Bostock,* 590 U.S. at 662–63, 674–76, and is consistent with the recent analysis of the statute's text and structure by various Federal courts, *see Grabowski,* 69 F.4th at 1113; *Grimm,* 972 F.3d at 616.

The Department disagrees with commenters who argued that Title IX's contractual nature demands a narrow reading of the law or that § 106.10 constitutes an unfair surprise or retroactive condition. While Title IX is in the nature of a contract, under Congress's Spending Clause authority, recipients have been on notice since enactment of Title IX that the statute means that no recipient may discriminate on the basis of sex. *See Jackson,* 544 U.S. at 175 (''Because Congress did not list any specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered.''); *see also Bennett,* 470 U.S. at 665–66, 673 (noting that ''the possibility that application of [the condition] might be unclear in [some] contexts'' does not render it unenforceable under the Spending Clause); *Sch. Bd. of Nassau Cnty.* v. *Arline,* 480 U.S. 273, 184, 286 n.15 (1987) (holding that individuals with contagious diseases are covered by Section 504 and rejecting lack of notice objections given Spending Clause statute's broad nondiscrimination mandate); *Grimm,* 972 F.3d at 619 n.18. Moreover, the notice required for the Spending Clause is satisfied by the text itself; just as the Supreme Court held in *Bostock* regarding Title VII, it is clear from the statutory text that, by its plain terms, Title IX covers discrimination that, like sexual orientation and gender identity discrimination is based on ''sex.'' *Cf. Bostock,* 590 U.S. at 662–63 (holding Title VII's prohibition on discrimination on the basis of sexual orientation or gender identity flows from the statute ''plain terms''). Further, this rulemaking process has afforded recipients notice and opportunity to comment, and recipients that do not wish to comply with the requirements of the final regulations have had and continue to have the opportunity to decline Federal funding. Further, the Department will not—and does not have the authority to—enforce these final regulations retroactively; they apply only to sex discrimination that allegedly occurred on or after August 1, 2024.

Consistent with Title IX, the final regulations provide for an appropriate balance between State and Federal authority. By statute, Congress has conferred authority on the Department to promulgate regulations under Title IX to effectuate the purposes of Title IX. 20 U.S.C. 1682. Compliance with Title IX and its implementing regulations is ''much in the nature of a contract,'' because, ''in return for federal funds, the States agree to comply with federally imposed conditions.'' *Pennhurst,* 451 U.S. at 17. Consistent with its position with respect to the 2020 amendments, the Department maintains that, through these final regulations, it is not compelling recipients to do anything. Recipients—including States and educational institutions—agree to comply with Title IX and its implementing regulations as part of the bargain for receiving Federal financial assistance, so that Federal funds are not used to support sex discrimination. *See* 85 FR 30459. States retain the ability to further address discrimination on the basis of sex in education in a manner that complies with these final regulations.

Accordingly, the Department disagrees that it lacks the delegated authority to promulgate § 106.10. In enacting Title IX, Congress conferred the power to promulgate regulations on the Department. 20 U.S.C. 1682. The Supreme Court has noted that ''[t]he express statutory means of enforc[ing] [Title IX] is administrative,'' as ''th[at] statute directs federal agencies that distribute education funding to establish requirements to effectuate the nondiscrimination mandate, and permits the agencies to enforce those requirements through 'any . . . means authorized by law' including ultimately the termination of federal funding.'' *Gebser,* 524 U.S. at 280–81 (quoting 20 U.S.C. 1682). The Supreme Court has held that sex discrimination, as prohibited by Title VII, encompasses discrimination based on sexual orientation and gender identity, *Bostock,* 590 U.S. at 659–62, and lower courts have applied this reasoning to Title IX, *see, e.g., Grabowski,* 69 F.4th at 1116; *Grimm,* 972 F.3d at 616. Section 106.10's coverage of discrimination on the basis of sexual orientation and gender identity is consistent with these Federal court holdings and is properly promulgated to effectuate the purposes of Title IX's nondiscrimination mandate.

Additionally, with respect to concerns that coverage of sexual orientation and gender identity discrimination under § 106.10 will lead to conflicts with State laws, the Department notes that the obligation to comply with Title IX and these final regulations is not obviated or alleviated by any State or local law or other requirements that conflict with Title IX and these final regulations. As

[88] *See, e.g., Ulane* v. *Eastern Airlines,* 742 F.2d 1081, 1085–87 (7th Cir. 1984), *not followed as dicta by Hively* v. *Ivy Tech Cmty. Coll. of Indiana,* 853 F.3d 339 (7th Cir. 2017); *Sommers* v. *Budget Mktg., Inc.,* 667 F.2d 748, 750 (8th Cir. 1982); *Holloway* v. *Arthur Andersen & Co.,* 566 F.2d 659, 664 (9th Cir. 1977), *overruling recognized by Schwenk* v. *Hartford,* 204 F.3d 1187, 1201–02 (9th Cir. 2000).

addressed in more detail in the discussion of § 106.6(b), it is well established that State laws can be preempted by Federal statutes and regulations when it is impossible for a private party to comply with both State and Federal requirements or because State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See Freightliner Corp.,* 514 U.S. at 287; *Hillsborough Cnty.,* 471 U.S. at 713; *Planned Parenthood of Hous.,* 403 F.3d 324; *O'Brien,* 162 F.3d 40. As long as State laws do not conflict with Title IX and these final regulations, recipients should be able to comply with State laws as well as these final regulations.

Relatedly, the Department disagrees that Title IX's coverage of sexual orientation and gender identity discrimination inappropriately infringes on the responsibility of State and local governments to provide public education or prevents States from customizing policies for their local communities. Nothing in these regulations prevents States or local governments from adopting innovative and customized approaches to education, as long as they are consistent with Title IX's prohibition on sex discrimination. And Title IX does not dictate curriculum. *See* 34 CFR 106.42 (''Nothing in [theseTitle IX regulations]shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.''). The Department declines to highlight examples of existing State laws and policies that directly conflict with Title IX because the Department refrains from offering opinions about specific laws or policies without an evaluation of all of the relevant facts.

The Department also disagrees with commenters who stated that the final regulations exceed the Department's authority under the Department of Education Organization Act; the final regulations do not grant the Department authority to direct, supervise, or control the administration or personnel of any recipient. 20 U.S.C. 3403(b).

The Department acknowledges that a district court entered a preliminary injunction barring the Department from enforcing its *Bostock* NOI against twenty States because the court concluded that the plaintiffs were likely to succeed on their claim that the *Bostock* NOI and other accompanying documents were required to go through notice-and-comment rulemaking. *Tennessee,* 615 F. Supp. 3d at 840. The Department disagrees with the conclusion and is appealing that ruling. But the district court's holding has no bearing on the Department's statutory authority to promulgate and amend its Title IX regulations as failure to employ notice-and-comment rulemaking was the ground upon which the *Tennessee* court enjoined that notice. The Department disagrees that the cases commenters cited prevent the Department from regulating on Title IX's application to sexual orientation or gender identity discrimination. *Mann Construction, Inc.* v. *United States,* 27 F.4th 1138 (6th Cir. 2022), for example, does not involve Title IX and examines notice-and-comment rulemaking requirements. Here, however, the Department has complied with all applicable APA requirements for this rulemaking, and thus, *Mann* does not apply.

The Department also clarifies that it did not rely on Executive Orders 13988 or 14021 for its interpretation of Title IX. Rather, these orders directed the Department to review its current regulations implementing Title IX for consistency with Title IX's statutory prohibition on sex discrimination. The Department's statutory authority for § 106.10 comes from Title IX, 20 U.S.C. 1682, and other statutes, 20 U.S.C. 1221e–3 and 3474.

Changes: None.

3. Reliance on Bostock and Title VII Case Law

Comments: Some commenters noted that Federal courts have found that discrimination on the basis of sexual orientation and gender identity is sex discrimination under Title VII, Title IX, and other laws, and noted that courts have historically equated the meaning of sex discrimination under Title IX with Title VII and looked to Title VII to interpret Title IX.

Other commenters objected to the Department's reliance on Title VII case law because of differences between Title IX and Title VII, including that Title IX expressly permits separation or different treatment of students based on sex in certain contexts and because education and employment are different in analytically material ways; that Title IX has a contractual framework whereas Title VII is framed as an outright prohibition; that Title IX is ''sex-affirmative'' and expressly permits some sex-based distinctions whereas Title VII is ''sex-prohibitive;'' and that the text of Title VII's prohibition on discrimination ''because of sex'' and Title IX's prohibition on discrimination ''on the basis of sex'' are sufficiently different that the reasoning of *Bostock* should not apply to the latter.

Some commenters objected to the Department's reliance on *Bostock* for explicitly including sexual orientation and gender identity discrimination under Title IX, arguing that the Supreme Court assumed that ''sex'' referred to ''biological distinctions between male and female,'' 590 U.S. at 655, framed the issue before it narrowly, and stated that the decision did not apply to other Federal laws that prohibit sex discrimination, *id.* at 681. Some commenters asserted that discrimination against a person for being ''nonbinary'' or ''bisexual'' may not require consideration of sex in the same way the *Bostock* Court analyzed discrimination because a person is gay or transgender.

Some commenters argued that the Department did not provide a persuasive explanation for its change from the position taken in a memorandum from its General Counsel's office commenting on *Bostock's* application to Title IX. U.S. Dep't of Educ., Memorandum from Principal Deputy General Counsel delegated the authority and duties of the General Counsel Reed D. Rubinstein to Kimberly M. Richey, Acting Assistant Secretary of the Office for Civil Rights re *Bostock* v. *Clayton Cnty.* (Jan. 8, 2021) (archived and marked not for reliance in March 2021) (Rubinstein Memorandum), *https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf.* Some commenters urged that the final regulations should not extend beyond the boundaries of the Rubinstein Memorandum, which they argued is consistent with *Bostock* and better protects cisgender women and girls from discrimination.

Discussion: Some courts have declined to extend the Supreme Court's reasoning in *Bostock* to Title IX by concluding that prohibitions on discrimination ''because of sex'' and discrimination ''on the basis'' of sex do not mean the same thing. *See, e.g., Neese* v. *Becerra,* 640 F. Supp. 3d 668, 675–84 (N.D. Tex. 2022). The Department disagrees. Both phrases simply refer to discrimination motivated in some way by sex. Indeed, the Supreme Court has used the terms ''because of'' and ''on the basis of'' interchangeably, including in *Bostock* itself. *Bostock,* 590 U.S. at 650 (''[I]n Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin.''); *see also Meritor Sav. Bank,* 477 U.S. at 64 (''[W]hen a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on

the basis of sex.''). And like Title VII, Title IX's prohibition on discrimination ''on the basis of'' sex clearly encompasses discrimination on the basis of sexual orientation and gender identity, given that such bases of discrimination meet the same but-for causation test relied upon in *Bostock. See, e.g., Sheppard* v. *Visitors of Va. State Univ.,* 993 F.3d 230, 236–37 (4th Cir. 2021); *cf. Radwan* v. *Manuel,* 55 F.4th 101, 131–32 (2d Cir. 2022) (addressing but not deciding the question). Indeed, some courts have construed Title IX to impose a ''motivating factor'' standard, and discrimination based on sexual orientation and gender identity is motivated, at least in part, by sex. *See, e.g., Doe* v. *William Marsh Rice Univ.,* 67 F.4th 702, 708–09 (5th Cir. 2023). As *Bostock* explained, ''under this more forgiving [motivating factor] standard, liability can sometimes follow even if sex wasn't a but-for cause of the . . . challenged decision.'' 590 U.S. at 657. Nonetheless, the Court concluded that even ''the more traditional but-for causation standard'' encompassed discrimination on the basis of sexual orientation and gender identity. *Id.* Thus, Title IX's statutory text is no more permissive of discrimination on the basis of sexual orientation and gender identity than Title VII's.

With respect to the justification for changes from the position taken in the now-archived Rubinstein Memorandum, the Department explained in the July 2022 NPRM that the Department found that the position taken in the Rubinstein Memorandum was at odds with Title IX's text and purpose and the reasoning of the courts that had considered the issue. 87 FR 41531–37. In particular, the Department found that Title IX and its implementing regulations did not determinatively set forth the definition of ''sex'' to mean ''biological sex.'' 87 FR 41537. The Department agrees, however, that even assuming ''sex'' means ''biological sex,'' Title IX's prohibition on sex discrimination encompasses sexual orientation and gender identity discrimination. *See* 87 FR 41531. A recipient would not therefore need to determine on a case-by-case basis whether a particular incident of sexual orientation or gender identity discrimination is rooted in ''biological sex'' as discrimination on these bases always demands consideration of sex. The Department is also concerned that a narrower interpretation could exclude some individuals from Title IX protections that properly apply to all students. Indeed, the Department recognized this concern in the Rubinstein Memorandum. *See* Rubinstein Memorandum at 2 (declining to conclude that all sexual orientation discrimination constitutes sex discrimination, but suggesting that *Bostock*'s analysis ''would logically extend to individuals who allege discrimination on the basis that they are heterosexual or non-transgender.'')

With respect to the Supreme Court's decision in *Bostock,* the Department first notes that the Court did not adopt a particular definition of ''sex'' in *Bostock,* instead ''assum[ing]'' a definition provided by the employers that the employees had accepted ''for argument's sake.'' 590 U.S. at 655. The Court made clear that ''nothing in [its] approach to these cases turn[ed] on the outcome of the parties' debate'' about the definition of sex. *Id.* The same is true here. Nothing in the Department's interpretation of the scope of discrimination ''on the basis of sex'' under Title IX turns on resolving the meaning of sex because, as in *Bostock* and as explained further below, it is impossible to discriminate against a person on the bases listed in § 106.10 without discriminating against that individual based, at least in part, on sex, even if ''sex'' is understood only in terms of certain physiological sex characteristics.

The Department disagrees with the commenter who argued that discrimination against a person because they are nonbinary or bisexual does not require consideration of a person's sex. As the Court explained in *Bostock,* such traits are ''inextricably bound up with sex.'' 590 U.S. at 660–61. Moreover, it is plainly sex discrimination under longstanding Supreme Court precedent to treat a person worse because of their gender nonconformance. *See Price Waterhouse,* 490 U.S. at 251. A person's nonconformity with expectations about the sex of the person to whom they should be attracted or the sex with which they should identify implicate one's sex, and discrimination on that basis is prohibited. *See Whitaker,* 858 F.3d at 1048.

The Department acknowledges that *Bostock* interpreted Title VII and did not purport to interpret other Federal laws or address issues not raised in that litigation. *See* 590 U.S. at 681. The Department notes that this is consistent with the principle that Federal courts may not provide advisory opinions and are limited to deciding particular cases and controversies. *See, e.g., Carney* v. *Adams,* 592 U.S. 53, 58 (2020). As noted above, because the statutory prohibitions against sex discrimination in Title VII and Title IX are similar, the Supreme Court and other Federal courts look to interpretations of Title VII to inform Title IX. Thus, *Bostock*'s discussion of the text of Title VII appropriately informs the Department's analysis of Title IX. Since *Bostock,* three Federal courts of appeals have held that the plain language of Title IX's prohibition on sex discrimination must be read similarly to Title VII's prohibition. The Department agrees with the reasoning in these cases. *See A.C. by M.C.* v. *Metro. Sch. Dist. of Martinsville,* 75 F.4th 760, 769 (7th Cir. 2023); *Grabowski,* 69 F.4th at 1116–17; *Doe* v. *Snyder,* 28 F.4th 103, 113–14 (9th Cir. 2022); *Grimm,* 972 F.3d at 616.

More broadly, the Department also disagrees with commenters who argued that Title VII case law should not be considered when interpreting the scope of prohibited sex discrimination under Title IX. Federal courts, including the Supreme Court, often look to interpretations of other laws barring sex discrimination, particularly Title VII, when analyzing Title IX.[89]

The Department also disagrees with commenters who asserted that the fact that Title IX and its regulations include several express exceptions that permit recipients to separate or treat students differently on the basis of sex under certain circumstances prevents the Department from interpreting Title IX's broad prohibition on sex discrimination consistent with courts' interpretation of Title VII or other Federal sex discrimination laws. Indeed, like Title IX, Title VII also includes an exception that allows an employer to differentiate or separate individuals on the basis of sex in certain circumstances. *See* 42 U.S.C. 2000e–2(e)(1) (allowing an employer to consider a person's sex in employment decisions where a person's sex is ''a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise''). In addition, like Title IX, Title VII has also been interpreted to permit employers to offer sex-separate facilities despite its ''sex-prohibitive'' framework. *See, e.g.,* U.S. Equal Emp. Opportunity Comm'n, *Sexual Orientation and Gender Identity (SOGI) Discrimination, https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination* (last visited Mar. 12, 2024). The Department therefore disagrees that Title IX's

[89] *See, e.g., Davis,* 526 U.S. at 631 (holding that Title VII agency principles do not apply in determining liability for money damages under Title IX, but finding Title VII remains relevant in determining what constitutes sex discrimination under Title IX); *Olmstead* v. *L.C. ex rel. Zimring,* 527 U.S. 581, 617, n.1 (1999) (Thomas, J., dissenting) (''This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX.'').

limited allowance for separate or different treatment on the basis of sex in certain contexts prevents the Department from relying on Title VII case law to inform its interpretation of Title IX's general prohibition on sex discrimination.

Changes: None.

4. Sexual Orientation and Gender Identity Discrimination Generally

Comments: Some commenters shared views on Title IX's coverage of sexual orientation and gender identity discrimination together. Comments that separately address coverage of those bases are discussed in separate sections below.

Many commenters expressed support for the proposed inclusion of sexual orientation and gender identity in proposed § 106.10 because they stated that it would: help recipients create more inclusive, safe, and supportive environments for all students, allowing for equal and equitable access to education; protect LGBTQI+ students and families from sex discrimination in schools; help reduce elevated rates of discrimination, suicidality, and bullying experienced by LGBTQI+ students; be consistent with congressional intent in passing Title IX, which was to broadly prohibit sex discrimination; and ensure that Title IX is given ''a sweep as broad as its language.'' Other commenters supported the inclusion of sexual orientation and gender identity in proposed § 106.10, noting the high levels of sex discrimination, including sex-based harassment, against LGBTQI+ students and school employees and the negative effects of such discrimination.

Some commenters expressed concern that coverage of sexual orientation and gender identity discrimination will harm religious students, including religious students who do not attend recipient institutions that are eligible for a religious exemption, particularly if they could be held responsible for conduct that does not constitute intentional discrimination (*e.g.,* expressing a religious belief that another individual finds offensive). Commenters also asserted that institutions with conflicting religious beliefs would be forced to choose between accepting Federal funding and adopting policies and curricula related to sexual orientation and gender identity that align with their religious beliefs. Some commenters opposed proposed § 106.10 because students who participate in Federal financial aid programs may be unable to attend their college of choice if those colleges choose to forego Federal funds to avoid obligations under the proposed regulations.

Some commenters asked the Department to amend proposed § 106.2 to include definitions of conduct and practices that may constitute discrimination on the bases of sexual orientation and gender identity, including intentional use of offensive language, and to distinguish between genuine mistakes and repeated and intentional conduct.

Some commenters raised concerns that proposed coverage of sexual orientation and gender identity discrimination will be costly for recipients to implement and may make recipients vulnerable to costly and increased complaints, investigations, and litigation. Some commenters requested that the Department issue additional guidance and provide technical assistance and training with regard to best practices creating educational environments free from discrimination against LGBTQI+ students and families, and responding promptly and appropriately to all complainants regardless of sexual orientation and gender identity.

Discussion: The Department agrees with commenters who noted that discrimination based on sexual orientation and gender identity is a serious problem that the final regulations' clarification of the scope of sex discrimination will help to address in the context of federally funded education programs and activities. The Department also agrees that the final regulations will increase the inclusion and the safety of LGBTQI+ students and employees in schools; provide them with access to a process to address sex-based harassment; and be consistent with the text and intent of Title IX. The Department agrees with the comments that the inclusion of sexual orientation and gender identity in § 106.10 will improve consistency between Title IX and the nondiscrimination laws of some States and the policies of many recipients.

The Department disagrees with the contention that including sexual orientation and gender identity in the scope of § 106.10 harms women. Recognizing these bases of sex discrimination under Title IX in no way lessens the force of Title IX's protections against discrimination that limits educational opportunities for girls and women. Further, discrimination based on sexual orientation or gender identity is typically motivated by the same sex stereotypes that limit opportunities for women regardless of whether they identify as LGBTQI+. *See, e.g., Price Waterhouse,* 490 U.S. at 250 (''In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.''); *Grabowski,* 69 F.4th at 1117 (holding that discrimination against a student because they do not conform to a particular masculine or feminine sex stereotype is prohibited under Title IX); *Whitaker,* 858 F.3d at 1049 (''A policy that . . . punishes [an] individual for his or her gender non-conformance . . . violates Title IX.''); *Pederson* v. *La. State Univ.,* 213 F.3d 858, 880 (5th Cir. 2000) (recognizing that a university violated Title IX when its athletic funding decisions were based on ''paternalism and stereotypical assumptions about [women's] interests and abilities,'' and a ''remarkably outdated view of women and athletics''); *Videckis* v. *Pepperdine Univ.,* 150 F. Supp. 3d 1151, 1160 (C.D. Cal. 2015) (''It is undisputed that Title IX forbids discrimination on the basis of gender stereotypes.''); *Pratt* v. *Indian River Cent. Sch. Dist.,* 803 F. Supp. 2d 135, 152 (N.D.N.Y. 2011) (holding that allegations of peer harassment based on nonconformity or perceived nonconformity with sex stereotypes state a claim under Title IX); *cf. United States* v. *Virginia,* 518 U.S. 515, 533 (1996) (stating that in making classifications based on sex, the State ''must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.'').

With respect to concerns about potential conflicts with beliefs of religious students and institutions, the Department notes that it is fully committed to respecting rights protected under the First Amendment and adhering to Title IX's religious exemption. A recipient's compliance with the final regulations must be carried out consistent with § 106.6(d), which specifies that nothing in these regulations requires a recipient to restrict rights protected under the First Amendment or any other constitutional provisions, and no other provision authorizes such action. Further, Title IX does not ''apply to an educational institution which is controlled by a religious organization if the application of [20 U.S.C. 1681(a)] would not be consistent with the religious tenets of such organization.'' 20 U.S.C. 1681(a)(3).

The Department declines the suggestion to add definitions of specific conduct and practices that constitute sexual orientation or gender identity discrimination because the Department refrains from offering opinions about how the regulations apply to specific facts without first conducting an investigation. The Department notes

that school policies that limit or deny a student's participation in a recipient's education program or activity on the basis of that student's sexual orientation or gender identity are subject to Title IX's prohibitions on sex discrimination. The Department will investigate complaints and make fact-specific determinations, as appropriate, to determine whether a particular practice or policy limits or denies a student their right to participate in the recipient's education program or activity free from sex discrimination. 34 CFR 100.7 (incorporated through 34 CFR 106.81).

The Department is cognizant that some commenters disagree with Title IX's coverage of sexual orientation and gender identity discrimination, but the Department is guided by the text and purpose of the statute. The Department's goal in adopting § 106.10 is to clarify the scope of Title IX's prohibition on sex discrimination, consistent with Title IX's text and purpose and the interpretations of Federal courts.

Likewise, the Department maintains that it has sufficiently examined relevant data on the impact of these regulations and accounted for such impact. In connection with the clarification of Title IX's scope under § 106.10, the Department's view is that articulating this standard will result in greater nondiscrimination protection, which in turn will result in more students able to access education and employees able to work free from sex discrimination. For a detailed analysis of costs and benefits related to the final regulations, please see the *Regulatory Impact Analysis.* These final regulations protect recipients' discretion to shape responses to sex discrimination in nondiscriminatory ways that account for the needs of the parties involved. The final regulations clarify the scope of a recipient's legal obligations. They do not, however, specify outcomes for all scenarios, which will turn on particular facts and circumstances.

The Department agrees that discrimination or hostility toward LGBTQI+ students, parents, guardians, caregivers, and family members can deny students' equal access to educational opportunities. Anyone who believes that a recipient has engaged in prohibited discrimination against a person participating or attempting to participate in the recipient's education program or activity may file a complaint with OCR.

Changes: None.

5. Gender Identity

Comments: In addition to the comments discussed above, the Department received comments specifically focused on coverage of gender identity discrimination under proposed § 106.10. Some commenters urged the Department to articulate a specific definition of ''gender identity,'' or clarify if certain identities would constitute ''gender identity'' under proposed § 106.10. Some commenters argued that the term ''gender identity'' is subjective, unconstitutionally vague, overbroad, and requires ''self-identification'' of which others may not be aware, or that may change unbeknownst to a recipient. One commenter asserted that the failure to define the term makes it impossible for recipients to determine how to adequately ensure they do not discriminate on that basis.

Other commenters asked for clarity on how a recipient must balance a student's allegations of gender identity discrimination against another student's right to freedom of expression.

Some commenters asked whether the prohibition on gender identity discrimination protects only transgender people. One commenter stated that it would be more consistent with *Bostock* to frame proposed § 106.10 as discrimination based on transgender status.

Other commenters urged the Department to modify proposed § 106.10 or another section of the regulations to permit recipients to separate students based on biological sex rather than gender identity when reasonable to ensure privacy, safety, and fairness.

One commenter asked the Department to clarify how Title IX's coverage of gender identity discrimination may overlap with court decisions treating gender dysphoria as a disability under the Americans with Disabilities Act.

Discussion: The Department disagrees that the term ''gender identity'' is too vague, subjective, or overbroad a term to incorporate in the Title IX regulations, or that it is necessary to further clarify what ''gender identity'' means in the regulations. The Department understands gender identity to describe an individual's sense of their gender, which may or may not be different from their sex assigned at birth. Courts have used the term consistent with this understanding, *see Bostock,* 590 U.S. at 660, 669; *Parents for Priv.* v. *Barr,* 949 F.3d 1210, 1217 (9th Cir. 2020); *Whitaker,* 858 F.3d at 1049, sometimes with only a brief explanation, *Grimm,* 972 F.3d at 594 (''gender identity—or their deeply felt, inherent sense of their gender''); *Boyertown Area Sch. Dist.,* 897 F.3d at 522 (''A person's gender identity is their subjective, deep-core sense of self as being a particular gender''); *Schroer* v. *Billington,* 577 F. Supp. 2d 293, 295 (D.D.C. 2008). The term is now well understood as it is used widely in laws and policies, and so the Department determined that—consistent with the approach taken by many courts—it is unnecessary to articulate a specific definition of ''gender identity'' in § 106.10.

The Department appreciates a commenter's recognition that one person may not know another's gender identity without inquiring unless the other person volunteers the information. This, however, does not undermine the fact that gender identity discrimination is sex discrimination. By comparison, one person may not know another person's sexual orientation, religion, race, or national origin without asking, but may still discriminate against them by, for example, harassing them on one of those bases in a manner that creates a hostile educational environment, or by discriminating against them based on perceived traits. To comply with the prohibition on gender identity discrimination, a recipient must not treat individuals more or less favorably based on their gender identity and, as described in more detail in the discussion of § 106.31(a)(2), generally may not prevent a person from participating in its education program or activity consistent with the person's gender identity.

The Department declines the suggestion to revise § 106.10 to address separation of students based on sex. Permissible sex separation under the statute is discussed further below in the discussion of § 106.31(a)(2).

The Department declines the suggestion to include discrimination based on transgender status instead of or in addition to discrimination based on gender identity in § 106.10. *Bostock* instructs that when a person is discriminated against because their gender identity is not consistent with their sex assigned at birth, ''sex'' is, at least in part, a basis for that discrimination. *See Bostock,* 590 U.S. at 669. This therefore includes discrimination against a person because they are transgender, or because they identify in some other way that is inconsistent with their sex assigned at birth. *See id.* at 669, *see also, e.g., Doe* v. *Mass. Dep't of Corr.,* No. CV 17–12255, 2018 WL 2994403 (D. Mass. June 14, 2018); *EEOC* v. *R.G. & G.R. Harris Funeral Homes, Inc.,* 884 F.3d 560 (6th Cir. 2018); *Whitaker,* 858 F.3d 1034. The Department also notes that a dissent in *Bostock* asserted that ''there is no apparent difference between discrimination because of transgender status and discrimination because of

gender identity.'' 590 U.S. at 686, n.6 (Alito, J. joined by Thomas, J., dissenting). The Department has determined that ''gender identity'' encompasses a person's ''transgender status,'' but is a more widely understood term that more accurately and fully reflects the scope of Title IX's protections.

With respect to the need to respond to a student's allegations of gender identity discrimination while respecting another student's right of freedom of expression, there is no inherent conflict between one student's right to be free from sex discrimination and another student's right to freedom of expression, and the Department notes that it is fully committed to respecting rights protected under the First Amendment. For additional discussion of the First Amendment, see the definition of Hostile Environment Sex-Based Harassment—First Amendment Considerations (Section I.C) (§ 106.2).

With respect to the question about gender dysphoria, the Department notes that the Fourth Circuit recognized that Congress directed ''courts [to] construe the ADA in favor of maximum protection for those with disabilities,'' and saw ''no legitimate reason why Congress would intend to exclude from the ADA's protections transgender people who suffer from gender dysphoria.'' *Williams* v. *Kincaid,* 45 F.4th 759, 769–70, 773 (4th Cir. 2022), *cert. denied,* 143 S. Ct. 2414 (June 30, 2023) (No. 22–633). A recipient may have overlapping obligations not to discriminate against a transgender individual based on disability in addition to the final regulations' prohibition on gender identity discrimination.

Changes: None.

6. Sexual Orientation

Comments: Some commenters urged the Department to define ''sexual orientation'' and clarify what conduct may be considered discrimination or harassment based on sexual orientation. Some commenters who opposed protections based on sexual orientation argued that the term is vague and could be interpreted in ways that harm students or encompass particular sexual practices or abusive or criminal conduct. One commenter expressed concern that the July 2022 NPRM conflates ''gay'' with ''queer'' and that ''queer'' can be interpreted very broadly.

One commenter asked whether a recipient can apply provisions permitting sex separation to separate students by sexual orientation.

Another commenter asked the Department to clarify that Title IX does not and cannot interfere with the private associational rights of lesbian, gay, and bisexual individuals.

Discussion: The Department disagrees with commenters who asserted that the term ''sexual orientation'' must be defined in the Title IX regulations. Courts routinely use the term without providing an express definition. *See, e.g., Bostock,* 590 U.S. at 653–54, 671; *Grabowski,* 69 F.4th at 1113; *Hively,* 853 F.3d at 340. The term is now well understood as it is used widely in laws and policies. The Department strongly disagrees with commenters who falsely suggested that protection from sexual orientation discrimination would encompass abusive and criminal conduct that does not describe the sex of a person to whom another person is attracted, as the term sexual orientation is commonly understood to mean. Further, the idea that stronger protections for lesbian, gay, and bisexual individuals will result in protections for abusive or criminal activity is itself grounded in harmful sex stereotypes.

The Department recognizes that a concept like sexual orientation is distinct from sex, even if it is ''inextricably bound up with sex,'' *cf. Bostock,* 590 U.S. at 660–61. As discussed above, § 106.10 does not define ''sex,'' but rather clarifies the scope of Title IX's prohibition on ''sex discrimination.'' When the regulations permit separation on the basis of ''sex,'' § 106.10 does not permit a recipient to separate students on the basis of sexual orientation or other bases in § 106.10, such as pregnancy or sex stereotypes. Indeed, a recipient's intentional separation or different treatment of students based on their sexual orientation generally would constitute sex discrimination under the final regulations. *Cf. Bostock,* 590 U.S. at 659–62.

The final regulations prohibit discrimination on the basis of sexual orientation under Title IX. *See* § 106.10. Nothing in these final regulations impacts any private associational rights of lesbian, gay, and bisexual individuals.

Changes: None.

7. Sex Characteristics

Comments: Some commenters applauded the inclusion of an explicit prohibition on discrimination based on sex characteristics in proposed § 106.10. Commenters asserted that discrimination based on sex characteristics, including intersex traits, is invariably motivated by sex-based considerations, and coverage under Title IX is thus consistent with the reasoning of *Bostock* and other Federal court precedent. Some commenters asserted that the 2020 amendments failed to clarify the nondiscrimination protections for people whose anatomy is neither typically male nor typically female. Other commenters objected to the Department's reliance on court cases that address gender identity discrimination and asserted that the term ''sex characteristics'' should not encompass ''gender identity.''

Some commenters urged the Department to clarify the term ''sex characteristics,'' because they believed the term is vague, should be explicitly limited to mean only male or female, or should only refer to reproductive sex traits. Some commenters asserted that coverage of discrimination based on sex characteristics should be based on objective medical analysis or observation and limited to conditions affecting an individual's reproductive capacity. A commenter argued that sex characteristics should not be based on a subjective perception of one's identity. The commenter argued that the Department's assertion that ''[d]iscrimination based on intersex traits is rooted in perceived differences between an individual's specific sex characteristics and those that are considered typical for their sex assigned at birth'' is vague and misleading. 87 FR 41532.

Some commenters supported the proposed prohibition on discrimination on the basis of sex characteristics because it would protect intersex people from discrimination and denial of educational opportunities. Commenters noted that discrimination against intersex individuals is often rooted in sex stereotypes. One commenter urged the Department to provide examples of prohibited discrimination that intersex students may face, such as harassment based on a student's visible nonconformity with sex stereotypes caused by their intersex traits, inappropriate disclosure of medical information about a student's intersex traits, or denial of access to sex-separate facilities consistent with a student's gender identity based on a student's intersex traits.

One commenter objected to the term ''intersex,'' arguing that it is a colloquial term, and suggested that the term ''differences of sex development'' is more accurate.

Discussion: The Department agrees with commenters that the prohibition on discrimination based on sex characteristics in § 106.10 is consistent with Title IX and sex discrimination case law. *See, e.g., Bostock,* 590 U.S. at 669 (addressing discrimination against

''persons with one sex identified at birth and another today''); *Grimm,* 972 F.3d at 608. In the July 2022 NPRM, the Department cited case law involving gender identity discrimination for the principle that sex discrimination bars discrimination based on traits that are ''inextricably bound up with'' sex. 87 FR 41532; *Bostock,* 590 U.S. at 660–61.

The Department appreciates the opportunity to clarify that the term sex characteristics is intended to refer to physiological sex-based characteristics. Sex discrimination based on a person's physiological sex characteristics may include discrimination based on a person's anatomy, hormones, and chromosomes associated with male or female bodies. As explained in the July 2022 NPRM, discrimination on the basis of sex characteristics includes discrimination based on intersex traits. 87 FR 41532.

The Department disagrees with a commenter who suggested that a medical diagnosis may be required to substantiate discrimination based on sex characteristics, or that sex characteristics are necessarily limited to a person's reproductive capacity. Discrimination based on a person's physiological sex characteristics could be considered sex discrimination regardless of any specific medical diagnosis, and could include, for example, discrimination based on physiological sex characteristics that differ from or align with expectations generally associated with male and female bodies.

The Department agrees with commenters who argued that the prohibition on discrimination on the basis of sex characteristics in § 106.10 will help clarify protections from sex discrimination for people with intersex traits, among others. The Department declines to make definitive statements about examples, due to the necessarily fact-specific nature of the analysis, but the Department recognizes that examples such as inappropriate disclosure of medical information about a student's intersex traits could constitute prohibited discrimination based on sex characteristics.

With respect to the term ''intersex,'' the Department notes that it did not propose using this term in the regulations, but rather described intersex traits as an example of a context in which the prohibition on discrimination based on sex characteristics could apply. The Department uses the term ''intersex'' because it is more accessible and commonly used than ''differences of sex development.'' The Department also notes, however, that the July 2022 NPRM also cited guidelines from the Consortium on the Management of Disorders of Sex Development, and clarifies that the Department understands the term ''intersex'' to include the same spectrum of conditions. 87 FR 41532.

Changes: None.

8. Sex Stereotypes

Comments: Some commenters objected to the Department's reliance on *Price Waterhouse* for the proposition that discrimination based on sex stereotypes constitutes sex discrimination because *Price Waterhouse* interpreted Title VII rather than Title IX. Commenters further asserted that *Price Waterhouse*'s plurality deemed sex stereotyping to be probative of sex discrimination, but not to constitute sex discrimination in and of itself.

One commenter argued that the term ''sex stereotypes'' is open to overbroad and inconsistent interpretation absent an objective definition of ''sex.''

One commenter asked the Department to clarify that the application of sex-specific rules and practices is not a form of sex stereotyping.

Discussion: The July 2022 NPRM describes sex stereotypes as ''fixed or generalized expectations regarding a person's aptitudes, behavior, self-presentation, or other attributes based on sex.'' 87 FR 41533. The Department disagrees that any differences between Title VII and Title IX support a conclusion that Title IX does not prohibit discrimination based on sex stereotypes. Sex stereotyping violates Title IX when it operates to exclude a person from participation in, deny a person the benefits of, or otherwise subject a person to discrimination under a recipient's education program or activity. As noted in the July 2022 NPRM, many courts have applied the reasoning in *Price Waterhouse* to hold that sex stereotyping can be a form of sex discrimination. 87 FR 41533–34; *see, e.g., Whitaker,* 858 F.3d at 1049 (''A policy that . . . punishes [an] individual for his or her gender non-conformance . . . violates Title IX.''); *Pederson,* 213 F.3d at 880 (recognizing that a university violated Title IX when its funding decisions in athletics were based on ''paternalism and stereotypical assumptions about [women's] interests and abilities,'' and a ''remarkably outdated view of women and athletics''); *see also Grabowski,* 69 4th at 1117.

The Department also disagrees that ''sex'' must be defined narrowly to avoid overbroad application of a prohibition on discrimination based on sex stereotypes. The Department appreciates the opportunity to clarify that not all conduct one might label ''sex stereotyping'' necessarily violates Title IX. Rather, in order to establish sex discrimination under Title IX, including discrimination based on sex stereotypes, a school policy, practice, or other conduct must, on the basis of sex, exclude a person from participation in, deny a person the benefits of, or otherwise subject a person to discrimination under a recipient's education program or activity. The Department has specified in § 106.31(a)(2) that otherwise permissible sex separation is consistent with Title IX as long as it is carried out in a manner that does not impose more than de minimis harm on affected students.

Changes: None.

9. Pregnancy or Related Conditions

Comments: Many commenters supported the clarification provided in § 106.10 that Title IX's prohibition on sex discrimination applies to discrimination on the basis of pregnancy or related conditions. Commenters said that discrimination based on pregnancy or related conditions is a type of sex discrimination that is far too common, prevents students from having equal access to educational opportunities, and derails education and careers. Commenters said that the proposed regulations will increase pregnant students' access to educational opportunities.

Some commenters noted that although the Department's Title IX regulations have prohibited recipients from discriminating against students based on pregnancy or related conditions since 1975, pregnant and parenting students are routinely stigmatized, discriminated against, and denied the resources and support they need to thrive.

Some commenters appreciated that the proposed regulations would clarify that harassment based on pregnancy or related conditions is a form of sex-based harassment. Some commenters noted that pregnant students experience higher rates of sexual harassment, which negatively impacts their education.

Some commenters described personal stories of harassment based on pregnancy, noting that students who become pregnant are often subjected to shame, punishment, or unwanted sexual attention and others suggested that schools are more likely to ignore or punish pregnant or parenting students who report sexual harassment because of stereotypes that they are

''promiscuous.'' Commenters said that explicit inclusion of pregnancy or related conditions in the scope of sex discrimination in § 106.10, combined with better procedures for resolving complaints, will foster an atmosphere of respect, and that students will feel safer knowing that any discrimination and harassment they experience will be properly addressed.

Some commenters suggested that proposed § 106.10 should be amended to add ''current, potential, or past'' to the description of ''pregnancy or related conditions'' that are protected from discrimination. One commenter suggested that the Department add ''reproductive health'' to prohibit harassment a person might experience based on their views on abortion, birth control, and other aspects of reproductive health. As an alternative, the commenter suggested changing the wording of proposed § 106.10 to make the meaning of ''related conditions'' clearer but did not suggest a specific revision.

One commenter asserted that § 106.10 would for the first time expand the scope of prohibited pregnancy discrimination to apply to all aspects of a recipient's education program or activity, rather than only admissions.

Discussion: Section 106.10 makes clear that Title IX's prohibition on sex discrimination includes discrimination based on pregnancy or related conditions. While this interpretation of Title IX is longstanding, as discussed above, many of these comments further demonstrated the need for § 106.10, as they show that pregnant students face higher rates of sexual harassment than non-pregnant peers and that recipients sometimes improperly rely on sex stereotypes about this population, which impedes the recipient's response. The comments further show that although discrimination based on pregnancy or related conditions has been prohibited by the Title IX regulations for decades, the existing regulations lacked clarity and consistency regarding recipient obligations. The Department agrees with commenters that § 106.10 is both consistent with Title IX's nondiscrimination mandate and essential to ensuring that students are not denied educational opportunities because of sex discrimination, including harassment, based on pregnancy or related conditions.

The Department does not agree that it is necessary to add ''current, potential, or past'' to modify ''pregnancy or related conditions'' in § 106.10 to protect against sex discrimination on this basis because final §§ 106.21(c), 106.40(b)(1), and 106.57(b) already prohibit discrimination based on ''current, potential, or past pregnancy or related conditions.''

The Department does not need to clarify the meaning of ''related conditions'' in § 106.10 because ''pregnancy or related conditions'' is separately defined in § 106.2. The Department also declines to add ''reproductive health'' to the final regulations because the scope of the commenter's suggested ''discrimination on the basis of reproductive health'' is unclear.

The commenter who suggested that adding a reference to ''pregnancy or related conditions'' in § 106.10 would for the first time expand the scope of pregnancy nondiscrimination protection beyond a recipient's admissions process is mistaken. Sections of the current Title IX regulations in §§ 106.40, 106.51, and 106.57 have long prohibited pregnancy discrimination against students and employees in areas other than admissions. 40 FR 24128 (codified at 45 CFR 86.40(b)(2), 86.51(b)(6), 86.57(b) (1975)); 34 CFR 106.40(b)(1), 106.51(b)(6), 106.57(b) (current).

Changes: None.

10. Menstruation or Related Conditions

Requests To Add ''Menstruation or Related Conditions'' Within Scope of Sex Discrimination

Comments: Some commenters argued that to meet the goal of prohibiting all sex discrimination covered by the statute, the Department should add ''menstruation and related conditions'' to the list of prohibited bases of discrimination in proposed § 106.10. These commenters requested that the Department explicitly prohibit discrimination based on menstruation, perimenopause, and menopause, and all of their related conditions in the regulatory text to clarify that such discrimination against students and employees is a form of discrimination based on sex. They asserted that such discrimination often includes sex-based harassment and stigma and leads to learning loss and other harms. Commenters cited examples of discrimination such as unnecessary menstruation-related bathroom restrictions by teachers, coaches, and other school officials; discipline for excessive bleeding; and harassment by employees or students. Commenters asserted that adding ''menstruation and related conditions'' to the scope of discrimination based on sex is consistent with the Department's position on other types of sex discrimination, such as discrimination based on sex characteristics. Commenters added that menstruation-related coverage will help protect all persons who menstruate.

Some commenters argued that in the alternative, the Department should amend its definition of ''pregnancy or related conditions'' in § 106.2 to state that ''pregnancy or related conditions'' includes menstruation or related conditions. Commenters argued that—in a manner similar to the July 2022 NPRM's explanation of discrimination based on pregnancy or related conditions—discrimination based on menstruation or related conditions is often based on stereotypes about women and society's sex-based indifference to their needs, and that policies fail to accommodate conditions associated with women as effectively as those associated with men. A group of commenters further requested that the Department require reasonable modifications for menstruation or related conditions for students and employees, such as changes to attendance policies to enable bathroom access, dress code modifications, or permission to request a classroom or seat that is closer to the bathroom. Some commenters requested that the Department go beyond offering reasonable modifications to individual students and require all recipients to provide access to menstrual products and ''menstruation-friendly'' bathrooms, noting that one recent study showed that around 20 percent of teenagers struggled to or could not afford menstrual products, and that students from lower-income households, students of color, and those in rural communities with limited resources were most affected. Commenters pointed to other studies demonstrating that without access to menstrual products, students may face barriers to learning, such as being forced to arrive late to class, leave early, or miss school altogether, all of which can affect their academic success. To minimize loss of learning time, some commenters argued that students should not be disciplined or marginalized due to menstruation.

Discussion: Discrimination based on menstruation, perimenopause, menopause, or their related conditions is sex discrimination because, depending on the facts presented, it can overlap or fall within the scope of discrimination based on pregnancy or related conditions, sex stereotypes, or sex characteristics under § 106.10. Menstruation is a process, triggered by hormones, that prepares the body for possible pregnancy. It typically occurs from puberty until menopause. Perimenopause (the time of transition to

menopause) and menopause are processes related to cessation of menstruation. Menstruation, perimenopause, and menopause may each be accompanied by various medical conditions, such as premenstrual syndrome, premenstrual dysphoric disorder, missed or irregular periods, migraines, pain, hot flashes, or heavy bleeding.

Accordingly, while the Department acknowledges commenters' suggestion that the final regulations explicitly include ''menstruation or related conditions,'' either standing alone or as part of the definition of ''pregnancy or related conditions'' under §§ 106.2 or 106.10, the Department concludes that doing so is unnecessary as discrimination on this basis is already covered as outlined above. We appreciate the opportunity to clarify for schools, students, and employees that harassment and other discrimination based on menstruation, perimenopause, menopause, or their related conditions and symptoms is prohibited sex discrimination under § 106.10.

Recognizing that discrimination based on menstruation or related conditions is in the scope of sex discrimination is also consistent with court decisions that have reached the same conclusion when interpreting Title VII. In particular, the Department notes that those decisions held that Title VII prohibited discrimination on the basis of menstruation or related conditions based on the statute's ''because of sex'' language, not the ''pregnancy . . . or related conditions'' language of the Pregnancy Discrimination Act. *See, e.g., Petrosino* v. *Bell Atl.,* 385 F.3d 210, 215 (2d Cir. 2004) (''gender-hostile environment'' was sufficiently severe and pervasive to defeat motion for summary judgment when male supervisors ''routinely [connected] their perceptions of [a menstruating worker's job performance] and her anatomy, especially [with] vulgar references to her breasts and menstrual cycle''); *Conner* v. *Schrader-Bridgeport Int'l, Inc.,* 227 F.3d 179, 196 (4th Cir. 2000) (asking a factory worker if she was ''on the rag today'' in front of colleagues multiple times a month was evidence of a hostile work environment).

To the extent that discrimination based on menstruation or related conditions becomes a barrier to an individual's participation in a recipient's education program or activity, schools have an obligation to address such barriers, prevent their recurrence, and remedy their effects. *See* § 106.44(a) and (f)(1). These barriers could include, for example, menstruation-related harassment by students or employees, unreasonable limits on students' or employees' bathroom access to address menstrual needs, conduct by school officials that publicly exposes that a student is menstruating (*e.g.,* requiring a student to remove a garment around their waist, or prohibiting a student from changing clothes at school when the student needs to address a menstruation-related issue), or similar menstruation-related restrictions or discipline. *See generally* T4PA Center, Considerations for Menstrual Equity and Student Success, at 4 (2023).

The Department declines to change the regulatory text to explicitly require recipients to provide reasonable modifications for menstruation or related conditions for students and employees, or access to menstrual products and ''menstruation-friendly'' bathrooms. The Department intends to continue to study the issue to determine whether further action or clarification is required to address discrimination on the basis of menstruation. Presently, the Department maintains that many, if not most, of the menstruation-related issues students and employees face will be addressed by recipients in their compliance with the nondiscrimination protections of § 106.10, such as requiring flexibility in a dress code policy for a student who has experienced a menstrual leak and for whom discipline for a resulting failure to comply with the dress code would be discriminatory; requiring a recipient to address a situation in which one employee is harassed by another for having headaches related to perimenopause; or requiring a recipient to allow a teacher to use a fan in a classroom to address hot flashes due to menopause, if, for example, the recipient allows teachers to use fans or other items or make other changes in their classroom to increase comfort for other types of reasons. The Department further notes that, due to the specific facts presented, should a student's menstruation or related conditions meet the definition of ''pregnancy or related conditions'' set out in § 106.2, the student is entitled to reasonable modifications under § 106.40(b)(3)(ii). For example, a student suffering from polycystic ovary syndrome, may also be entitled to reasonable modifications for pregnancy or related conditions if the student requires time off for medical treatment. Similarly, to the extent a student's or employee's menstruation-related condition qualifies as a disability under Section 504 or the ADA, that individual must be provided full rights under those laws, as applicable, including reasonable modifications.

Nothing in these final regulations precludes a recipient from using its discretion to provide reasonable modifications to students and employees for whom menstruation or related conditions present barriers to education or employment.

Changes: None.

Privacy of Menstruation-Related Records

Comments: Commenters also encouraged the Department to clarify in the regulations that students' menstruation-related records should be kept private and may not be used to track students' or employees' menstrual cycles, as that would raise serious privacy concerns. Commenters urged the Department to specify that Title IX Coordinators may not share an individual's menstruation-related information with law enforcement or keep it in a disclosable student record. Commenters also requested that the Department issue subsequent guidance to address this concern.

Discussion: The Department agrees with comments expressing concern about the privacy of records related to menstruation or related conditions. The Department emphasizes that nothing in these regulations requires a recipient to collect and maintain more information than is necessary under the recordkeeping provision at § 106.8(f) to ensure that a student or employee is not discriminated against or harassed based on menstruation or related conditions, for example in records of complaints of sex discrimination and the steps the recipient took to meet its obligations under § 106.44. In addition, the Department's final regulations revise § 106.44(j) to prohibit a recipient from disclosing personally identifiable information—which could include information about menstruation or related conditions—obtained in the course of complying with this part, with some limited exceptions. The provision that prohibits disclosure of personally identifiable information is explained more fully in the discussion of § 106.44(j). Finally, the Department understands that supporting recipients in the implementation of these regulations is important. The Department will offer technical assistance, as appropriate, to promote compliance with these final regulations.

Changes: The Department has revised § 106.44(j) to clarify that a recipient must not disclose personally identifiable information obtained in the course of complying with this part, except in limited circumstances.

Requests for Menstrual Education and Training

Comments: Some commenters requested that the Department explicitly require a recipient to provide menstrual education and training. Regarding training for staff, some commenters said that training requirements for Title IX Coordinators and all staff should include information about menstruation and related conditions and what constitutes discrimination on that basis, so that staff members understand the recipient's obligation to address it. Commenters encouraged the Department to provide guidance to Title IX Coordinators, including examples of menstruation-related discrimination that Title IX Coordinators could use to raise awareness and sample questions that recipients could use to conduct surveys on this issue.

Regarding students, commenters said that providing menstrual health education to all students in middle to late elementary school, along with puberty education, would give students the confidence and skills they need to take care of themselves when they start menstruating, reduce the fear and shame regarding menstruation that students often experience, and lead to long-term changes in attitudes and policies regarding menstruation.

Discussion: The Department acknowledges commenters' suggestion that required training for Title IX Coordinators and other staff include information about menstruation, related conditions, and discrimination on that basis, so that all staff members understand the recipient's obligation to address it. These final regulations do not explicitly require training related to menstruation or related conditions. However, under § 106.8(d)(1), all employees must be trained on the recipient's obligation to address sex discrimination in its education program or activity and the scope of conduct that constitutes sex discrimination. Because discrimination on the basis of menstruation or related conditions falls within the scope of § 106.10, schools may benefit from including it as part of any employee training on the scope of conduct that constitutes sex discrimination. The Department also declines to mandate the content of trainings, beyond the general requirement that they provide employees with the tools necessary to identify conduct that may constitute discrimination, in order to allow recipients flexibility. Nothing in the final regulations precludes a recipient from including in its employee trainings more comprehensive information on menstruation or related conditions and how they might affect student and employee participation in the recipient's education program or activity. Regarding the request for guidance with examples of menstruation-related discrimination and sample survey questions, the Department will consider whether future guidance is appropriate and will provide technical assistance to ensure compliance with these regulations.

With respect to menstrual education for students, the Department does not control school curricula, *see* 20 U.S.C. 1232a, and does not require recipients to provide instruction regarding menstrual health. Nothing in these final regulations impedes a recipient's discretion to provide accurate educational information to students.

Changes: None.

B. Section 106.31(a) Education Programs or Activities—General

1. De Minimis Harm Standard

Comments: Some commenters supported § 106.31(a)(2) because it would be consistent with courts' analysis of discrimination on the basis of sex and would clarify a recipient's obligations under Title IX.

Several commenters objected to the ''de minimis harm'' standard, arguing that it is not rooted in Title IX or case law, that it is confusing, ambiguous, vague, or overbroad, or is too malleable, enabling recipients and the Department to act arbitrarily rather than based on objective principles.

One commenter suggested that the Department revise proposed § 106.31(a)(2) to clarify that harm must be assessed at an individual level from the perspective of a reasonable person in the individual's position.

Some commenters argued that proposed §§ 106.10 and 106.31(a)(2) violate the constitutional principle of separation of powers and the ''major questions'' doctrine as articulated by the Supreme Court in *West Virginia,* 597 U.S. 697. Commenters argued that prohibiting schools from engaging in gender identity and sexual orientation discrimination and treating individuals consistent with a gender identity that differs from their sex assigned at birth are questions of great political and economic significance. Commenters asserted that §§ 106.10 and 106.31(a)(2) will have a broad economic impact and that the Department has not accounted for costs such as construction, sanctions, litigation, and non-monetary costs of changed policies, such as risks to due process rights and free speech concerns.

Some commenters asserted that the de minimis harm standard is inconsistent with the hostile environment standard.

Discussion: The Department agrees with commenters who asserted that § 106.31(a)(2) is consistent with Title IX's text and purpose, and that it will help recipients understand their nondiscrimination obligations.

As the Department explained in the July 2022 NPRM, the Department's regulations have long specified that separate or different treatment on the basis of sex is generally prohibited under Title IX because such treatment is presumptively discriminatory. 87 FR 41534; *see* 34 CFR 106.31(b)(4), (7) (''Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex . . . [s]ubject any person to separate or different rules of behavior, sanctions, or other treatment; [or] [o]therwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.''). Despite this presumption and general prohibition, however, the Department's regulations have long recognized limited contexts in which sex separation or differentiation is allowed. *See* 87 FR 41534. The Department therefore seeks with § 106.31(a)(2) to further explain the legal authority for permitting sex separation in certain circumstances, and the limitations the statute sets on how recipients may carry out such separation.

Consistent with Supreme Court precedent, the Department interprets Title IX's nondiscrimination mandate to mean that, save for the limited instances allowed by statute and listed in the text of § 106.31(a)(2), recipients may not make ''distinctions or differences in treatment [on the basis of sex] that injure protected individuals.'' *Bostock,* 590 U.S. at 681 (citing *Burlington N. & Santa Fe Ry. Co.* v. *White,* 548 U.S. 53, 59–60 (2006)). The Department does not interpret Title IX to prohibit all sex-based distinctions or separation, but rather, only those that subject a person to injury, or harm—*i.e.,* discrimination prohibited by the statute. The Department has therefore concluded that to provide an education program or activity that does not subject participants to sex discrimination, a recipient must not provide sex-separate facilities or activities in a manner that subjects any person to legally cognizable injury—*i.e.,* more than de minimis harm—unless there is a statutory basis for allowing otherwise.

The Department disagrees with commenters who asserted that the Department's articulation of this ''de minimis harm'' standard is not

grounded in case law. Rather, it is well-established that the concept of discrimination includes an element of injury or harm. *See, e.g., Oncale,* 523 U.S. at 81 (Title VII does not reach non-harmful ''differences in the ways men and women routinely interact with'' each other); *Peltier,* 37 F.4th at 129 (''for the plaintiffs to prevail under Title IX, they must show that . . . the challenged action caused them harm''). Such harm, however, must generally be something more than innocuous, or de minimis, to be actionable discrimination. *See, e.g., Threat* v. *City of Cleveland,* 6 F.4th 672, 678 (6th Cir. 2021); *cf. Chambers* v. *DC,* 35 F.4th 870, 875 (D.C. Cir. 2022), *judgment entered,* No. 19–7098, 2022 WL 2255692 (D.C. Cir. June 23, 2022) (declining to decide whether Title VII includes a de minimis harm exception because in that case, the denial of a job transfer request easily surmounted that bar). Setting the bar at more than de minimis harm accounts for this important aspect of courts' legal construction of the meaning of the term ''discrimination.'' *See Burlington N. & Santa Fe Ry. Co.,* 548 U.S. at 59 (''No one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals.''); *see also Bostock,* 590 U.S. at 657 (''To 'discriminate against' a person, then, would seem to mean treating that individual worse than others who are similarly situated.''). This threshold concept is particularly important in the context of determining when separate or different treatment on the basis of sex may be permitted, and when it constitutes prohibited discrimination under Title IX. The Department notes that there are injuries, including stigmatic injuries, associated with treating individuals differently on the basis of sex, and in such circumstances, no additional showing of a more ''material'' harm is required under Title IX.

The Department appreciates commenters' questions as to how to determine whether a harm is more than de minimis, and whether the inquiry is objective or purely subjective. Harm under § 106.31(a)(2) must be genuine and objectively non-trivial and assessed from the perspective of a reasonable person in the individual's position. It is not necessary to elaborate on this point in the regulatory text, because this objective standard is consistent with and grounded in longstanding anti-discrimination law and its injury requirement. *See, e.g., Burlington N. & Santa Fe Ry. Co.,* 548 U.S. at 59, 68–69 (explaining that, under Title VII, ''judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts[.]''). As discussed in detail below, § 106.31(a)(2) further clarifies that preventing a person from participating in an education program or activity consistent with the person's gender identity violates this standard and is generally prohibited.

The Department disagrees that the major questions doctrine applies to the Department's adoption of §§ 106.10 and 106.31(a)(2). *West Virginia* described ''extraordinary cases'' in which an ''unprecedented'' agency action concerns issues of such ''economic and political significance'' that there is reason to hesitate before concluding that Congress conferred the authority. 597 U.S. at 700, 721–23. The case also concerned a situation in which the Court concluded that the ''agency ha[d] no comparative expertise'' in making the relevant policy judgments and had invoked an ''ancillary'' statutory provision to enact its regulations. *Id.* at 724, 729 (quotation marks omitted). The Department's issuance of these regulations does not resemble the circumstances described in *West Virginia.* The applicable statutory provisions are in no way ancillary to the statutory scheme, and there is nothing unprecedented about these regulations, which are consistent with the analysis of Federal courts and the practices of many recipients. Moreover, they reflect the Department's expertise on what constitutes sex discrimination in education programs or activities. *See* U.S. Dep't of Educ., Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 FR 52858, 52859 (Aug. 30, 2000) (discussing the Department's ''leadership role in Title IX enforcement'').

Further, these regulations do not require the kind of costs or restructuring that might implicate the major questions doctrine. In *West Virginia,* the Court characterized the agency action as ''substantially restructur[ing] the American energy market,'' and as a ''transformative expansion'' of agency authority. 597 U.S. at 724 (quotation marks omitted). In contrast, the final regulations more fully implement Title IX, consistent with the Department's longstanding authority, and the Department estimates that most of the costs associated with the final regulations that may accrue to federally funded education programs will be offset by savings as a result of these final regulations. Additional discussion of comments on the costs of the final regulations can be found in the *Regulatory Impact Analysis.* The Department agrees with commenters that protection from sexual orientation and gender identity discrimination is an important issue; its capacity to deprive students of equal access to educational opportunities has informed the Department's decision to clarify Title IX's coverage of sexual orientation and gender identity discrimination in this rulemaking. The importance of this application of Title IX supports the Department's decision to pursue this rulemaking, consistent with Executive Order 12866.

Even if the major questions doctrine did apply, the Department's authority is especially clear based on ordinary tools of statutory interpretation, as the Department discusses throughout this preamble. The final regulations fall within Congress's clear and explicit statutory grant of authority to the Department to issue regulations that are consistent with the objectives of Title IX. *See* 20 U.S.C. 1682 (authorizing the Department to ''issu[e] rules, regulations, or orders . . . which shall be consistent with achievement of the objectives of the statute.''). The Department is not relying on a novel or long dormant authority in this rulemaking. Congress indisputably entrusted the Department with the authority to articulate what constitutes sex discrimination in schools. For a more detailed explanation of the Department's authority, see the discussion of statutory authority (Section II.B).

In addition, §§ 106.10 and 106.31(a)(2) are consistent with Federal court decisions, including those from the Supreme Court, that have defined the contours of sex discrimination. Most recently, the Supreme Court held in *Bostock* that sex discrimination, as prohibited by Title VII, encompasses discrimination based on sexual orientation and gender identity. 590 U.S. at 659–62; *see* 87 FR 41530. The *Bostock* Court also flatly rejected the argument advanced in dissent that Title VII's prohibition on sex discrimination should not be read to include sexual orientation or gender identity because Congress had failed to add such terms to the statute. 590 U.S. at 669–70. Indeed, the Court held that while there was no way to know why Congress had not amended Title VII to include those bases in subsequent years, the issue was

irrelevant given that the existing statutory text so clearly encompassed discrimination on the basis of sexual orientation and gender identity. *Id.* The Supreme Court's statement that ''it is impossible to discriminate against a person'' because of their sexual orientation or gender identity ''without discriminating against that individual based on sex,'' *Bostock,* 590 U.S. at 660, is equally true under Title IX. Federal courts have relied on *Bostock* to recognize that Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity. *See, e.g., Grabowski,* 69 F.4th at 1113; *Grimm,* 972 F.3d at 616. Federal courts have likewise recognized that preventing students from participating in a recipient's education program or activity consistent with their gender identity causes harm that violates Title IX. *See, e.g., Whitaker,* 858 F.3d at 1045–46; *Grimm,* 972 F.3d at 617–18. The Department's final regulations are not ''beyond what Congress could reasonably be understood to have granted.'' *West Virginia,* 597 U.S. at 700–01, 724.

With respect to comments that the de minimis harm standard is inconsistent with the hostile environment standard, the Department disagrees. The hostile environment standard in the definition of ''sex-based harassment'' § 106.2, applies when determining whether harassing conduct rises to the level of a hostile environment, such that the conduct constitutes discrimination prohibited by the statute. A recipient's obligations to respond promptly and effectively to sex-based harassment are described in § 106.44(a). Section 106.31(a)(2), on the other hand, does not apply to sex-based harassment; it applies only to the manner in which a recipient carries out otherwise permissible different treatment or separation on the basis of sex. As explained below, however, absent a limited exception under Title IX, a recipient policy or practice that separates or treats students differently based on sex violates § 106.31(a)(2) if the policy or practice prevents a student from participating in the recipient's education program or activity consistent with their gender identity or otherwise causes a student more than de minimis harm.

Changes: None.

2. Application

Comments: Some commenters asked the Department to clarify how proposed § 106.31(a)(2) would apply to people other than students (*e.g.,* employees, parents, or other parties participating in a recipient's education program or activity).

Some commenters asked the Department to specify the types of permissible ''different treatment or separation on the basis of sex'' covered by § 106.31(a)(2), including, for example, single-sex classes and activities, social fraternities or sororities, or sex-specific appearance codes.

Some commenters urged the Department to specify when subjecting a person to more than de minimis harm is ''otherwise permitted'' by Title IX or the regulations to avoid causing ''unfair surprise'' when OCR enforces the final regulations or ad hoc judgments about when harm may be implicitly authorized. Some commenters expressed confusion as to whether and how § 106.31(a)(2) would apply to criteria a recipient uses to determine a student's eligibility to participate on a male or female athletic team.

Discussion: With respect to questions about who is covered by § 106.31(a)(2), the Department appreciates the opportunity to clarify that it applies to any ''person,'' including students, employees, applicants for admission or employment, and other individuals participating or attempting to participate in the recipient's education program or activity, which also could include parents of minor students, students from other institutions participating in events on a recipient's campus, visiting lecturers, or other community members whom the recipient invites to campus.

The Department also appreciates the opportunity to clarify that § 106.31(a)(2) applies, with some limited exceptions discussed below, to any circumstances in which a recipient engages in permissible sex separation or differentiation, such as in its provision of restrooms and locker rooms (34 CFR 106.33), access to classes and activities (34 CFR 106.34(a)–(b)), and policies such as appearance codes (including dress and grooming codes). For additional context on Title IX's application to appearance codes, see separate discussion below.

Proposed § 106.31(a)(2) specifies that the prohibition on subjecting a person to more than de minimis harm does not apply when ''otherwise permitted by Title IX or this part.'' The Department agrees with commenters that the Department should specify the contexts in which Title IX or the regulations permit such harm. Section 106.31(a)(2) recognizes that in the limited circumstances in which recipients are permitted to separate or differentiate on the basis of sex, recipients must carry out such separation consistent with the statute's nondiscrimination mandate, 20 U.S.C. 1681, except when the statute itself allows otherwise. Those contexts are limited to the enumerated exceptions in 20 U.S.C. 1681(a)(1) through (9) and the regulatory provisions that implement those statutory provisions, namely §§ 106.12 (religious exemption), 106.13 (military and merchant marine educational institutions), 106.14 (membership practices of social fraternities and sororities, YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls, and voluntary youth service organizations); § 106.15(d), (e) (admissions to certain classes of educational institutions); the provision for living facilities under 20 U.S.C. 1686 and its implementing regulatory provision, § 106.32(b)(1) (sex-separate housing); and § 106.41(b) (sex-separate athletic teams), as explained in more detail below. However, even in these limited contexts where Congress has enumerated exceptions, nothing in the final regulations prohibits a recipient from voluntarily taking steps to protect students from sex-based harm, including by permitting them to participate consistent with their gender identity.

Regarding commenters' questions on sex-separate athletic teams, § 106.31(a)(2) does not apply to male and female athletic teams a recipient offers under § 106.41(b). As background, for decades, recipients' obligations with regard to the operation of athletics in schools have been governed by an overarching nondiscrimination mandate and obligation to provide equal athletic opportunities for students regardless of sex. *See* 34 CFR 106.41(a), (c). As discussed in the July 2022 NPRM, in 1974 Congress enacted the Javits Amendment, which directed that the Title IX regulations should include reasonable provisions that take into account unique considerations that arise in athletic competition among schools. 87 FR 41538, Education Amendments of 1974 section 844. In 1975, HEW, the Department's predecessor, first promulgated regulations under Title IX after multiple congressional hearings. 87 FR 41393; 121 Cong. Rec. 20467 (1975) (statement of Sen. Birch Bayh). The regulations were subject to a statutory ''laying before'' provision, designed to afford Congress an opportunity to examine the proposed regulations and disapprove them by resolution within 45 days if Congress deemed them to be inconsistent with Title IX. *N. Haven Bd. of Educ.,* 456 U.S. at 531–32. The Supreme Court has stated that the fact that no such

disapproval resolution was adopted ''strongly implies that the [Title IX] regulations accurately reflect congressional intent.'' *Grove City Coll.* v. *Bell,* 465 U.S. 555, 568 (1984); *see also N. Haven Bd. of Educ.,* 456 U.S. at 533–35.

Consistent with the Javits Amendment and the longstanding athletics regulations, the Department has historically interpreted Title IX's nondiscrimination mandate to tolerate sex separation in athletics in a manner that imposes more than de minimis harm on individual students when such separation served educational interests consistent with Title IX's nondiscrimination mandate. *See* 34 CFR 106.41(b) (permitting exclusion of a student of a particular sex from a sex-separate athletic team in certain circumstances, even when student wishes to participate). Under the longstanding athletics regulations, individual students may be excluded from a particular male or female athletic team on the basis of their sex, even when doing so may impose on them more than de minimis harm, *see id.,* as long as students, regardless of sex, have an equal opportunity to access the recipient's athletic program as a whole, *see* 34 CFR 106.41(c). Consistent with the Javits Amendment, under § 106.41(c), the Department has also long evaluated a recipient's provision of equal athletic opportunity on the basis of sex at a program-wide level, rather than at an individual-level, as the Department does with respect to other aspects of a recipient's education program or activity. *Compare* 34 CFR 106.41(c) (''A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes''), *with, e.g.,* 34 CFR 106.21(a) (''No person shall, on the basis of sex, be denied admission . . . .'').

Consistent with the longstanding athletics regulations, § 106.31(a)(2) does not apply to permissible sex separation of athletic teams. The Department of Education issued a notice of proposed rulemaking that would, if finalized, provide a standard for criteria for a student's eligibility to participate on sex-separate athletic teams in the future. *See* Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 FR 22860 (Apr. 13, 2023) (Athletics NPRM). The Athletics NPRM said a categorical ban on transgender students playing sports consistent with their gender identity would not satisfy the proposed regulation, but more targeted criteria, substantially related to sport, level of competition, and grade or education level, could be permissible. The Department is continuing to evaluate comments on that proposed regulation, and will issue its final rule on this standard for criteria for a student's eligibility to participate on sex-separate athletic teams in the future. Until that rule is finalized and issued, the current regulations on athletics continue to apply.

Changes: To clarify the scope of § 106.31(a)(2), the Department is replacing ''unless otherwise permitted by Title IX or this part'' with ''except as permitted by 20 U.S.C. 1681(a)(1) through (9) and the corresponding regulations at §§ 106.12through 106.15, 20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b)''.

3. Participation Consistent With Gender Identity

Comments: Some commenters supported § 106.31(a)(2) because providing access to sex-separate activities and facilities consistent with a student's gender identity aligns with Title IX's statutory text and purpose of ensuring that all students have equal opportunity to participate in federally funded education programs and activities free of sex discrimination, as well as case law interpreting Title IX and other sex discrimination laws.

Other commenters asserted that there is no basis in the statutory text or case law for the principle that treating a person inconsistent with their gender identity constitutes sex discrimination. Some commenters argued that § 106.31(a)(2) effectively eliminates the sex-based distinctions that Title IX allows. Some commenters noted that the Supreme Court in *Bostock* declined to prejudge questions about ''sex-segregated bathrooms, locker rooms, and dress codes'' and did not address whether treating a person inconsistent with their gender identity constitutes sex discrimination. 590 U.S. at 681. Other commenters asserted that § 106.31(a)(2) is at odds with *United States* v. *Virginia,* which recognized that sex-based classifications are sometimes permissible because certain ''differences between men and women'' are ''enduring.'' 518 U.S. at 533.

Some commenters argued that § 106.31(a)(2) elevates protections for transgender students over other students, especially cisgender girls and women.

Some commenters asked the Department to clarify how a recipient should determine a person's gender identity for purposes of proposed § 106.31(a)(2); what medical, procedural or documentation requirements a recipient can impose on a person prior to permitting access to sex-separate facilities; and whether a recipient may require a student to disclose medical records and related information.

Some commenters asked the Department to clarify whether the prohibition on preventing students from participating consistent with their gender identity in § 106.31(a)(2) would apply to sex-separate restrooms, locker rooms, housing, classes or portions of classes, and academic programs. Many commenters expressed concern about issues such as competitive fairness and safety in school athletic programs if § 106.31(a)(2) were applied to sex-separate athletic teams. Some commenters urged the Department to modify the proposed regulations to require recipients to provide gender-neutral facilities, noting, for example, that nonbinary students may not be fully accommodated by sex-separate facilities.

Some commenters said the de minimis harm standard could result in chilling protected speech both at an individual and group association level and feared that § 106.31(a)(2) would result in compelling and restricting speech in violation of the First Amendment.

Some commenters expressed concern about the propriety of students participating in education programs and activities consistent with their gender identity. Those commenters suggested that § 106.31(a)(2) would effectively eliminate single-sex spaces and could compromise some students' privacy and safety. Some commenters urged the Department to require that all students have access to a single-occupancy restroom or changing facility, or require transgender students to use separate facilities. Other commenters argued that requiring a student to use a separate facility can be stigmatizing and could result in the disclosure of a student's transgender status. Some commenters asked whether a recipient or a student organization would violate Title IX if they offer a transgender person a private alternative to sex-separate shared spaces, to be sensitive to their needs or preferences.

Some commenters noted that § 106.31(a)(2) is consistent with case law concluding that denying a student access to a recipient's education program or activity, including extracurricular activities or facilities, consistent with their gender identity causes students harm in violation of

Title IX. Some commenters asserted that preventing students from participating in school consistent with their gender identity causes more than de minimis harm and stated that many transgender students avoid school bathrooms or other sex-separate spaces at school because they do not feel safe using them. Some commenters argued that permitting students to participate in school consistent with their gender identity positively impacts their mental health and improves educational outcomes and noted that major organizations representing medical professionals support such policies. Other commenters argued that affirming a gender identity different than a person's sex assigned at birth could do more harm than good, particularly for young children. These commenters asserted that school policies that accept students' requests to treat them consistent with a gender identity that does not align with their sex assigned at birth are harmful.

Commenters asked the Department to clarify whether proposed § 106.31(a)(2) requires recipients to allow students to live in sex-separate housing consistent with gender identity. Some commenters felt that the Department's interpretation of 20 U.S.C. 1686 in the July 2022 NPRM—to permit sex separation in living facilities even when it causes more than de minimis harm—would conflict with *Grimm*'s analysis and Title IX's statutory text. Commenters also asked how proposed § 106.31(a)(2) applies in the context of random roommate assignment programs for students.

Some commenters argued that provisions permitting separation by ''sex'' should be interpreted to focus on physiological differences between males and females to align with contemporary dictionary definitions and courts' understanding of the term. Commenters noted that the original Title IX rulemaking did not mention ''gender identity,'' and asserted that the current regulations permitting separation by sex (*e.g.,* bathrooms, locker rooms, and athletic teams) assume ''sex'' is limited to sex assigned at birth. One commenter argued that § 106.31(a)(2)'s focus on gender identity undermines the Department's statement in the July 2022 NPRM that Title IX does not depend on any particular definition of the term ''sex.'' Some commenters said that separating locker rooms, bathrooms, and shower facilities by sex assigned at birth is authorized by 20 U.S.C. 1686, citing *Adams,* 57 F.4th 791.

Discussion: The Department disagrees with commenters who assert that § 106.31(a)(2)'s articulation of a recipient's nondiscrimination obligation with respect to gender identity is inconsistent with Title IX. As explained in the July 2022 NPRM, *see* 87 FR 41535, courts have recognized that, except as otherwise provided in the statute, Title IX prohibits all sex discrimination, including gender identity discrimination in federally funded education programs and activities, and that students experience sex-based harm that violates Title IX when a recipient bars them from accessing sex-separate facilities or activities consistent with their gender identity. *See, e.g., Whitaker,* 858 F.3d at 1045–46 (discussing district court's findings, based on expert testimony, that denying transgender student's access to a sex-separate education program or activity consistent with his gender identity imposed significant harm on his mental health and overall well-being in violation of Title IX); *Grimm,* 972 F.3d at 617–18 (holding that evidence that a transgender boy suffered physical, emotional, and dignitary harms as a result of being denied access to a sex-separate program or activity consistent with his gender identity was sufficient to constitute sex-based harm prohibited under Title IX); *Bd. of Educ. Of the Highland Loc. Sch. Dist.,* 208 F. Supp. 3d at 870–71 (describing stigma and isolation and interference with learning caused by district's exclusion of transgender girl from a sex-separate education program or activity consistent with her gender identity and concluding that such harm is sufficient to demonstrate a Title IX violation).

The Department disagrees that § 106.31(a)(2) is inconsistent with Supreme Court precedent, including *Bostock* and *Virginia*. 87 FR 41532. Under *Bostock,* treating a person worse because their sex assigned at birth differs from their gender identity is sex discrimination under Title IX, just as it is under Title VII. 87 FR 41532 (citing *Bostock,* 590 U.S. at 659–62). *Bostock,* however, did not purport to address the specific question of whether sex separation in bathrooms or locker rooms ''might not qualify as unlawful discrimination or find justifications under other provisions'' of the law, 140 S. Ct. at 1753, which is the question the Department addresses here with respect to Title IX.

The Department has determined, based on a careful reading of Title IX and each of its statutory provisions, that sex separation in certain circumstances, including in the context of bathrooms or locker rooms, is not presumptively unlawful sex discrimination. However, when such separation imposes more than de minimis injury on a protected individual, *see Bostock,* 590 U.S. at 681, such as when it denies a transgender student access to a sex-separate facility or activity consistent with that student's gender identity, this would violate Title IX's general nondiscrimination mandate, 20 U.S.C. 1681. The Department recognizes, however, that the statute created exceptions to that general nondiscrimination mandate in 20 U.S.C. 1681(a)(1)–(9), and also carved out from its general nondiscrimination mandate the maintenance of sex-separate living facilities in 20 U.S.C. 1686; and Congress further recognized that the unique circumstances of athletics also merit a different approach to addressing sex discrimination in that context, as reflected in the Department's promulgation of §§ 106.41(b) and (c). Therefore, as explained above and in the July 2022 NPRM, the Department interprets those provisions to mean that, in those contexts, recipients may carry out sex-specific policies and practices in a manner that may cause more than de minimis harm to a protected individual. 87 FR 41536.

Title IX protects students from sex discrimination, including sex-based harassment, in a recipient's education program or activity, including when they access sex-separate facilities. This protection applies with equal force to all students, including transgender and nonbinary students. Under § 106.31(a)(2), a recipient must provide access to sex-separate facilities, including bathrooms, in a manner that does not cause more than de minimis harm. Title IX also prohibits sex-based harassment, including when students access sex-separate facilities. Section 106.31(a)(2) does not specify how a recipient must provide access to sex-separate facilities for students who do not identify as male or female. For nonbinary students, a recipient may, for example, coordinate with the student, and the student's parent or guardian as appropriate, to determine how to best provide the student with safe and nondiscriminatory access to facilities, as required by Title IX. Under § 106.44(a), a recipient must respond promptly and effectively when it knows of conduct that reasonably may constitute sex discrimination, including sex-based harassment, in its education program or activity, including in any sex-separate facilities.

The Department disagrees with commenters who argued that this interpretation of Title IX is inconsistent with the Supreme Court's recognition in *Virginia* that physiological differences can sometimes justify sex-based classifications. Title IX's statutory

prohibition on sex discrimination is ''narrower in some respects and broader in others'' than the substantive rights and protections guaranteed under the Equal Protection Clause. *Fitzgerald* v. *Barnstable Sch. Comm.,* 555 U.S. 246, 256 (2009). Thus, although equal protection case law may inform the Department's interpretation, the Department does not read *Virginia* as opining on the scope of Title IX's statutory exceptions. But some lessons from *Virginia* are instructive in the Title IX context. For instance, *Virginia* recognized that, unlike in the context of race or national origin classifications, some sex-based classifications may be constitutionally permissible because of enduring physical differences between the sexes. *Virginia,* 518 U.S. at 533. Like *Virginia,* § 106.31(a)(2) acknowledges that there are circumstances in which sex differentiation is not presumptively discriminatory. Nonetheless, *Virginia* goes on to hold that reliance on these generalized differences alone cannot substantiate a categorical sex-based exclusion from an education program under the Equal Protection Clause. 518 U.S. at 533. To do so would be to rely on the ''notably circular argument'' that separation on the basis of sex can serve as both an institution's discriminatory means and its justifiable end under the intermediate scrutiny analysis. *See id.* at 544–45 (''Virginia and VMI trained their argument on 'means' rather than 'end,' and thus misperceived our precedent.'').

The Department also disagrees that § 106.31(a)(2) eliminates the sex-based distinctions permitted by Title IX. As explained in the July 2022 NPRM, the Department recognizes that Title IX does not treat all sex-based distinctions as impermissible discrimination. 87 FR 41534. The Department's regulations have always recognized that recipients can separate students on the basis of sex in contexts where separation is generally not harmful, and § 106.31(a)(2) does not change that. However, consistent with Supreme Court precedent and Title IX's general nondiscrimination mandate, § 106.31(a)(2) clarifies that when such otherwise permissible sex separation causes more than de minimis harm to a protected individual—and the harm is not otherwise permitted by Title IX—such harm cannot be justified or otherwise rendered nondiscriminatory merely by pointing to the fact that, in general, there are physical differences between the sexes.

Section 106.31(a)(2)'s prohibition on preventing students from participating consistent with their gender identity applies to any circumstance in which a recipient engages in permissible sex separation or differentiation, except when more than de minimis harm is permitted by the statute. For example, the text of § 106.31(a)(2) makes clear that it does not apply to sex-separate athletic teams permitted under 34 CFR 106.41(b). As noted above, Congress made clear that the Title IX regulations should reflect the fact that athletic competition raises unique considerations and the Department's regulations have always permitted more than de minimis harm to individual students in the context of sex-separate athletic teams. On the other hand, § 106.31(a)(2) applies in contexts for which there is no statutory exception, such as sex-separate restrooms and locker rooms under § 106.33, and single-sex classes or portions of classes under § 106.34(a) and (b). The Department has always treated access to facilities and classes differently than athletics. Classes, for example, focus on learning skills and competencies and do not raise the unique issues that are present in sex-separate interscholastic or intercollegiate athletic competition. As explained in more detail below, a recipient can address any concerns about the application of § 106.31(a)(2) to contexts like classes and facilities without preventing students from participating consistent with their gender identity.

With respect to concerns that the ''de minimis harm'' standard will chill or otherwise limit protected speech, the Department reiterates that § 106.31(a)(2) generally prohibits a recipient from preventing a person from participating in school consistent with their gender identity. The provision does not in any way limit § 106.6(d), which states that nothing in the Title IX regulations requires a recipient to restrict any rights that would otherwise be protected from government action by the First Amendment; deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments; or restrict any other rights guaranteed against government action by the United States Constitution. The Department reaffirms that a recipient may not invoke Title IX to require restricting speech, expression, or conduct in violation of the First Amendment. Similarly, the Department also underscores that none of the amendments to the regulations change or are intended to change the commitment of the Department, through these regulations and OCR's administrative enforcement, to fulfill its obligations in a manner that is fully consistent with the First Amendment and other guarantees of the Constitution of the United States. For additional information regarding Title IX and the First Amendment, see the discussion of Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2).

With respect to commenters' questions about how a recipient should determine a person's gender identity for purposes of § 106.31(a)(2), the Department is aware that many recipients rely on a student's consistent assertion to determine their gender identity, or on written confirmation of the student's gender identity by the student or student's parent, counselor, coach, or teacher. However, requiring a student to submit to invasive medical inquiries or burdensome documentation requirements to participate in a recipient's education program or activity consistent with their gender identity imposes more than de minimis harm. In particular, a recipient may not require a person to provide documentation (such as an amended birth certificate or evidence of medical treatment) to validate their gender identity for purposes of compliance with § 106.31(a)(2) if access to such documentation is prohibited by law in that jurisdiction.

The Department agrees with commenters who noted the substantial harm transgender students experience when they are excluded from a sex-separate facility consistent with their gender identity, and § 106.31(a)(2) properly accounts for such harm. As detailed in the July 2022 NPRM, several Federal courts have found that excluding students from sex-separate facilities and activities consistent with their gender identity can impose significant harm on those students' mental health and overall well-being. 87 FR 41535. These findings are consistent with the guidelines published by well-established medical organizations, which say being able to live consistent with one's gender identity is critical to the health and well-being of transgender youth.[90] To the extent there are also harms associated with being treated consistent with a gender identity that

[90] *See* World Professional Association for Transgender Health, *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8,* 23 Int'l J. Transgender Health S1 (2022); Jason Rafferty et al., Am. Acad. of Pediatrics, *Ensuring Comprehensive Care and Support for Transgender and Gender Diverse Children and Adolescents* 142 Pediatrics 72 (2018); Tanya Albert Henry, *Exclusionary Bathroom Policies Harm Transgender Students,* American Medical Association (Apr. 17, 2019), *https://www.ama-assn.org/delivering-care/population-care/exclusionary-bathroom-policies-harm-transgender-students.*

differs from one's sex assigned at birth, individuals (and their parents, as appropriate) are better positioned to weigh any harms and benefits for themselves than is an educational institution. Section 106.31(a)(2) therefore simply prohibits a recipient from adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity when that person seeks to participate consistent with their gender identity.

The Department disagrees that prohibiting more than de minimis harm in the context of sex-separate bathrooms and locker rooms would result in the elimination of the sex-based separation that Title IX allows in this context. Recipients continue to have discretion under these regulations to provide sex-separate facilities consistent with Title IX's nondiscrimination mandate; making Title IX's protections against sex-based harms explicit does not change that.

The Department also disagrees that § 106.31(a)(2) elevates protections for transgender students over cisgender students. The application of § 106.31(a)(2) is not limited to transgender students—and indeed protects all students from harm when a recipient separates or treats students differently based on sex. As explained in more detail above, § 106.31(a)(2) recognizes that students experience sex-based harm when they are excluded from sex-separate facilities consistent with their gender identity. However, based on the Department's enforcement experience, listening sessions with stakeholders, and its review of Federal case law, the Department is unaware of instances in which cisgender students excluded from facilities inconsistent with their gender identity have experienced the harms transgender students experience as a result of exclusion from facilities consistent with their gender identity.

While the Department strongly agrees that recipients have a legitimate interest in protecting all students' safety and privacy, we disagree that such goals are inconsistent with § 106.31(a)(2). As noted in the July 2022 NPRM, a recipient can make and enforce rules that protect all students' safety and privacy without also excluding transgender students from accessing sex-separate facilities and activities consistent with their gender identity. 87 FR 41535; *see also, e.g.,* Rehearing Amicus Brief of School Administrators from Twenty-Nine States and the District of Columbia in Support of Plaintiff-Appellee Gavin Grimm, *Grimm,* 972 F.3d 586 (No. 19–1952), 2019 WL 6341095. The Department disagrees that it has disregarded potential harms to cisgender students.

The Department does not agree with commenters who alleged there is evidence that transgender students pose a safety risk to cisgender students, or that the mere presence of a transgender person in a single-sex space compromises anyone's legitimate privacy interest. In many cases, Federal courts have rejected claims that treating students consistent with their gender identity necessarily harms cisgender students in violation of Title IX. For example, when plaintiffs have asserted only unsubstantiated and generalized concerns that transgender persons' access to sex-separate spaces infringes on other students' privacy or safety, courts have rejected those claims. *See, e.g., Grimm,* 972 F.3d at 626 (Wynn, J., concurring); *Whitaker,* 858 F.3d at 1052 (holding that transgender student's presence provides no more of a risk to other students' privacy rights than does the presence of any other student in a sex-separate space); *Boyertown,* 897 F.3d at 521 (same); *Parents for Priv.,* 949 F.3d at 1228–29 (holding that ''[t]he use of facilities for their intended purpose, without more, does not constitute an act of harassment simply because a person is transgender''); *Cruzan* v. *Special Sch. Dist. # 1,* 294 F.3d 981, 984 (8th Cir. 2002) (per curiam) (holding that a transgender woman's mere presence in a sex-separate space did not constitute actionable sexual harassment of her women co-workers). The Supreme Court has also rejected the notion that the preferences or discomfort of some can justify otherwise unconstitutional discrimination against others. *See City of Cleburne* v. *Cleburne Living Ctr.,* 473 U.S. 432, 450 (1985).

The Department also appreciates the opportunity to clarify that nothing in Title IX or the final regulations prevents a recipient from offering single-occupancy facilities, among other accommodations, to any students who seek additional privacy for any reason. The Department agrees with commenters that access to gender-neutral or single-occupancy facilities may be helpful for accommodating students who do not want to use shared sex-separate facilities. The Department declines the suggestion to require that recipients provide gender-neutral or single-occupancy facilities because such facilities are not the only way a recipient could provide nondiscriminatory access to its facilities. In addition, the proposal would likely carry significant cost implications and it would be appropriate to seek public comment on this issue before making any such changes. Additionally, nothing in § 106.31(a)(2) prohibits recipients from taking nondiscriminatory steps to ensure privacy and safety for all students in a recipient's sex-separate facilities—steps that many recipients already take consistent with their general codes of conduct, including rules prohibiting harassment, assault, and other forms of misconduct.

The Department has previously made clear that all students are protected from sex discrimination under Title IX, and that a recipient generally must treat transgender students consistent with their gender identity with respect to their participation in single-sex classes and activities. *See* U.S. Dept of Educ., Office for Civil Rights, Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities, at 25 (Dec. 1, 2014), *https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.* The Department recognizes that § 106.31(a)(2) interprets Title IX differently from the 2021 Rubinstein Memorandum. The Department explained in detail in the July 2022 NPRM why it disagreed with the reasoning in that archived memorandum. *See* 87 FR 41536–37. The Rubinstein Memorandum's suggestion that Title IX requires separation according to sex assigned at birth or that treating a student inconsistent with their gender identity does not implicate Title IX is at odds with Title IX's text and purpose and the reasoning of the courts that had considered the issue. The Department reiterates that § 106.31(a)(2) is consistent with Federal case law on this point, *see, e.g., Metro. Sch. Dist. of Martinsville,* 75 F.4th 760; *Grimm,* 972 F.3d 586; *Whitaker,* 858 F.3d 1034, and to the extent some courts have come to a different conclusion, *see, e.g., Adams,* 57 F.4th 791; *Bridge* v. *Okla. State Dep't of Educ.,* No. CIV–22–00787, 2024 WL 150598, at *8 (W.D. Okla. Jan. 12, 2024); *Roe* v. *Critchfield,* No. 1:23-cv-00315, 2023 WL 6690596, at *1 (D. Idaho Oct. 12, 2023), the Department does not agree with those courts' interpretation of Title IX for the reasons that follow.

For example, in *Adams,* the Eleventh Circuit held that a school district policy preventing a transgender boy from using the boys' restroom did not violate Title IX because the Court determined that ''sex'' as used in Title IX can only refer to ''biology and reproductive function,'' not gender identity, 57 F.4th at 812–15, and that restrooms are covered by a statutory provision permitting a recipient to maintain ''separate living

facilities for the different sexes,'' *id.* at 812–15 (quoting 20 U.S.C. 1686). The Department determined that it is not necessary to resolve the question of what ''sex'' means in Title IX for the Department to conclude that no statutory provision permits a recipient to discriminate against students—*i.e.,* to subject them to more than de minimis harm—in the context of maintaining certain sex-separate facilities or activities. In particular, contrary to the reasoning in *Adams,* even if ''sex'' under Title IX were to mean only sex assigned at birth, Title IX's ''living facilities'' provision, does not permit a recipient to subject a person to more than de minimis harm on that basis in any context *except* living facilities. As explained in the July 2022 NPRM, 20 U.S.C. 1686 specifically carves out from Title IX's general statutory prohibition on sex discrimination an allowance for recipients to maintain sex-separate living facilities. 87 FR 41536; 20 U.S.C. 1686 (''Notwithstanding anything to the contrary contained in [Title IX],'' nothing in Title IX ''shall be construed to prohibit any educational institution . . . from maintaining separate living facilities for the different sexes.''). And it provides the statutory basis for the Department's housing provision at § 106.32(b)(1). But that carve-out does not apply to the remainder of § 106.32 or to any other aspects of a recipient's education program or activity for which Title IX permits different treatment or separation on the basis of sex, such as bathrooms, locker rooms, or shower facilities—regulations that the Department adopted under different statutory authority, and which have long been addressed separately from ''living facilities.'' The Department notes that when HEW adopted the original Title IX regulations, it cited section 907 of the Education Amendments (20 U.S.C. 1686) as one of the sources of its statutory authority for the housing provision, 40 FR 24141 (codified at 45 CFR 86.32 (1975)), whereas it cited only sections 901 and 902 of the Education Amendments (20 U.S.C. 1681–1682) as its statutory authority for the provision governing toilet, locker room, and shower facilities, 40 FR 24141 (codified at 45 CFR 86.33 (1975)), and the Department of Education retained those authorities when it adopted its own Title IX regulations in 1980. 45 FR 30955 (May 9, 1980) (codified at 34 CFR 106.32 and 106.33). As the statutory sources cited in the text of the regulations themselves demonstrate, a recipient's provision of separate bathrooms and locker rooms is governed not by 20 U.S.C. 1686, but by the statute's general nondiscrimination mandate, 20 U.S.C. 1681. And § 106.33 ''cannot override the statutory prohibition against *discrimination* on the basis of sex.'' *Grimm,* 972 F.3d at 618 (emphasis in the original). The *Adams'* court's reasoning therefore cannot be reconciled with Title IX's plain text and ignores that Congress could have, but did not, address anything other than the practice of maintaining sex-separate ''living facilities'' in 20 U.S.C. 1686. *See* 87 FR 41536 (''Congress's choice to specify limited circumstances where harm resulting from sex separation is permitted illustrates that, outside of those contexts, Title IX's general prohibition on sex discrimination prohibits such harm.''). The Department therefore declines to adopt the Eleventh Circuit's reasoning in *Adams* that the statutory carve out for living facilities governs the interpretation of § 106.33, the Department's regulations on bathrooms and locker rooms, or any other regulatory provision other than housing, 34 CFR 106.32(b)(1).

With respect to commenters' questions about whether § 106.31(a)(2) prohibits a recipient from excluding students from sex-separate housing consistent with their gender identity, it does not, because of the express carve-out for sex-separate living facilities under 20 U.S.C. 1686. But that is the extent of the reach of 20 U.S.C. 1686, and nothing in the statute or final regulations precludes a recipient from voluntarily choosing to adopt policies that enable transgender students to access sex-separate housing consistent with their gender identity.

Changes: None.

4. Parental Rights

Comments: Some commenters expressed concern that proposed § 106.31(a)(2) would prevent schools from respecting a parent's wishes regarding how their child should be treated and urged the Department to clarify parental rights in this context. Some commenters asserted that in most cases parents should make important decisions about their children's health and well-being, that parents are best situated to act in the best interests of their children, and that parents have a right to ''direct the upbringing and education of children under their control,'' citing *Pierce* v. *Soc'y of Sisters,* 268 U.S. 510, 534–35 (1925).

Some commenters raised questions about matters related to gender identity, including whether a recipient should comply with a request by a minor student to change their name or pronouns used at school if their parent opposes the change and whether the proposed regulations would lead to claims that a parent is mistreating a child if the parent does not affirm the child's gender identity.

Commenters also asked the Department to clarify whether it would be a potential violation of Title IX for a recipient to treat a student according to their sex assigned at birth if requested by the parents to do so; notify a student's parents of the student's gender transition or gender identity; or to deny parents access to their child's educational records, including information about their child's gender identity. Some commenters urged the Department to amend the regulations to expressly provide that a minor student's parents must be consulted before a school could begin treating a student consistent with a different gender identity.

Some commenters expressed concern that proposed § 106.31(a)(2) would conflict with State laws, like Florida's Parental Rights in Education Act, HB 1557. Some commenters asserted that proposed § 106.31(a)(2) would affect the content of a recipient's curricula and override claimed parental rights over curricula. Some commenters worried that a school board could feel pressured to include information about gender identity in the curriculum to avoid a Title IX violation and to use Title IX to justify denying parental opt-outs from lessons on gender identity.

Some commenters argued that because the proposed regulations define ''parental status'' to include a person acting ''in loco parentis,'' a school district employee could act in place of a student's parent, including regarding the student's gender identity.

Discussion: The Department acknowledges and respects the rights of parents and their fundamental role in raising their children. The Department appreciates the opportunity to clarify that nothing in the final regulations disturbs parental rights, and accordingly the Department determined that additional regulatory text regarding parental rights is not necessary to effectuate Title IX's prohibition on sex discrimination.

Indeed, as explained in the discussion of § 106.6(g), that provision reinforces the right of a parent to act on behalf of their minor child, whether their child is a complainant, respondent, or other person. Under § 106.6(g), nothing in Title IX or the final regulations may be read in derogation of any legal right of a parent, guardian, or other authorized legal representative to act on behalf of a minor child, including but not limited to making a complaint through the

recipient's grievance procedures for complaints of sex discrimination. When a parent and minor student disagree about how to address sex discrimination against that student, deference to the judgment of a parent, guardian, or other authorized legal representative with a legal right to act on behalf of that student is appropriate.

Further, nothing in these final regulations prevents a recipient from disclosing information about a minor child to their parent who has the legal right to receive disclosures on behalf of their child. For additional explanation of the final regulations' application to disclosure of information to parents of minor children, see the discussions of §§ 106.44(j) (Section II.B) and 106.6(g) (Section I.F).

Although the hypothetical factual scenarios raised by commenters require case-by-case determinations, the Department reiterates that nothing in the final regulations restricts any right of a parent to act on behalf of a minor child or requires withholding of information about a minor child from their parents. *See* §§ 106.44(j)(2), 106.6(g). A recipient can coordinate with a minor student and their parent, as appropriate, to ensure sex discrimination does not interfere with the student's equal access to its education program or activity.

The Department declines to opine on how § 106.31(a)(2) interacts or conflicts with any specific State laws because it would require a fact-specific analysis, but refers the public to § 106.6(b), which affirms that a recipient's obligation to comply with Title IX and the regulations is not obviated or alleviated by any State or local law.

In response to comments regarding curricula, the Department does not have the authority to regulate curricula and reiterates that these final regulations do not regulate curricula or interfere with any asserted parental right to be involved in recipients' choices regarding curricula or instructional materials. The explicit regulatory limitation on the Department regulating curricular materials under Title IX remains unchanged: ''Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.'' 34 CFR 106.42.

In response to the comments regarding the inclusion of ''in loco parentis'' in the definition of ''parental status,'' the Department appreciates the opportunity to clarify that the definition is limited to the context of §§ 106.21(c)(2)(i), 106.37(a)(3), 106.40(a), and 106.57(a)(1), which prohibit sex discrimination related to the parental status of students, employees, and applicants for admission or employment (*e.g.,* treating mothers more or less favorably than fathers). This definition does not affect the rights or status of a student's parents, authorize a recipient to act in the place of parents, or diminish parental rights. The Department further clarifies that the definition of ''parental status'' does not relate to parental rights under § 106.6(g) and does not bestow parental authority on any person. *See* discussion of the definition of ''parental status'' in § 106.2 (Section III).

Changes: None.

5. Intersection With Health Care

Comments: Some commenters expressed concern that proposed § 106.31(a)(2) could set a new medical standard of care by virtue of Title IX's application to campus health centers, teaching hospitals, and school nurses' offices. Specifically, commenters raised concerns about whether § 106.31(a)(2) would require a recipient to provide gender-affirming care.

Commenters urged the Department to exclude minor children from any ''mandates'' concerning gender transition procedures or prohibit a recipient from treating gender dysphoria in a minor student without parental involvement. One commenter suggested the Department should require rigorous gatekeeping procedures before medical interventions.

Another commenter asserted that § 106.31(a)(2) would coerce health care providers' medical care and speech and require providers to treat gender dysphoria in ways to which they have medical, ethical, or religious objections. Some commenters argued that § 106.31(a)(2)'s effect on health care violates the Religious Freedom Restoration Act, 42 U.S.C. 2000bb–1 (RFRA), and the First Amendment's Free Speech and Free Exercise of Religion Clauses.

Another commenter asked the Department to jointly consider the impact of the proposed regulations with the impact of the regulations proposed by the U.S. Department of Health and Human Services (HHS) for Section 1557.

Discussion: Title IX applies to recipients of Federal funding that operate an ''education program or activity.'' 20 U.S.C. 1681(a). When a recipient is an educational institution, all of its operations are considered covered by Title IX. *See* Public Law 100–259, 102 Stat. 28 (Mar. 22, 1988) (codified at 20 U.S.C. 1687); U.S. Dep't of Justice, Title IX Legal Manual at III.C, *https://www.justice.gov/crt/title-ix* (last visited Mar. 12, 2024) (''In the context of traditional educational institutions, it is well established that the covered education program or activity encompasses *all* of the educational institution's operations including, but not limited to, 'traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities.''' (footnote omitted) (citing S. Rep. No. 64 at 17, reprinted in 1988 U.S.C.C.A.N. at 19)). Thus, for example, when a federally funded educational institution operates a health center or nurses' office, those centers and offices are part of the institution's ''education program or activity'' and are subject to the Department's Title IX regulations. For recipients that are not educational institutions, the Department's Title IX regulations apply only to any education program or activity operated by such entities.

The Department's Title IX regulations do not (and cannot) promote any particular medical treatment, require provision of particular medical procedures, or set any standard of care. As such, these regulations do not interfere with providers' exercise of their professional medical judgment. Rather, these regulations implement the nondiscrimination requirements of Title IX.

Section 1557, 42 U.S.C. 18116, prohibits discrimination on the basis of race, color, national origin, sex, age, and disability in a range of health programs and activities. While we appreciate that some recipients may be covered under both the Department's Title IX regulations and HHS' Section 1557 regulations, the Section 1557 rulemaking undertaken by HHS is outside of the scope of the Department's Title IX rulemaking. It is the Department's practice to collaborate with other Federal agencies when there may be overlapping civil rights jurisdiction, and we are committed to continuing such collaboration should it arise in the context of these two sets of regulations. The Department will provide technical assistance in the future, as appropriate.

Further, as stated in § 106.6(d), nothing in these regulations requires a recipient to restrict rights protected under the First Amendment or any other rights guaranteed against government action under the U.S. Constitution. The Department likewise interprets and applies its regulations consistent with RFRA and Title IX's exemption for educational institutions controlled by religious organizations.

Changes: None.

6. Intersection With Individuals' Religious Beliefs

Comments: Commenters raised concerns regarding the application of proposed §§ 106.10 and 106.31(a)(2) to institutions and individuals when compliance with such provisions would violate their religious beliefs.

Some commenters raised specific concerns regarding the application of the religious exemption in Title IX, with some asserting that §§ 106.10 and 106.31(a)(2) would not apply when the provisions would conflict with the religious tenets of an organization. Other commenters suggested further clarification around the religious exemption in Title IX and posed specific hypotheticals for the Department to address and affirm as falling within the religious exemption. Some commenters raised concerns that persons of faith attending or employed by non-religious schools or religious schools are unable to invoke the religious exemption. One commenter argued that declining to consider the need of such persons to freely exercise their faith would be arbitrary and capricious.

Some commenters expressed concern that requirements under § 106.31(a)(2) would potentially interfere with their constitutionally protected free speech and free exercise rights under the First Amendment. Commenters further asserted that proposed § 106.31(a)(2) would prohibit persons with traditional religious views of family and sexuality from exercising their constitutionally protected free speech and free exercise rights. One commenter also expressed concerns that the proposed regulations would compel faculty, staff, and students to speak in particular ways about sexual orientation and gender identity that may conflict with their religious beliefs, citing *Vlaming* v. *W. Point Sch. Bd.,* 10 F.4th 300, 304 (4th Cir. 2021). One commenter also asserted that these provisions would conflict with RFRA, insofar as these provisions apply to non-exempt religious schools or insofar as they require individual religious teachers, students, and visitors at secular schools to violate their religious beliefs.

Some commenters urged the Department to clarify that free speech and religious liberty protections extend to recipients and individuals and that such protections will not be altered or abridged through the final regulations or future Department guidance or practice.

Discussion: The Department is committed to enforcing Title IX consistent with all applicable free speech and religious liberty protections.

With respect to religious educational institutions, the Department agrees with commenters that §§ 106.10 and 106.31(a)(2) do not apply to an educational institution that is controlled by a religious organization to the extent that the provisions' application would not be consistent with the religious tenets of such organization. 20 U.S.C. 1681(a)(3). If an institution wishes to claim an exemption, its highest-ranking official may submit a written statement to the Assistant Secretary for Civil Rights, identifying the provisions of Title IX that conflict with a specific tenet of the controlling religious organization. 34 CFR 106.12(b).

The Department notes that that the religious exemption in Title IX applies to an ''educational institution'' or other ''entity' that is controlled by a religious organization, 20 U.S.C. 1681(a)(3); 1687(4); it does not address an individual student or employee's exercise of their religious beliefs. As commenters also noted, however, RFRA provides that the Federal government ''shall not substantially burden a person's exercise of religion'' unless the government ''demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest.'' 42 U.S.C. 2000bb–1.

The Department cannot opine on how RFRA might be applied in particular situations, including in hypotheticals suggested by commenters, because determinations about whether the application of Title IX in a particular context substantially burdens a person's exercise of religion would necessarily depend on the circumstances at hand. The Department, however, must abide by RFRA, and OCR considers RFRA's requirements when it evaluates a recipient's compliance with Title IX. An individual may also inform the Department of a burden or potential burden under RFRA by sending an email to *RFRA@ed.gov.* The Department's Office of the General Counsel, in consultation with other Department offices or Federal agencies when appropriate, will determine whether further investigation is warranted.

With regard to commenters' concerns related to the Free Speech and Free Exercise Clauses of the First Amendment, § 106.6(d) explicitly states that nothing in the regulations requires a recipient to restrict rights protected under the First Amendment or other constitutional provisions. The Department, likewise, must act in accordance with the U.S. Constitution.

Changes: None.

7. Appearance Codes

Comments: Some commenters urged the Department to clarify how Title IX and the final regulations apply to sex-specific appearance codes, including dress and grooming codes. Some commenters urged the Department to clarify whether and how sex-specific appearance codes violate Title IX and how the final regulations' prohibition in § 106.31(a)(2) on separating or treating students differently based on sex in a manner that causes more than de minimis harm applies in this context.

Commenters said that appearance codes with sex-specific requirements perpetuate sex stereotypes and contribute to sex discrimination, including sex-based harassment. Some commenters explained that dress and appearance codes are enforced disproportionately against girls and LGBTQI+ students and often restrict common Black protective hairstyles like braids, locs, hair wraps, Bantu knots, and bandanas or impose hair length requirements on students for whom wearing long hair may be an important part of their identity, including Indigenous students, Sikh students, and others.

Some commenters stated that the Department should restore and update the dress code provision in the original 1975 Title IX regulations that was rescinded in 1982. One commenter stated that the absence of a provision regarding dress codes has led many school boards and school administrators to believe that Title IX does not cover dress codes. This commenter asked the Department to provide guidance or additional regulations making clear that dress and appearance codes that include sex-based distinctions, either on their face or as enforced, are subject to Title IX. Commenters also noted that the Fourth Circuit recently held that Title IX applies to dress codes. *Peltier,* 37 F.4th at 128.

Some commenters asked the Department to offer examples of how sex-specific dress and appearance codes could violate Title IX, including with respect to sex-specific hair length requirements for boys and girls, and asked whether a sex-specific appearance code could violate the right of any students, including cisgender and transgender students.

Discussion: The Department appreciates the opportunity to clarify that sex-specific appearance codes, including sex-specific dress and grooming codes, are subject to Title IX and § 106.31(a)(2) of the final regulations. Thus, under § 106.31(a)(2),

a recipient may adopt an appearance code with some sex-based distinctions to the extent those distinctions do not cause more than de minimis harm. For example, some sex-based distinctions may be appropriate in the protective gear or uniforms a recipient expects students to wear when participating in certain physical education classes or athletic teams. On the other hand, imposing different restrictions on how boys and girls dress or appear would violate Title IX if the sex-specific restriction causes students more than de minimis harm under § 106.31(a)(2). *See, e.g., Peltier,* 37 F.4th at 130; discussions of de minimis harm standard (below and Section IV.B.1).

Although the Title IX regulations no longer include a provision explicitly addressing appearance codes as they did from 1975 until 1982, neither the Title IX statute nor the regulations contain an exception that would permit a recipient to discriminate on the basis of sex in the context of appearance codes. However, in light of comments the Department received, the Department understands the need to clarify its view of the final regulations' application to sex discrimination in the context of appearance codes.

In addition to several of the specific prohibitions in what is now § 106.31(b), the Title IX regulations that HEW originally issued in 1975 also included a specific prohibition on ''[d]iscrimination against any person in the application of any rules of appearance.'' 40 FR 24128 (codified at 45 CFR 86.31(b)(5) (1975)). In 1982, the Department removed this specific prohibition from its Title IX regulations. The corresponding **Federal Register** notice offered three reasons for the removal: (1) to permit the Department ''to concentrate its resources on cases involving more serious allegations of sex discrimination''; (2) because ''[d]evelopment and enforcement of appearance codes is an issue for local determination''; and (3) because allegedly there was ''no indication in the legislative history of Title IX that Congress intended to authorize Federal regulations in the area of appearance codes.'' U.S. Dep't of Educ., Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 47 FR 32526, 32526–27 (July 28, 1982).

The Department notes that the third reason offered in the July 1982 notice was materially incomplete. Although the legislative history preceding enactment of Title IX in 1972 may not have included any discussion of appearance codes, it also did not suggest that such codes would be treated differently from other sex-based rules of student behavior and sex-based treatment of students. And although some witnesses at congressional hearings to review HEW's proposed rules in 1975 criticized the proposed regulations' prohibition on discrimination in appearance codes (and some witnesses praised it), *see Hearings Before the Subcomm. on Postsecondary Educ. of the Comm. on Educ. and Labor in the H.R., Review of Regulations to Implement Title IX of Public Law 92–318 Conducted Pursuant to Sec. 431 of the Gen. Educ. Provisions Act,* 94th Cong. 239, 250, 252, 362, 374, 450, 514–15, 609, 637 (1975), Congress did not disapprove the regulations or amend the law before the regulations, including the appearance provision, took effect in July 1975.

More importantly, although the 1982 amendment removed a specific reference to appearance codes from the regulations, it did not create a new exception or alter in any way the Title IX regulations' central prohibition on sex discrimination or the other specific prohibitions in § 106.31(b). Indeed, the Department would not have authority to take any action that creates an exception from Congress's clear prohibition on sex discrimination or that is otherwise inconsistent with Title IX.

The Departments of Justice and Education have clarified that the 1982 amendment did not exempt rules of appearance from the regulatory prohibitions on sex discrimination. *See* Statement of Interest of the United States at 13–14 & n.13, *Arnold* v. *Barbers Hill Indep. Sch. Dist.,* No. 20-cv-01802 (S.D. Tex. July 23, 2021), *https://www.justice.gov/crt/case-document/file/1419201/download; see also* Rehearing En Banc Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellees/Cross-Appellants, at 28 n.5, *Peltier,* 37 F.4th 104 (No. 20–1001(L), 20–1023), *https://www.justice.gov/crt/case-document/file/1449811/download.*

Moreover, since 1982 Federal courts, including in a recent Fourth Circuit en banc opinion, have affirmed that a recipient's enforcement of a sex-differentiated appearance code is subject to Title IX's statutory prohibition on sex discrimination. *See, e.g., Peltier,* 37 F.4th at 114, 127–31 (holding that based on the ''plain language and structure of the statute,'' Title IX ''unambiguously covers . . . sex-based dress codes,'' and remanding the case for consideration of whether the girl plaintiffs were harmed by the charter school's policy requiring only girls to wear skirts). Courts have likewise recognized that different hair length requirements for boys and girls are subject to Title IX. *See Hayden* v. *Greensburg Cmty. Sch. Corp.,* 743 F.3d 569, 583 (7th Cir. 2014) (holding that a policy requiring male basketball players, but not female basketball players, to keep their hair cut short, violated Title IX and the Equal Protection Clause); *cf. Arnold* v. *Barbers Hill Indep. Sch. Dist.,* 479 F. Supp. 3d 511, 524 (S.D. Tex. 2020) (finding under intermediate scrutiny that plaintiff had a substantial likelihood of success on his sex discrimination claim under the Equal Protection Clause challenging school district's sex-specific hair-length policy).

With respect to questions on whether and how § 106.31(a)(2) applies to all students and all appearance codes, the Department appreciates the opportunity to clarify that a recipient is barred from carrying out different treatment or separation in a manner that subjects ''any person'' to more than de minimis harm, except as permitted by Title IX.

Note that if a sex-specific requirement or set of requirements in a recipient's appearance code violate individual students' rights under Title IX, it would not be a defense for that recipient to point to a ''comparably burdensome'' requirement for other students, or to argue that the appearance code generally imposes ''equal burdens'' on both sexes, because Title IX, like Title VII, ''works to protect individuals of both sexes from discrimination, and does so equally.'' *Bostock,* 590 U.S. at 659 (finding that it is not a defense to sex discrimination under Title VII for an employer to say that it discriminates against both men and women because of sex); *see also Peltier,* 37 F.4th at 130 (rejecting the application of the ''comparable burdens'' test to a claim of sex discrimination under Title IX and citing *Bostock* for the proposition that ''[d]iscriminating against members of both sexes does not eliminate liability, but 'doubles it.'''). The Department is aware that some courts still apply a ''comparable burdens'' test to analyze Title IX claims alleging discrimination in the application of appearance codes, *see, e.g., Doe* v. *Rocky Mountain Classical Acad.,* No. 19–CV–03530, 2022 WL 16556255, at *7 (D. Colo. Sept. 30, 2022), but the Department disagrees with that test for the reasons noted in *Peltier,* 37 F.4th at 130 n.13.

The final regulations sufficiently account for discriminatory appearance codes, including both dress and grooming codes, and no further changes to the regulations are necessary.

Changes: None.

8. Juvenile Justice Facilities

Comments: Some commenters argued that, by treating youth consistent with their gender identity, the proposed regulations would increase the risk of rape and sexual assault in juvenile justice facilities, making it more difficult for such facilities to comply with applicable standards under the Prison Rape Elimination Act (PREA), and noted that the Department is obligated to thoroughly examine this potential issue along with alternatives that would minimize or avoid increased risk of sexual assaults in these facilities. The commenter noted PREA's requirement that facilities have a written policy of zero tolerance for sexual abuse and sexual harassment (28 CFR 115.311). Other commenters referenced a lawsuit alleging that a cisgender inmate was raped by a transgender inmate. Commenters also urged the Department to allow juvenile justice facilities to make placements according to sex assigned at birth.

Discussion: The Department's Title IX regulations apply to juvenile justice facilities that receive Federal funds from the Department, but they apply only to any education program or activity offered by such facilities. Further, as noted above, § 106.31(a)(2) does not apply in contexts in which different treatment that causes more than de minimis harm is ''otherwise permitted under Title IX,'' including in ''living facilities.'' 20 U.S.C. 1686. The Department recognizes that juvenile justice facilities have an obligation to protect their populations. The generalized data and anecdotal information cited by commenters do not support the commenters' conclusion that these regulations will increase the risk of rape or sexual assault at juvenile justice facilities.

Changes: None.

9. Burden on Schools

Comments: Some commenters asserted that proposed § 106.31(a)(2) would burden recipients and other entities to the extent it causes recipients to construct or retrofit facilities to protect privacy; bear administrative and increased legal costs associated with rule changes and record-keeping; monitor for sexual assaults in restroom and locker room facilities; provide lengthier trainings; seek additional assurances of religious exemptions; and forego participation in Federal student aid programs in order to avoid application of these final regulations under Title IX.

Discussion: The *Regulatory Impact Analysis* addresses costs and benefits associated with the final regulations, including those specifically attributable to § 106.31(a)(2).

Changes: None.

V. Retaliation

A. Section 106.71 Retaliation

1. General Support and Opposition

Comments: Many commenters expressed support for the proposed retaliation provisions, indicating the provisions would encourage reporting, support a safer and more welcoming environment, promote equal access to a recipient's education program or activity, be consistent with case law, and clarify and streamline the process for handling retaliation complaints, including the obligation to comply with § 106.44.

Some commenters opposed the proposed retaliation provisions to the extent the provisions would treat all retaliation as a form of sex discrimination, noting that there are motives for retaliation that do not implicate sex.

Some commenters expressed concern that the proposed changes to § 106.71 would restrict respondents' ability to defend themselves, and some commenters urged the Department to clarify that non-frivolous cross-complaints do not constitute retaliation. Other commenters noted that respondents sometimes make a retaliatory cross-complaint against a complainant, which can force the parties to interact, lengthen the process, drain the complainant's financial resources, and cause a complainant to take a leave of absence or transfer schools.

Discussion: The Department agrees that the retaliation provisions advance Title IX's nondiscrimination mandate by protecting those who exercise their rights under Title IX and participate in grievance procedures.

The Department disagrees with commenters who argued that the proposed regulations would cover conduct that does not constitute sex discrimination and confirms that is not the Department's intent. The Supreme Court in *Jackson* made clear that retaliation against a person for complaining of sex discrimination is '' 'discrimination' 'on the basis of sex''' in violation of Title IX ''because it is an intentional response to the nature of the complaint: an allegation of sex discrimination.'' 544 U.S. at 173–74. The Department agrees with commenters who noted that Title IX does not prohibit an individual from taking adverse action against a person who engaged in protected activity for legitimate, non-retaliatory reasons and that retaliation unrelated to sex is not covered by Title IX. The definition of ''retaliation'' in the final regulations at § 106.2 accounts for this by specifying that retaliation covers only those actions taken ''for the purpose of interfering'' with Title IX rights or ''because'' the person participated in the Title IX process.[91]

The Department disagrees with commenters who suggested that proposed § 106.71 would restrict a respondent's ability to defend themself, including by filing a cross-complaint. Section 106.45(e) recognizes that a respondent may make a cross-complaint and a recipient may consolidate resolution of that complaint with other complaints that arise out of the same facts or circumstances. A cross-complaint would not constitute retaliation under these regulations as long as there is another reason for the cross-complaint that is not a pretext for sex-based retaliation.

Changes: None.

2. Intersection With § 106.45(h)(5)

Comments: Some commenters supported the proposed removal of the statement in § 106.71(b)(2) of the 2020 amendments that retaliation does not include charging an individual with a code of conduct violation for making a materially false statement in bad faith during a Title IX grievance proceeding. Commenters argued that individuals should not be punished simply because their allegations cannot be substantiated. Commenters asserted that the prospect of being disciplined for making false statements under the 2020 amendments has deterred complainants from reporting sex discrimination.

Other commenters asserted that false allegations harm respondents, future complainants, and the integrity of the grievance procedures, and argued that the proposed change would make it harder to punish people who lie during a Title IX grievance procedure.

Other commenters acknowledged that the Department moved a revised version of this provision from § 106.71(b)(2) in the 2020 amendments to new § 106.45(h)(5) but asserted that differences between the language in the

[91] References to participation ''in the Title IX process'' in Section V include contexts where a person ''reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part, including in an informal resolution process under § 106.44(k), in grievance procedures under § 106.45, and if applicable § 106.46, and in any other actions taken by a recipient under § 106.44(f)(1),'' consistent with the definition of ''retaliation'' in § 106.2.

two provisions may be confusing to non-lawyers.

Some commenters urged the Department to clarify whether it is retaliation for a recipient to discipline a student for making a false statement or for engaging in consensual sexual conduct based solely on the recipient's determination whether sex discrimination occurred.

Discussion: Section 106.71(b)(2) in the 2020 amendments provided that when a recipient charges an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding, such an action would not be considered retaliatory as long as the recipient did not base its determination that a person made a materially false statement in bad faith solely on the outcome of the grievance proceeding. *See* 85 FR 30084. As explained in the July 2022 NPRM, the Department proposed removing this provision in response to feedback that the framing of § 106.71(b)(2) in the 2020 amendments was confusing and could have a chilling effect on a person's willingness to participate in a recipient's grievance procedures. 87 FR 41490. Instead, the final regulations include § 106.45(h)(5), which prohibits a recipient from disciplining a party, witness, or others participating in a grievance procedure for making a false statement based solely on the recipient's determination whether sex discrimination occurred.

The Department is not persuaded by commenters who suggested that the differences between § 106.71(b)(2) in the 2020 amendments and § 106.45(h)(5) in the final regulations would cause confusion or make it harder to discipline students for lying. The Department maintains that the affirmative prohibition on discipline based solely on a determination whether sex discrimination occurred in § 106.45(h)(5) of the final regulations will be easier to understand and apply than its prior framing as an exception to a general rule permitting discipline. A recipient will still have discretion to discipline those who make false statements based on evidence other than or in addition to the outcome of the Title IX grievance procedure. For example, a recipient may rely on the same evidence presented during the grievance procedure as evidence that a person made a false statement. However, the determination that a person made a false statement cannot be based solely on the determination whether sex discrimination occurred, because a determination that sex discrimination did not occur is not a proxy for a finding that statements made were false. For example, statements alleging that particular conduct occurred may be true and still not meet the standard for prohibited ''sex-based harassment,'' because the conduct did not create a hostile environment. Or a recipient may determine that there is insufficient evidence to conclude that the alleged conduct occurred, but that does not necessarily mean that the student lied about the conduct. Conflating the determinations of whether sex discrimination occurred and whether false statements were made can have a chilling effect on participation in Title IX grievance procedures.

The Department appreciates the opportunity to clarify that disciplining someone for making a false statement or for engaging in consensual sexual conduct would violate § 106.45(h)(5) if it is based solely on the recipient's determination whether sex discrimination occurred in a Title IX grievance procedure, and it would also constitute retaliation if it otherwise meets the standards outlined in § 106.71 and the definition of retaliation in § 106.2 (*e.g.,* the recipient engaged in the discipline for purpose of interfering with the person's Title IX rights or because they participated in Title IX grievance procedures).

Changes: None.

3. Examples of Prohibited Retaliation

Comments: Some commenters expressed support for proposed § 106.71(a), stating that the examples of prohibited retaliation would encourage reporting incidents of discrimination and promote Title IX's goal of eliminating sex discrimination.

Other commenters argued that proposed § 106.71(a) is not necessary because the definition of ''retaliation'' is broad enough to cover the circumstances described in that paragraph. One commenter argued that proposed § 106.71(a) could unintentionally limit enforcement objectives, such as by preventing alcohol or drug violations from being adjudicated against a respondent when associated with a Title IX complaint.

Some commenters suggested that the Department clarify proposed § 106.71 by providing non-exhaustive examples of retaliation, such as disciplining a pregnant student seeking reasonable modifications or disciplining a complainant for conduct that the school knows or should know results from the harassment or other discrimination (*e.g.,* defending themselves against harassers or acting out in age-appropriate ways in response to trauma). Another commenter urged the Department to modify the proposed regulations to address other code of conduct violations, beyond those arising out of the same facts and circumstances, to include any information learned as a result of the Title IX grievance procedures. As an example, the commenter stated that pursuing discipline against a student for an earlier violation of a recipient's alcohol policy could deter a complainant from reporting an unrelated sexual assault. Another commenter suggested that expressly encouraging or requiring recipients to adopt amnesty policies would more directly address the policy concern than proposed § 106.71(a).

Other commenters expressed concern that proposed § 106.71(a) fails to consider recipients' interests in maintaining codes of conduct for students, including codes of conduct that reinforce a recipient's policies on sexual morality or religious observance. Commenters asserted that recipients' inability to enforce their codes of conduct for non-Title IX transgressions during the pendency of a grievance procedure could prevent schools from maintaining effective discipline among students and have negative impacts on the community.

Discussion: Proposed § 106.71(a), which largely tracks the language from the 2020 amendments, recognized that fear of being disciplined for other code of conduct violations, such as underage drinking, can be a significant impediment to a student's willingness to report incidents of sex-based harassment and other forms of sex discrimination. 85 FR 30536; 87 FR 41542. Proposed § 106.71(a) was intended to encourage reporting of sex discrimination and participation in Title IX grievance procedures by providing assurance that a recipient may not use its code of conduct to dissuade a person from exercising their rights under Title IX or to punish them for having done so.

The Department agrees with commenters who argued that initiating a disciplinary process under the circumstances described in proposed § 106.71(a) may qualify as retaliation under the definition of ''retaliation'' absent the inclusion of that paragraph in the regulations. It is valuable to remind recipients that they violate the prohibition on retaliation if they initiate a disciplinary process against a student for the purpose of interfering with Title IX rights or because the student participated in Title IX grievance procedures. However, proposed § 106.71(a) was not intended to limit the contexts in which initiating a disciplinary process could constitute retaliation. For example, disciplining a

student who filed a complaint of sexual assault for an earlier violation of a recipient's alcohol policy that did not arise from the same facts or circumstances as the assault would not meet the standard in proposed § 106.71(a). But, in this example, it could still constitute retaliation under § 106.2 if the recipient initiated such discipline for the purpose of interfering with that student's Title IX rights or because the student had filed a Title IX complaint.

Because the example in proposed § 106.71(a) does not articulate substantive requirements or limitations beyond the standard outlined in the definition of retaliation at § 106.2, the Department has removed it from the final regulations. The Department similarly removed the example of peer retaliation in proposed § 106.71(b) and instead moved the reference to peer retaliation to the first sentence of § 106.71 of the final regulations to make clear that references to retaliation include peer retaliation. However, the removal of these examples from the text of the regulations does not reflect a change in policy; it reflects the Department's determination that examples of prohibited conduct are more appropriately discussed in this preamble.

For similar reasons, the Department declines to add other examples of prohibited retaliation to § 106.71. The analysis of whether specific conduct constitutes retaliation under the final regulations requires a close examination of all the facts and circumstances. Generally speaking, a recipient engages in retaliation in violation of Title IX when it takes an adverse action against a person because they engaged in a protected activity such as exercising their rights under Title IX. For example, in the commenter's hypothetical of a recipient disciplining a student after the student sought reasonable modifications related to the student's pregnancy, OCR would generally consider discipline to be an adverse action and a request for reasonable modifications to be a protected activity. However, OCR would also need to determine whether the recipient knew about the protected activity when it initiated the discipline and whether there was a causal connection between the protected activity and the discipline. OCR would then need to determine whether the recipient had a legitimate, non-retaliatory reason for the adverse action and whether that reason was genuine or a pretext for prohibited retaliation. OCR would also consider whether any exceptions to Title IX may apply, such as a religious exemption.

Similarly, if the trauma of a sexual assault causes a complainant to engage in problematic behavior (*e.g.,* defiant or aggressive conduct, missing class), a recipient may not initiate its disciplinary process for that misconduct for the purpose of interfering with the student's rights under Title IX. And, when the recipient knows that the student has been subject to possible sex discrimination, it must offer and coordinate supportive measures as described in § 106.44(g), which may include, as appropriate, measures to address trauma, fear of retaliation, or harassment. But the prohibition on retaliation does not bar a recipient from taking disciplinary action to address the problematic behavior described above absent a retaliatory motive.

The Department recognizes that some recipients have adopted broader ''amnesty'' policies under which a recipient will not discipline students for collateral conduct related to an incident of sex-based harassment and that such policies may help encourage reporting. Nothing in the final regulations precludes a recipient from adopting a broader amnesty policy. The Department has determined, however, that Title IX does not require all recipients to adopt such amnesty policies because recipients may have legitimate nondiscriminatory reasons for enforcing their codes of conduct with respect to collateral conduct.

At the same time, the Department also notes that under § 106.44(b) of the final regulations a recipient must require its Title IX Coordinator to monitor for potential barriers to reporting information about conduct that reasonably may constitute sex discrimination under Title IX and take steps reasonably calculated to address these barriers. To the extent a Title IX Coordinator finds fear of discipline for alcohol-related infractions, for example, to be a barrier to reporting sex discrimination, a recipient may consider adopting an amnesty policy as one approach to address that barrier.

The Department acknowledges that the prohibition on retaliation could prevent a recipient from initiating a disciplinary process for alcohol or drug violations against any person (including a complainant, respondent, or witness), but only if the recipient initiates the disciplinary process for the purpose of interfering with that person's Title IX rights or because the person participated in Title IX grievance procedures. That is, a recipient may continue to enforce its code of conduct unless it has a retaliatory motive for initiating the disciplinary process.

The Department disagrees with commenters who said that proposed § 106.71(a) would negatively impact community standards or prevent a religious institution from enforcing its policies on sexual morality or religious observance. While the Department has removed the example in proposed § 106.71(a) in the final regulations, the Department confirms that the definition of retaliation in § 106.2 and the prohibition on retaliation in § 106.71 of the final regulations clearly restrict a recipient from initiating a disciplinary process only when it does so for the purpose of interfering with an individual's Title IX rights or because an individual participated in Title IX grievance procedures. The prohibition on retaliation would not prevent a recipient from enforcing its code of conduct for legitimate, nondiscriminatory reasons.

Moreover, the Department notes that Title IX does not apply to an educational institution that is controlled by a religious organization to the extent that application of Title IX would be inconsistent with the religious tenets of the organization. 20 U.S.C. 1681(a)(3); 34 CFR 106.12.

Changes: In the final regulations, the Department has removed the last sentence of proposed § 106.71 and paragraphs (a) and (b) in their entirety. The Department also added ''including peer retaliation'' after ''retaliation'' in the first sentence of § 106.71 of the final regulations. Additional changes to proposed § 106.71 are explained further below in the discussion of this provision (Other clarifications to regulatory text).

4. First Amendment

Comments: Several commenters objected to the proposed removal of the statement from § 106.71(b) of the 2020 amendments that the exercise of First Amendment rights is not a form of retaliation. Some commenters found inadequate the Department's rationale that § 106.71(b)(1) in the 2020 amendments is redundant of § 106.6(d)(1). Other commenters expressed concern that removal of this statement would chill speech on matters related to Title IX or would make Federal funding contingent on the restriction of First Amendment rights.

Commenters asserted that criticism of a recipient's Title IX policies or practices should not be considered retaliation as that approach would conflict with a party's right to defend their interests and would unconstitutionally restrict protected speech. Some commenters asserted that criticism of another student's decision

to report sex discrimination, make a complaint, or participate in a grievance procedure is constitutionally protected unless it amounts to harassment or falls under a First Amendment exception. Commenters urged the Department to clarify that the prohibition on retaliation does not require a recipient to punish students' protected speech and association, even when those First Amendment rights are exercised with retaliatory intent.

Some commenters argued that the removal of the statement that the exercise of First Amendment rights is not a form of retaliation could result in disciplining students or employees for simply choosing not to associate with an individual who made an accusation against them in violation of their First Amendment right of association. Commenters noted that, while school-sponsored student organizations may be required to comply with anti-discrimination policies as a condition of sponsorship, citing *Christian Legal Society Chapter of the University of California, Hastings College of Law* v. *Martinez,* 561 U.S. 661, 667, 682 (2010), purely private student groups may have strong associational interests against government-backed interference in their membership and leadership decisions. Commenters asserted, for example, that the right to association would protect an organization's right to exclude a person who made a complaint of sexual harassment against the leader of the organization. The commenter argued that this exclusion is protected by the right to freedom of association.

Discussion: The Department carefully considered commenters' opinions regarding protection of First Amendment rights to speech and association. The Department has long made clear that it enforces Title IX consistent with the requirements of the First Amendment, and nothing in Title IX regulations requires or authorizes a recipient to restrict any rights that would otherwise be protected from government action by the First Amendment. *See* 34 CFR 106.6(d); 2001 Revised Sexual Harassment Guidance, at 22; 2003 First Amendment Dear Colleague Letter; 2014 Q&A on Sexual Violence, at 43–44. Section 106.6(d), which was added in the 2020 amendments, appropriately and clearly states the breadth of these protections, which extend to but are not limited to the retaliation context. Further, including language regarding First Amendment protections in the retaliation provision may create the misimpression that such First Amendment protections are limited to the retaliation context. However, the removal of this language from § 106.71 of the final regulations does not represent a substantive change.

The Department agrees with commenters who asserted that merely criticizing a recipient's Title IX policies or practices or an individual's decision to participate in a Title IX grievance procedure would not alone constitute retaliation under the final regulations and that the retaliation provisions do not require or authorize a recipient to punish students who exercise their First Amendment rights. The Department also agrees with commenters that Title IX appropriately requires a recipient to address sex discrimination in its education program or activity, including conduct that constitutes sex-based harassment or retaliation under §§ 106.2 and 106.71 of the final regulations. The Department notes that other provisions also require a recipient to protect the privacy and confidentiality of personally identifiable information it obtains in the course of complying with this part. *See* §§ 106.44(j), 106.45(b)(5).

The Department interprets and applies the final regulations consistent with the First Amendment and relevant case law, including *Christian Legal Society,* 561 U.S. at 667, 682, which permits a recipient to require school-sponsored student organizations to comply with reasonable, viewpoint-neutral nondiscrimination policies regarding access to the organization as a condition of sponsorship. The final regulations do not govern ''purely private'' groups that are not part of a recipient's education program or activity (*e.g.,* operated, sponsored, or officially recognized by a recipient).

Under the final regulations, a recipient-sponsored student organization must not exclude a student for the ''purpose of interfering'' with Title IX rights or ''because'' the person participated in the Title IX process, but such an organization may exclude a student to the extent it has another reason for the exclusion that is not a pretext for sex-based retaliation or another form of unlawful discrimination; the final regulations do not otherwise regulate student association. Whether any specific instance of exclusion from a student organization constitutes retaliation would require an examination of the individual facts and circumstances.

Changes: None.

5. Requests To Clarify or Modify

Comments: Several commenters asked for clarification as to who can make a complaint of retaliation. One commenter noted that the July 2022 NPRM indicates that retaliation complaints may be made by any person ''entitled to make a complaint of sex discrimination'' and asked whether this is meant to exclude a respondent, an ally of a respondent, or a witness from making a claim of retaliation. Some commenters urged the Department to clarify that the prohibition on retaliation is intended to protect complainants from retaliation for filing a complaint and that a complainant should never be disciplined for retaliation.

One commenter asked the Department to revise proposed § 106.71 to remind recipients about their independent obligations to remedy any hostile environment related to retaliation (such as by enforcing no-contact orders) and not limit a recipient's obligation to initiate its grievance procedures. The commenter argued that this would help to keep the burden on recipients and avoid overreliance on complainants to seek enforcement.

Some commenters asked the Department to clarify what steps parents of elementary school and secondary school students can take when they fear retaliation.

Discussion: With respect to the question of who may make a retaliation complaint, as explained in the July 2022 NPRM, any of the persons specified in § 106.45(a)(2) has a right to make a retaliation complaint. 87 FR 41541. Under the final regulations, this includes a complainant; a parent, guardian, or other authorized legal representative with the legal right to act on behalf of the complainant; the Title IX Coordinator, after making the determination specified in § 106.44(f)(1)(v); or any student, employee, or person other than a student or employee who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged retaliation. *See* § 106.45(a)(2). Anyone who has participated in any way in the Title IX process, including as a complainant, respondent, or a witness, may make a retaliation complaint if they believe the recipient or any other person, including a complainant, respondent, or witness, took adverse action against them because of their participation in Title IX grievance procedures. Further, any of the persons listed in § 106.45(a)(2), regardless of any participation in the Title IX process, may make a complaint of retaliation if they believe the recipient or another person has otherwise taken adverse action against them for the purpose of interfering with their Title IX rights. The Department disagrees with a commenter's suggestion that a complainant should never be

disciplined for engaging in retaliation. Each complaint of retaliation must be assessed under the relevant facts and circumstances to determine whether it meets the definition of retaliation in § 106.2.

The Department agrees with the comment that a recipient need not wait for a complaint alleging retaliation to be filed to take actions that would protect students from retaliation. Section 106.71 states: ''When a recipient has information about conduct that reasonably may constitute retaliation under Title IX or this part, the recipient is obligated to comply with § 106.44.'' Under § 106.44(f) of the final regulations, a recipient's Title IX Coordinator must take certain actions, such as to ''offer and coordinate supportive measures'' (which may include no-contact orders), § 106.44(f)(1)(ii), ''determine whether to initiate a complaint of sex discrimination'' under certain circumstances, § 106.44(f)(1)(v), and ''take other appropriate prompt and effective steps, in addition to steps necessary to effectuate the remedies provided to an individual complainant, if any, to ensure that sex discrimination does not continue or recur within the recipient's education program or activity,'' § 106.44(f)(1)(vii). The Department has determined that additional regulatory text is not necessary to further delineate this obligation.

With respect to the steps that parents of elementary school and secondary school students can take when they fear retaliation, the Department notes that they can make a complaint under the recipient's grievance procedures pursuant to § 106.45, file a complaint with OCR pursuant to § 100.7(b) (incorporated through § 106.81), or seek relief through the courts. *See Cannon,* 441 U.S. 677.

Changes: None.

6. Other Clarifications to Regulatory Text

Comments: None.

Discussion: The Department observed that the second sentence of proposed § 106.71, which would require a response when a recipient ''receives'' information about conduct that may constitute retaliation, could be read to refer only to those circumstances in which a recipient learns of retaliation from an outside source. Because that was not the Department's intent, the Department revised this sentence so that the provision accounts for any circumstances in which the recipient ''has'' information about retaliation. The Department further revised the reference to ''may constitute retaliation'' to ''reasonably may constitute retaliation under Title IX or this part'' to align with parallel references throughout the final regulations. Lastly, the Department observed that proposed § 106.71 did not address whether a recipient may use an informal resolution process to resolve a retaliation complaint; the Department therefore added language clarifying that a recipient may, as appropriate and consistent with the requirements of § 106.44(k), offer the parties to a retaliation complaint the option of an informal resolution process. The Department also added ''both'' before ''§§ 106.45 and 106.46'' in the fourth sentence to clarify that a postsecondary recipient would have to comply with both provisions when consolidating a complaint of retaliation with a complaint of sex-based harassment involving a student party.

Changes: In addition to the changes explained above in the discussion of this provision (Examples of prohibited retaliation), the Department has revised the second sentence of proposed § 106.71 to change the term ''receives'' to ''has,'' to add ''reasonably'' before ''may constitute,'' and to add ''under Title IX or this part'' after ''retaliation.'' The Department has revised the third sentence of proposed § 106.71 to add language clarifying that a recipient may, as appropriate, initiate an informal resolution process in response to a retaliation complaint. Finally, the Department added ''both'' before ''§§ 106.45 and 106.46'' in the fourth sentence.

B. Section 106.2 Definition of ''Retaliation''

1. Protected Activity

Comments: Some commenters urged the Department to clarify the activities that are protected under the definition of ''retaliation'' (*i.e.,* what constitutes a protected activity). Some commenters urged the Department to provide examples of retaliation, including retaliation against complainants, respondents, and others. One commenter noted that since ''made a complaint'' was specifically included in the proposed § 106.2, ''responded to a complaint'' should be added as well in order for the provision to be equitable to complainants and respondents.

Some commenters urged the Department to clarify that the proposed regulations would not prevent a recipient from lawfully compelling the good-faith participation of an employee or student of the recipient in a Title IX proceeding. Commenters noted that permitting an employee of a recipient to refuse to participate in any manner in a Title IX grievance procedure would be at odds with the purpose of Title IX and other obligations under the proposed regulations. One commenter stated that the Department should consider exempting an employee complainant from compelled participation in an investigation. One commenter suggested clarifying that a recipient may compel participation on the part of a non-employee who is authorized by a recipient to provide aid, benefit, or service (such as a volunteer coach). One commenter noted that, because non-participation is not considered protected activity under Title VII, many employers have policies requiring employees to participate as witnesses in Title VII investigations. The commenter noted that many recipients changed similar requirements with respect to students in response to the 2020 amendments, which has led to recipients having inconsistent policies under Title VII and Title IX on this issue and has prevented institutions from being able to conduct as thorough an investigation as possible in the Title IX context.

Discussion: With respect to comments about what constitutes a protected activity, the Department notes that the definition of ''retaliation'' at § 106.2 includes an ''interference'' clause and a ''participation'' clause, which define two types of protected activity. The interference clause prohibits an adverse action taken ''for the purpose of interfering with any right or privilege secured by Title IX'' and protects any actions taken in furtherance of a substantive or procedural right guaranteed by Title IX and its regulations. The participation clause applies when an adverse action is taken because a person ''has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing'' under the Department's Title IX regulations.

The participation and interference clauses are substantially similar to parallel clauses in the retaliation provision of the original regulations implementing Title VI, 29 FR 16301 (currently codified at 34 CFR 100.7(e)), which has been incorporated in the Department's Title IX regulations since they were originally issued in 1975. The Department's interpretation and application of these clauses is consistent with the ''protected activity'' element required to establish a prima facie case of retaliation and is informed by Federal case law. *See, e.g., Grabowski,* 69 F.4th at 1121 (reporting sex-based harassment

to school employees or otherwise speaking out against sex discrimination is ''protected activity'' for purposes of Title IX retaliation claim).

In response to a commenter's request for examples of protected activities, the Department notes that a protected activity includes the exercise of any rights under the final regulations, including, for example, a complainant's or respondent's procedural rights under §§ 106.45 and 106.46, or a pregnant student's right to seek a reasonable modification under § 106.40(b)(3)(ii). Thus, prohibited retaliation would include, for example, taking an adverse action against a complainant or respondent because either appealed a determination under § 106.46(i) or against a pregnant student based on a request for time off for a pregnancy-related medical appointment.

The Department disagrees with a commenter's suggestion to add ''responded to a complaint'' to the definition of ''retaliation.'' The final regulations include ''made a complaint'' as an example because it is an action that initiates the grievance procedures. The final regulations further specify that a recipient may not retaliate against a person because ''they participated or refused to participate in any manner'' in the Title IX process, which includes responding to a complaint. The Department has therefore determined that the suggested revision would be redundant and is unnecessary.

The Department recognizes that the ''refused to participate'' clause in the proposed definition of ''retaliation'' could be read to prevent a recipient from requiring an employee to participate in Title IX grievance procedures. This language was added to the regulations as part of the 2020 amendments to protect complainants' autonomy over how their allegations are resolved. 85 FR 30122 n.547. However, the Department agrees with commenters that giving an employee of a recipient a right under Title IX to refuse to participate in Title IX grievance procedures would be at odds with the purpose of Title IX and other obligations under the final regulations. The Department has therefore revised the final regulations to clarify that the definition of ''retaliation'' does not preclude a recipient from requiring an employee or other person authorized by a recipient to provide aid, benefit, or service under the recipient's education program or activity to participate as a witness in, or otherwise assist with an investigation, proceeding, or hearing under this part. This change also resolves commenters' concerns about inconsistency with Title VII.

With respect to employee complainants, under the revised definition, an employee may decline to make a complaint under the recipient's Title IX grievance procedures and may not be penalized for that decision under §§ 106.2 and 106.71. However, the recipient's Title IX Coordinator may determine that the risk of additional acts of sex discrimination occurring if the grievance procedures are not initiated requires the Title IX Coordinator to initiate a complaint. *See* § 106.44(f)(1)(v). In such a case, the recipient may require an employee to testify as a witness in such grievance procedures.

The Department declines to extend this exception to permit a recipient to require students to participate, because students do not share the same obligation to support a recipient's compliance with Title IX as do employees and the regulations have always recognized that Title IX applies differently to students and employees because of their different roles within a recipient's education program or activity. Thus, for example, the final regulations require a recipient to require certain employees to notify the Title IX Coordinator when they have information about conduct that reasonably may constitute sex discrimination, § 106.44(c), and do not impose a similar requirement on students. Further, a recipient generally exercises control over its employees in ways that it does not with respect to students.

Under the final regulations, a recipient may not retaliate against a student (including an actual or potential complainant, respondent, or witness) for refusing to participate in Title IX grievance procedures. A recipient may, however, investigate and resolve a complaint consistent with its grievance procedures under § 106.45, and if applicable § 106.46, despite a student respondent's refusal to participate. *See, e.g.,* § 106.46(f)(4). In such a circumstance, imposing disciplinary sanctions on a respondent because the recipient determines, following the conclusion of its grievance procedures, that the respondent violated the recipient's prohibition on sex discrimination, is not itself retaliation.

Changes: In the definition of ''retaliation'' in the final regulations, we have added a sentence clarifying that nothing in the definition or this part precludes a recipient from requiring an employee or other person authorized by a recipient to provide aid, benefit, or service under the recipient's education program or activity to participate as a witness in, or otherwise assist with, an investigation, proceeding, or hearing under this part.

2. Adverse Action

Comments: Some commenters addressed what may constitute ''intimidation, threats, coercion, or discrimination'' under the ''retaliation'' definition in proposed § 106.2. Specifically, some commenters argued that terms like ''intimidation'' and ''discrimination'' could cover trivial acts of exclusion or incivility such as staring at someone. Some commenters asked whether particular actions would constitute ''intimidation, threats, coercion, or discrimination,'' such as making a comment on social media, assigning a bad grade, exclusion from a recipient's programs, writing negative letters of recommendations or assessments, and adverse hiring and promotional decisions.

Some commenters noted that the risk of retaliatory disclosure of information about a complainant can chill reporting of discrimination and urged the Department to describe when such disclosure would constitute prohibited retaliation. One commenter asked the Department to clarify whether one party's disclosure of another party's identity (or failure to remedy such disclosure) would constitute retaliation. One commenter asked the Department to clarify that it could be considered retaliatory to disclose information related to an individual's status in a protected class, such as their gender identity or sexual orientation, because of the potential for further sex-based discrimination or harassment.

Commenters urged the Department to clarify that the Title IX regulations do not compel a recipient to punish student-journalists for the exercise of their First Amendment rights. Commenters also asked how the proposed retaliation provision would apply to media organizations, including the consequence of making materially false statements and acting in bad faith.

One commenter asked the Department to clarify that disclosure of information related to Title IX findings, as part of an employee reference check, is not retaliation.

One commenter urged the Department to clarify whether and when using additional investigation and adjudication processes could constitute retaliation by the complainant or the recipient, such as pursuing a Title IX process and a Title VII process based on the same conduct.

Some commenters asked the Department to clarify that requiring a complainant to enter a confidentiality agreement as a prerequisite to accessing

their rights under Title IX, including to obtain supportive measures or initiate an investigation or informal resolution, is a form of retaliation.

Discussion: With respect to comments seeking clarification as to what constitutes ''intimidation, threats, coercion, or discrimination'' as used in the definition of retaliation at § 106.2, the Department notes that substantially similar terms have been incorporated in the Department's Title IX regulations since they were originally issued in 1975, and these precise terms appeared in § 106.71 of the 2020 amendments. The Department's interpretation and application of these terms is consistent with the ''adverse action'' element required to establish a prima facie case of retaliation and is informed by Federal case law. *See, e.g., Ollier* v. *Sweetwater Union High Sch. Dist.,* 768 F.3d 843, 868 (9th Cir. 2014) (''Under Title IX, as under Title VII, the adverse action element is present when a reasonable person would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable person from making or supporting a charge of discrimination.'' (internal citations omitted)).

The Department disagrees that terms like ''discrimination'' or ''intimidation'' suggest trivial acts of exclusion or incivility. Courts have used those terms in describing prohibited retaliation, *see e.g., Jackson,* 544 U.S. at 173–74 (retaliation is a ''form of 'discrimination' because the complainant is being subjected to differential treatment''); *White* v. *Gaston Cnty. Bd. of Educ.,* No. 3:16cv552, 2018 WL 1652099, at *13 (W.D.N.C. Apr. 5, 2018) (''The record is replete with examples of intimidation''). The Department agrees with commenters that, depending on the facts, making adverse assessments or hiring and promotional decisions; lowering a student's grades, making threats or disclosing confidential information on social media; or excluding someone from an education program could constitute intimidation, threats, coercion, or discrimination that, if taken for the purpose of interfering with a person's Title IX rights or because of a person's participation in Title IX grievance procedures, would constitute retaliation under the final regulations. Whether a particular action is adverse in any given case would require a fact-specific analysis of how the action would affect a reasonable person in the complainant's position. *Cf. Burlington,* 548 U.S. at 71 (holding jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee based on evidence that new position was ''more arduous and dirtier,'' required fewer qualifications, and original position ''was objectively considered a better job''). *Compare Polite* v. *Dougherty Cnty. Sch. Sys.,* 314 F. App'x 180, 183–84 (11th Cir. 2008) (transferring a teacher to another school where he had the same responsibilities, earned the same pay, and got along well with the principal was not sufficiently adverse), *with Johnson* v. *Watkins,* 803 F. Supp. 2d 561, 574 (S.D. Miss. 2011) (transferring a literacy coach from a middle school to an elementary school was adverse when it entailed more work, less independence, greater out-of-pocket expenses, and a younger age group that was outside the literacy coach's area of expertise).

In response to questions concerning when a disclosure of information may constitute retaliation, the Department agrees with commenters that disclosure of certain information, including, for example, information about a person's LGBTQI+ status or pregnancy or related condition, can be harmful and chill reporting of incidents of discrimination. Deliberately disclosing or threatening to disclose such confidential information about a person would therefore constitute an adverse action. Such disclosures may violate the prohibition on retaliation, including peer retaliation, when they are taken for the purpose of interfering with a person's Title IX rights or because of a person's participation in Title IX grievance procedures. The Department notes that other provisions also require a recipient to protect the privacy and confidentiality of personally identifiable information it obtains in the course of complying with this part. *See* §§ 106.44(j), 106.45(b)(5).

The Department agrees with commenters that the Title IX regulations do not require or authorize a recipient to punish students, including student-journalists, for the exercise of their First Amendment rights. *See* 34 CFR 106.6(d). The Department further notes that the Title IX regulations apply to education programs and activities that receive Federal financial assistance from the Department and generally would not apply to media organizations unless they are part of a recipient's education program or activity (*e.g.,* operated, sponsored, or officially recognized by a recipient).

The Department appreciates the opportunity to clarify that when a student or employee whom a recipient has determined engaged in sex discrimination transfers to another recipient institution, the final regulations do not prohibit the first recipient from informing the other recipient of the misconduct and doing so does not constitute retaliation if the recipient has a legitimate nondiscriminatory reason. *See* § 106.6(e) discussion of Interaction between Title IX and FERPA Regarding the Disclosure of Information that is Relevant to Allegations of Sex Discrimination and Not Otherwise Impermissible; § 106.44(j). A recipient does not, however, have an affirmative obligation to disclose such information under Title IX or this part.

The Department also appreciates the opportunity to clarify that initiation of a disciplinary process or filing of a complaint outside the Title IX context could constitute retaliation if these actions meet the standards in § 106.71 and the definition of ''retaliation'' or ''peer retaliation'' in § 106.2 in the final regulations. Such actions would only constitute retaliation if taken for the purpose of interfering with a person's rights under Title IX or because they participated in Title IX grievance procedures and the recipient lacks another reason for the action that is not a pretext for sex-based retaliation.

With respect to the comment on the permissibility of confidentiality agreements, § 106.45(b)(5) requires a recipient to take reasonable steps to protect the privacy of the parties and witnesses during the pendency of the grievance procedures, in recognition of the fact that a party's improper disclosure of information could compromise the fairness of the grievance procedures. Section 106.45(b)(5) also specifies, however, that those steps must not ''restrict the ability of the parties to: obtain and present evidence, including by speaking to witnesses, subject to § 106.71; consult with their family members, confidential resources, or advisors; or otherwise prepare for or participate in the grievance procedures.'' Further, requiring a student to sign a confidentiality agreement as a prerequisite to obtaining supportive measures, initiating an investigation or an informal resolution, resolving a complaint (formally or informally), or exercising any other rights under the final regulations could constitute retaliation if it is done for the purpose of interfering with Title IX rights or because the student participated in the Title IX process in any way.

Changes: None.

3. Causal Connection

Comments: One commenter asked the Department to clarify the phrase ''for the purpose of interfering with any right or

privilege secured by Title IX'' in both proposed §§ 106.2 and 106.71. Another commenter urged the Department to remove this phrase because students do not typically have access to evidence of a decisionmaker's state of mind to prove that the students were disciplined for this purpose. The commenter also noted that recipient officials who punish complainants may instead rely on sex stereotypes.

Another commenter argued that retaliatory motive is redundant because intimidation, threats, coercion, and discrimination against someone participating in Title IX grievance procedures would always violate Title IX.

Discussion: In response to commenters' request that the Department clarify or remove the phrase ''for the purpose of interfering with any right or privilege secured by Title IX,'' the Department notes that this standard has been incorporated in the Department's Title IX regulations since they were originally issued in 1975. The requirement to establish retaliatory motive is a core element of a retaliation claim. *Jackson,* 544 U.S. at 173–74 (retaliation ''is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination''); *Mercy Cath. Med. Ctr.,* 850 F.3d at 564 (requiring proof of causal connection between recipient's adverse action and plaintiff's protected activity to establish retaliation).

Although a student may not have evidence of a decisionmaker's state of mind, a retaliatory motive may be established through either direct evidence (*e.g.,* a written or oral statement demonstrating the action was taken for the purpose of interfering with Title IX rights) or circumstantial evidence (*e.g.,* changes in the recipient's treatment of the complainant following the protected activity, the time span between when the individual engaged in a protected activity and when the recipient took the adverse action, different treatment of the complainant compared to other similarly situated individuals, deviation from established policies or practices). To the extent a recipient takes adverse action against a student based on sex stereotypes, the recipient violates the prohibition on sex discrimination based on sex stereotypes in § 106.10 and, depending on the context, may also violate the prohibition on bias and conflict of interest in § 106.45(b)(2) in the final regulations.

The Department disagrees with commenters who asserted that retaliatory motive is a redundant or unnecessary element of the definition of ''retaliation.'' Although intimidation, threats, coercion, and discrimination against a participant in a grievance procedure always raise concerns, to establish an adverse action constitutes retaliation, there must be a causal connection to the protected activity: the adverse action must have been taken ''because'' an individual engaged in a protected activity or for the purpose of interfering with a protected activity. For example, when a student participates in Title IX grievance procedures, and then an employee of the recipient denies that student's application to participate in a study abroad program, the student may believe the recipient took that action in retaliation for their participation in the grievance procedures. The denial would constitute retaliation if, for example, the employee knew the student had participated in Title IX grievance procedures and denied the student's application to punish them for participating. If, on the other hand, the employee was not aware of the student's participation in Title IX grievance procedures or the recipient had a legitimate, non-retaliatory reason for denying the application (*e.g.,* the program was already at capacity at the time the student applied), then the denial would not constitute retaliation.

Changes: None.

4. Other Clarifications to Regulatory Text

Comments: None.

Discussion: In the first sentence of the definition of ''retaliation'' in § 106.2, the Department reordered the list of persons or entities who can be alleged to have engaged in retaliation for clarity. The Department also revised a reference to ''other appropriate steps taken by a recipient in response to sex discrimination under § 106.44(f)(6)'' to align with revisions to the text and structure of § 106.44(f) in the final regulations. *Changes:* In the first sentence of the definition of ''retaliation'' in § 106.2, the reference to ''recipient'' has been moved to precede ''student'' and the reference to an ''employee'' has been combined with ''or other person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity.'' The description of and reference to § 106.44(f)(6) has been revised to cover ''other actions taken by a recipient under § 106.44(f)(1).''

C. Section 106.2 Definition of ''Peer Retaliation''

Comments: Some commenters appreciated that the proposed regulations would clarify that prohibited retaliation includes retaliation by students against other students. Other commenters asserted that a recipient should not be responsible for the actions of students or student groups that are not sponsored by the recipient. Some commenters argued that explicit coverage of peer retaliation is unnecessary, as it is covered by other provisions in the regulations. One commenter asked whether the Department intentionally excluded retaliatory harassment from the proposed definition of ''peer retaliation.'' Some commenters urged the Department to include a more detailed description of what constitutes ''peer retaliation'' and how it differs from ''retaliation'' by a recipient.

Some commenters asked the Department to consider broadening the proposed definition of ''peer retaliation'' to cover retaliation among a recipient's employees. Another commenter noted that coverage of peer retaliation by non-supervisory employees would differ from parallel legal obligations under Title VII.

One commenter suggested that the proposed definition of ''peer retaliation'' could also extend to adult agents acting on behalf of the student, such as parents or guardians.

One commenter worried that coverage of peer retaliation would be burdensome and unworkable if recipients are expected to monitor students' interactions, including on social media platforms.

One commenter warned that, absent a clear definition of peer ''coercion'' or ''discrimination,'' mere criticism against, or ostracism of, an individual filing a claim or participating in a Title IX procedure could be considered peer retaliation and violate students' First Amendment rights.

One commenter urged the Department to restrict a recipient's responsibility for addressing peer retaliation to instances when the recipient has actual knowledge of retaliation and responds with deliberate indifference.

Discussion: The Department agrees with commenters who stated that Title IX prohibits discrimination by recipients but disagrees that recipients have no responsibility to address retaliatory misconduct by students or student groups. As explained in more detail in the discussion of § 106.44(a), a recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity, whether engaged in by students, employees, or other individuals, must respond promptly and effectively. Also, as explained in the July 2022 NPRM, retaliation by peers could limit or deny a student's access to

the recipient's education program or activity on the basis of sex. 87 FR 41540. The Department determined it needed to clarify the standards applicable to student-to-student retaliation based on feedback received during the June 2021 Title IX Public Hearing, which highlighted the pervasiveness of peer retaliation against those who participate in a recipient's grievance procedures under Title IX. 87 FR 41540.

The Department recognizes that conduct that meets the definition of peer retaliation may sometimes also constitute sex-based harassment under the final regulations. The elements for establishing peer retaliation and sex-based harassment are not the same, even though both are ultimately forms of sex discrimination. To fully implement Title IX, a recipient must address such conduct whether it meets the definition of ''sex-based harassment,'' ''peer retaliation,'' or both. While the definitions of ''peer retaliation'' and ''sex-based harassment'' do not explicitly reference one another, if sex-based harassment between students is undertaken for the purpose of interfering with Title IX rights or because the person participated in the Title IX process, such conduct would also be peer retaliation. For example, to constitute ''peer retaliation'' under the final regulations, conduct must be undertaken for the purpose of interfering with Title IX rights or because the person participated in some way in Title IX grievance procedures. In contrast, hostile environment ''sex-based harassment'' between peers is unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity. Under the final regulations, recipients have an obligation to address both.

With respect to requests to provide more detail about what constitutes peer retaliation, the Department notes that the definition of ''peer retaliation'' applies the longstanding understanding of retaliation (*i.e.,* actions taken for the purpose of interfering with any right or privilege secured by Title IX) to the specific context of retaliation by a student against another student. The July 2022 NPRM included examples of such conduct, such as teammates vandalizing a student's locker because he complained to school administrators about unequal opportunities for girls or a student council president threatening to remove a member from a committee if they serve as a witness in a Title IX investigation of the president's friend. 87 FR 41540.

The Department acknowledges commenters' concern about employees who may retaliate against one another in ways that constitute sex discrimination. Although the Department determined it needed to clarify in the text of the regulations that the prohibition on retaliation applies to student-to-student retaliation, as discussed above, it is not necessary to do so for employee-to-employee retaliation, which is covered under the definition of ''retaliation'' in § 106.2 and prohibited by § 106.71, as well as under Title VII. The Department therefore declines the suggestion to revise the final definition of ''peer retaliation'' to cover employee-to-employee retaliation.

The Department declines to expressly extend the final definition of ''peer retaliation'' to adults acting on behalf of a student as a recipient may lack control over the context of retaliation that takes place between individuals who are not recipient employees, students, or applicants. To the extent a recipient is aware of anyone engaging in harassment or retaliation toward a student, the recipient must respond consistent with its obligation under final § 106.44, which may include providing supportive measures or investigating a complaint.

With respect to commenters' concern about the burden of monitoring for or responding to allegations of peer retaliation, the Department notes that recipients are not required to investigate allegations of peer retaliation that, even if proven, would not meet the definition of ''peer retaliation.'' *See* § 106.45(d)(iv). And, because retaliation is a form of sex discrimination, a recipient's duty with respect to peer retaliation is to respond only to conduct that ''reasonably may'' meet the definition. Further, the Department does not expect a recipient to monitor students' interactions on social media platforms. However, to the extent a recipient has information that students are threatening and intimidating each other to dissuade them from exercising their rights under Title IX a recipient must take action to address that conduct to preserve an educational environment free from sex discrimination.

The final definitions of ''retaliation'' and ''peer retaliation'' are not intended to restrict any rights that would otherwise be protected from government action by the First Amendment. *See* 34 CFR 106.6(d)(1). Any students, including complainants and respondents, may make a complaint of peer retaliation. The Department appreciates the opportunity to clarify that merely criticizing another student's decision to participate in Title IX grievance procedures would not alone constitute peer retaliation under the final regulations. The final retaliation provisions do not require or authorize a recipient to punish students who exercise their First Amendment rights to speech and association.

The Department declines the suggestion to restrict a recipient's responsibility for addressing peer retaliation to instances when the recipient has actual knowledge of retaliation and responds with deliberate indifference. The Department similarly declined to apply the actual knowledge requirement to claims of retaliation in the 2020 amendments, because ''the Supreme Court [had] not applied an actual knowledge requirement to a claim of retaliation.'' 85 FR 30537. The Department agrees with that logic and also declines to apply the actual knowledge and deliberate indifference standards to retaliation for the same reasons it declines to apply those standards to sex-based harassment, as explained in more detail in the discussion of § 106.44(a).

Changes: None.

VI. Outdated Regulatory Provisions

A. Section 106.3(c) and (d) Self-Evaluation

Comments: While recognizing that the proposed regulations would eliminate the self-evaluation procedures in § 106.3(c) and (d) because they are outdated, some commenters noted that similar provisions for self-evaluation remain important options for future Title IX regulations or guidance.

Discussion: Although the Department appreciates that provisions requiring self-evaluation may be an option for future regulations, the Department did not propose such provisions in the July 2022 NPRM. The Department removed § 106.3(c) and (d) from the final regulations because they described requirements that are no longer operative.

Changes: None.

B. Sections 106.2(s), 106.16, and 106.17 Transition Plans

Comments: While recognizing that the proposed regulations would eliminate the transition plan requirements in §§ 106.2(s), 106.16, and 106.17 because they are outdated, some commenters noted that similar provisions for transition plans remain important options for future Title IX regulations or guidance. Other commenters speculated that the removal of these provisions related to the Department's proposal to

clarify that Title IX prohibits gender identity discrimination.

Discussion: Although the Department does not disagree that provisions requiring transition plans may be an option for other Title IX regulations in the future, the Department maintains that the provisions requiring transition plans in §§ 106.2(s), 106.16, and 106.17 are outdated, and that no similar transition plan provisions are required by these final regulations.

The removal of these provisions does not relate to Title IX's coverage of gender identity discrimination. These provisions governed the transition of certain single-sex institutions to coeducational institutions in the years immediately following adoption of the original Title IX regulations in 1975. The Department removed §§ 106.16 and 106.17 from the final regulations because they describe requirements that are no longer operative or necessary. The Department removed § 106.2(s) from the final regulations because it defined a term that, with the removal of §§ 106.16 and 106.17, is no longer included in the regulations. In addition, the authority for Title IX's coverage of gender identity discrimination is explained in the discussion of § 106.10 above.

Changes: None.

C. Section 106.41(d) Adjustment Period

Comments: One commenter was concerned that because the Department did not propose replacing § 106.41(d) with a different adjustment period, any interpretation of Title IX's application to athletics in the final regulations would take effect immediately.

Discussion: Current § 106.41(d) required recipients to come into compliance with the original athletic regulations within three years of the date those regulations became effective in 1975. The Department removed § 106.41(d) from the final regulations because that adjustment period has passed and so the provision it is no longer operative.

These final regulations do not include any changes to other provisions governing athletics.

The effective date for other provisions amended in these final regulations is addressed in the discussion of Effective Date and Retroactivity (Section VII.F).

Changes: None.

VII. Miscellaneous

A. General Support and Opposition

Comments: Many commenters expressed overall support for the proposed regulations, stating that they are necessary to effectuate the broad purpose and goals of Title IX; would realign Title IX with its core tenets; would streamline, strengthen, standardize, and update Title IX protections; and would ensure equitable Title IX enforcement. Other commenters expressed support for the proposed regulations because they believed the regulations would improve the Title IX complaint process, including by providing more effective and equitable practices for responding to sex-based harassment. Commenters identified how the proposed regulations would protect students, especially students from vulnerable or marginalized groups, from the negative short- and long-term effects of sex discrimination, including by providing an optimal educational environment in which students and others feel safe, keeping students in school and improving their future livelihoods, improving students' mental, emotional, and physical health, and teaching students to be better citizens. Some commenters expressed the belief that the proposed regulations are necessary to protect civil rights from infringement by States and balance the need for oversight with the burden on recipients while also protecting freedom of expression and freedom of religion and respecting the separation of church and state.

Many commenters also expressed general opposition to the proposed regulations. For example, some commenters opposed the proposed regulations on the grounds that the regulations are unclear, vague, ambiguous, and impose open-ended standards on recipients.

Some commenters asserted that the proposed regulations would interfere with teacher-parent relationships and increase a teacher's role in a disproportionate way. Some commenters believed that the proposed regulations increased liability for recipients, for example, due to non-compliance by teachers and other staff, without increasing protections for employees. One commenter asserted that the open-ended nature of the proposed regulations incentivized recipients to err on the side of over-enforcing Title IX at the expense of students, faculty, and staff so recipients do not lose Federal funds.

Some commenters claimed that the Department should stay out of education policy, and instead let education be handled by State or local governments, including school boards. Some commenters believed that the proposed regulations would create hostility between recipients and their staff. Some commenters further characterized the proposed regulations as distracting from what the commenters perceived as the traditional goals of education, like teaching core subjects and training students for future careers.

Discussion: The Department acknowledges the commenters' variety of reasons for expressing support for the proposed regulatory amendments. To the extent commenters expressed general support related to specific provisions of the regulations, those comments are addressed in the sections dedicated to those regulatory provisions in this preamble.

The Department similarly acknowledges commenters for sharing their diverse reasons for opposing the regulations. However, the Department has determined that the greater clarity and specificity of the final regulations will better equip recipients to create and maintain school environments free from sex discrimination. The Department developed the proposed and final regulations based on an extensive review of its prior regulations implementing Title IX, as well as the live and written comments received during a nationwide virtual public hearing and numerous listening sessions held with a wide variety of stakeholders on various issues related to Title IX. The Department understands the concerns voiced by some commenters that the proposed regulations were vague or unclear and the Department acknowledges commenters who shared feedback on proposed provisions that they believed required clarification. The Department considered those comments in the context of the specific provisions in which they were raised, and has, when appropriate, revised regulatory text or addressed commenters' concerns in the preamble. *See, e.g.,* discussion of Hostile Environment Sex-Based Harassment–First Amendment Considerations (Section I.C). The Department also acknowledges the numerous commenters during the virtual public hearing and listening sessions who described the need for students and recipients to have a clear understanding of their rights and obligations under Title IX, and the Department specifically considered these commenters' concerns while drafting the final regulations. To that end, the Department, among other things, has identified bases of prohibited sex discrimination, *see* § 106.10, has specifically articulated the duties of recipients' employees, *see* § 106.44, and has provided detailed grievance procedures for recipients to follow in addressing complaints, *see* §§ 106.45 and 106.46.

The final regulations do not interfere with teacher-parent relationships, and the Department further discusses parental rights in the section below on parental rights. Regarding the appropriate role for teachers and concerns about overenforcement, the Department notes that the final regulations at § 106.8(d) require annual Title IX training for employees so they can adhere to the regulations' requirements. Further, teachers' duties under § 106.44 are generally limited to reporting to the recipient's Title IX Coordinator information about conduct that reasonably may constitute sex discrimination under Title IX. Finally, the Department disagrees that the obligations placed on employees go beyond what Title IX requires. The statute broadly prohibits discrimination on the basis of sex in federally funded education programs and activities, and the Department—in an exercise of its authority to implement the statute under 20 U.S.C. 1682—has determined that requiring employees to identify and report sex discrimination is necessary to effectuate that prohibition.

Responding to concerns about the Department overstepping its role, the Department emphasizes that Congress, through the passage of Title IX, concluded that the Federal government must address sex discrimination in a recipient's education program or activity regardless of traditional local and State control of education policy in general. The Department is implementing that congressional mandate. 20 U.S.C. 1682. Nothing in the final regulations requires schools to teach particular subjects or use particular curricula. 34 CFR 106.42. In the Department's experience, recipients have been able to implement Title IX regulations without engendering hostility in their staff, and the commenter did not explain why this would change under the final regulations. Likewise, the Department disagrees that the regulations distract from what the commenters perceived as the traditional goals of education; to the contrary, as noted above and underscored throughout this preamble, the Department drafted these final regulations with the benefit of the input of hundreds of thousands of stakeholders through the public comment process and the final regulations are consistent with the Department's statutorily mandated role in effectuating Title IX.

Changes: None.

B. Parental Rights—Generally

Comments: Numerous commenters expressed opposition to the proposed regulations because they believed that the proposals would negatively impact or eliminate parental rights. Commenters expressed various reasons, including that they believed the proposed regulations would: interfere with parents' rights to raise their children, keep them safe, and instill their moral values; interject the Department's values into family matters; erode the traditional family structure; prevent parents from deciding their children's curricula and accessing information about their children; usurp parental control over their children's off-campus conduct; give children too much autonomy to make major life decisions without parental input; and allow recipients to ignore parents' wishes. Some commenters asserted that the proposed regulations would disrupt their children's education because families would leave the public education system, and some commenters believed the proposed regulations would expose parents to investigations, reprimands, and criminal penalties.

Some commenters argued that the proposed regulations would be contrary to case law holding that parental rights are fundamental rights and would violate parents' liberty interests under the Due Process Clause of the Fourteenth Amendment. Some commenters also felt that the proposed regulations would exceed the scope and intent of Title IX because Congress did not authorize the Department to diminish parental rights.

Finally, many commenters objected to the proposed regulations on religious grounds and asserted that the proposed regulations would violate parents' First Amendment rights by preventing parents from instilling religious values in their children and by forcing parents to approve of behavior that violates their religious tenets.

Discussion: The Department disagrees with commenters' views that the final regulations diminish parental rights and appreciates the opportunity to emphasize the importance of strong and effective partnerships between recipients and parents, guardians, or caregivers and to clarify the ways the final regulations safeguard those interests. When developing these final regulations, the Department carefully considered commenters' input regarding parental rights. For example, § 106.6(g) affirms that the regulations do not interfere with a parent's right to act on behalf of their minor child, § 106.44(j)(2) permits disclosures of information obtained in the course of complying with this part to a minor student's parent, and § 106.40(b)(3) recognizes a recipient's duty to take actions to prevent discrimination and ensure equal access upon notification by a parent of a minor student's pregnancy or related conditions.

The Department disagrees that the final regulations interfere with parents' rights to raise their children, keep their children safe, and instill their moral values; erode family structures; or interject the Department's values into family matters. To the contrary, the scope of these final regulations is limited to Title IX, and commenters' claims that these regulations will harm students, undermine or dictate family moral values, or erode traditional family structures are speculative and without supporting evidence. A nondiscriminatory and safe educational environment for all students and educators supports all students and their families. Further, the Department disagrees that these final regulations advance specific ideologies or moral values other than the broad nondiscrimination principle that Congress enacted in Title IX. Rather, the final regulations clarify the scope and application of Title IX's protections against sex discrimination. The Department acknowledges commenters' concerns about families potentially withdrawing students from school due to the final regulations, but this concern is speculative and would not necessarily be a direct consequence of the rule.

Commenters did not specify which proposed provisions would allegedly give children autonomy to make major life decisions without parental input or allow recipients to ignore parents' wishes. In any event, the Department notes that § 106.6(g), which, as explained in the discussion of that provision, only had a small number of clarifying revisions to the text of the 2020 amendments, states that these final regulations do not derogate legal rights of parents to act on behalf of their child and notes that nothing in these regulations confers parental rights to any person or recipient. The Department's final regulations do not impose criminal penalties on parents or include provisions related to investigations or reprimands of parents. Moreover, nothing in the regulations holds parents vicariously liable for the actions of their children or requires a recipient to investigate a parent whose student is a respondent in a grievance proceeding.

With regard to claims that the regulations undermine parents' rights to decide their children's curricula and to access information about their children, the Department does not regulate curricula and disagrees that the

regulations interfere with any established parental right to be involved in recipients' choices regarding curricula or instructional materials. The explicit limitation in the Title IX regulations regarding the Department regulating curricula remains unchanged: ''Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.'' 34 CFR 106.42. Further, as explained with respect to § 106.6(g) and elsewhere in this preamble, nothing in these regulations derogates a parent's FERPA right to review and inspect the education records of their children or interferes with teacher-parent communication.

Additionally, the Department disagrees with commenters' assertion that the final regulations interfere with control over off-campus conduct, and some commenters' reliance on *Mahanoy* to support that assertion is misplaced. *Mahanoy* did not reach the issue of a recipient's authority to discipline students for online conduct that creates a sex-based hostile environment on campus. Indeed, the Court suggested that the longstanding *Tinker* standard that schools can regulate speech that materially disrupts classwork, creates substantial disorder, or invades the rights of others—including ''harassment''—may apply to off-campus or online speech in certain circumstances. *Mahanoy,* 141 S. Ct. at 2045–46. Nonetheless, nothing in these final regulations derogates parental control over their child's off-campus conduct. *See* discussion of definition of Hostile Environment Sex-Based Harassment (Section I.C).

The commenters cited several other cases that implicate various parental rights. For example, some commenters cited *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), in which the Supreme Court recognized the ''liberty of parents and guardians to direct the upbringing and education of children under their control.'' Id. at 534–35 (citing *Meyer* v. *Nebraska,* 262 U.S. 390 (1923)). Commenters likewise cited *Wisconsin* v. *Yoder,* 406 U.S. 205, 234 (1972), in which the Supreme Court concluded that a compulsory schooling law violated the Free Exercise Clause of the First Amendment because it conflicted with the religious beliefs of the Amish community to which it had been applied. Nothing in the final regulations prevents parents from sending their children to any particular educational institution or educating them in any particular subject, nor does anything in the final regulations otherwise violate the liberty interest recognized in *Meyer* and *Pierce* or the Free Exercise rights recognized in *Yoder.* Likewise, commenters also cited *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, 639–40 (1974), in which the Supreme Court held invalid a local school board requirement that pregnant schoolteachers take unpaid leave for a specific period of time, recognizing ''freedom of personal choice in matters of marriage and family life'' under the Due Process Clause of the Fourteenth Amendment. The Department emphasizes that nothing in the final regulations interferes with personal choice in matters of family life, and these final regulations support the personal choices of pregnant teachers. Indeed, parents remain free to send their children to institutions that, because of their religious tenets, are exempt from certain applications of the regulations, *see* 34 CFR 106.12, and the Department's regulations provide that they ''shall [not] be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials,'' *see* 34 CFR 106.42. Thus, the Department maintains that these final regulations are consistent with the First and Fourteenth Amendments and throughout this preamble has reminded recipients of their obligations to respect rights protected by the U.S. Constitution.

Moreover, nothing in the final regulations encroaches on a parent's right to determine who is fit to obtain visitation rights with a parent's minor children. In contrast to the statute at issue in another case cited by commenters, *Troxel* v. *Granville,* 530 U.S. 57 (2000), the final regulations specifically protect parents' rights by providing that ''[n]othing in Title IX or this part may be read in derogation of any legal right of a parent, guardian, or other authorized legal representative to act on behalf of a complainant, respondent, or other person,'' § 106.6(g). Thus, although the Department agrees with commenters that the Supreme Court has recognized that parents have a liberty interest in controlling their children's upbringing, the Department does not agree that the final regulations undermine that interest.

Finally, the Department disagrees that these final regulations exceed the Department's authority. As an initial matter, the Department disputes the underlying premise to the commenters' argument that the final regulations diminish parental rights. Further, as explained elsewhere in this preamble. Congress assigned to the Department the responsibility to ensure full implementation of Title IX and the Supreme Court has recognized the Department's ''authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate.'' *Gebser,* 524 U.S. at 292.

Changes: None.

C. Religious Exemptions

1. General Support and Opposition

Comments: Some commenters expressed general support for the Department's decision not to propose changes to § 106.12, arguing that § 106.12, as revised in 2020, allows religious schools to strive to eliminate sex discrimination in their communities while acting in accordance with their religious tenets.

Some commenters expressed concern about how the proposed regulations would interact with the religious exemption to the extent the regulations conflict with religious tenets on human sexuality, gender, and marriage. Several commenters urged the Department to clarify the extent to which religious educational institutions would be required to comply with various aspects of the proposed regulations, including with respect to discrimination based on sexual orientation or gender identity and sex-separate facilities and activities.

Some commenters argued that a religious exemption for provisions related to sexual orientation and gender identity is not justified and that eliminating the religious exemption would benefit campus climate, academic scores, and student mental health. Some commenters argued that the Title IX religious exemption should not allow recipients to punish students because they are LGBTQI+ or have sought an abortion and urged the Department to clarify that institutions eligible for the religious exemption must still protect students from sex-based harassment. One commenter noted that it is difficult to conceive of a religious tenet that would be inconsistent with prohibiting sexual assault.

Discussion: The Department declines to amend § 106.12, the provision governing religious exemptions, in these final regulations. Since 1972, Title IX has provided that its prohibition on sex discrimination ''shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.'' 20 U.S.C. 1681(a)(3). The Department acknowledges that some commenters opposed the religious exemption, but because Congress enacted the Title IX statute with the exemption, the authority to eliminate it also rests with Congress. As explained in more detail

below, the amendments the Department made to § 106.12 in 2020 codified longstanding agency practice.

The Department cannot opine on the extent to which a particular institution would be exempt from particular obligations, such as Title IX's prohibition on sex-based harassment, because such a determination requires a fact-specific analysis as to whether application of a particular provision would be inconsistent with specific tenets of an institution's controlling religious organization. *See* 20 U.S.C. 1681(a)(3); 34 CFR 106.12.

Changes: None.

2. Section 106.12(c)

Comments: Several commenters expressed concern that the 2020 amendments to § 106.12 set criteria for when a recipient is controlled by a religious organization that exceed the scope of the Department's statutory authority under Title IX. Many commenters urged the Department to rescind § 106.12(c) or narrow the evidence a recipient may offer to establish that it is controlled by a religious organization. Some commenters asserted that the religious exemption is inconsistent with Title IX's purpose and argued the Department must give the exemption a narrow interpretation.

Discussion: When the Department adopted § 106.12(c) in a rulemaking separate from the 2020 amendments, *see* 85 FR 59916 (Sept. 23, 2020) (Free Inquiry Rule), the Department stated that § 106.12(c) did not, and was not intended to, ''create new exceptions to the Title IX statute.'' 85 FR 59949. In that rulemaking, the Department explained that § 106.12(c) would not make ''a substantial number of educational institutions . . . newly eligible to assert a religious exemption under Title IX, where they could not before,'' 85 FR 59973, or ''substantially change the number or composition of entities asserting the exemption.'' 85 FR 59977.

The Department also notes that some of the concerns expressed by the commenters about § 106.12(c) were addressed in the 2020 amendments and the Free Inquiry Rule.

First, recipients ''are not entitled to any type of formal deference when invoking eligibility for a religious exemption, and recipients have the duty to establish their eligibility for an exemption, as well as the scope of any exemption.'' 85 FR 30479. The burden is not on a student or the Federal Government to disprove any claim for a religious exemption. *See* 85 FR 30475, 30480 (''The student does not bear the burden with respect to the religious exemption.''). Instead, a recipient must establish that it was eligible for an exemption at the time the alleged noncompliance occurred.

Second, although § 106.12(c) offers several different ways to show that the educational institution is controlled by a religious organization, it is not enough for recipients to show ''tenuous relationships to religious organizations.'' 85 FR 59961. A recipient ''that merely has loose ties to religious teachings or principles, without establishing 'control' by a religious organization, is not eligible to assert a religious exemption.'' 85 FR 59957.

Third, when an educational institution is controlled by a religious organization, the relevant tenets to examine are those of the religious organization, not the personal beliefs of an official or employee working for the recipient. 85 FR 30478.

Finally, even if a recipient shows it is an educational institution controlled by a religious organization and invokes the exemption, § 106.12 ''does not prevent OCR from investigating or making a finding against a recipient if its religious tenets do not address the conduct at issue. In those cases, OCR will proceed to investigate, and if necessary, make a finding on the merits.'' 85 FR 30477. And ''a recipient cannot invoke a religious exemption to retaliate against a person.'' 85 FR 30479.

These explanations issued in 2020 in conjunction with the adoption of § 106.12(c) make the scope of the provision and its operation clear.

Changes: None.

3. Section 106.12(b)

Comments: Some commenters urged the Department to continue the approach reflected in the 2020 amendments to § 106.12, permitting an educational institution to assert an exemption after OCR opens an investigation. Some commenters warned that any requirement of pre-approval of a recipient's religious exemption would be unlawful, lack statutory authority, and impose administrative and legal costs on religious schools, and require religious schools to expose internal documents that risk reputational and privacy harms. Some commenters encouraged the Department to urge other Federal agencies to adopt regulations similar to § 106.12. Some commenters suggested that the Department modify the Title IX regulations so that religious exemptions are granted automatically and the process for securing the Department's assurance of an exemption is less burdensome.

Many commenters expressed concern about the impact of the clarification in the 2020 amendments that schools may assert a religious exemption after they are already under investigation. Many commenters urged the Department to require schools to notify the Department in advance of asserting a religious exemption and bar schools from invoking the exemption retroactively. A few commenters argued that the 2020 amendments to § 106.12 had the effect of encouraging schools to be less clear regarding whether and how they intend to assert an exemption.

One commenter opined that seeking advance assurance can be considered as evidence of the sincerity of an exemption claim. One commenter expressed a concern that when schools can claim exemptions for the first time during investigations, schools may use religion as a pretext for unlawful discrimination. One commenter noted that a process for advance assurance of an exemption and the transparency it fosters is important to ensure that there is a genuine conflict between Title IX and a religious tenet.

Some commenters expressed concern that the 2020 amendments to § 106.12 do not require a school to identify any specific conflict with a tenet of its controlling religious organization. Some commenters urged the Department to amend § 106.12(b) to clarify that any claimed religious exemption must be sufficiently supported by a specific tenet of the religion.

Discussion: The Department acknowledges the view of commenters that a recipient should be able to more easily establish a religious exemption and of commenters who urged the Department to require a recipient to seek advance assurance of an exemption. Under § 106.12(b), and consistent with longstanding agency practice, a recipient may, but is not required to, submit a written statement to OCR seeking assurance of a religious exemption prior to invoking such exemption. A recipient may also assert a religious exemption in response to a pending OCR investigation. As noted previously, the Department did not propose changes to § 106.12(b) in the July 2022 NPRM, and the Department continues to believe that the process outlined in § 106.12(b) appropriately balances the requirements placed on an institution to establish an exemption and the need to ensure that asserted exemptions are consistent with the statutory requirements.

The Department acknowledges that § 106.12(b) uses different language than

the Title IX regulations of other Federal agencies and, therefore, other agencies may elect or be required to use different approaches in addressing the same issue. In 2020, the Department concluded that such interagency differences were acceptable, 85 FR 30504, and that comments ''regarding other agencies' regulations are outside the scope of this rulemaking process and the Department's jurisdiction.'' 85 FR 30072.

The Department notes that many of the comments appear to assume that, once a recipient receives an assurance from OCR that it has established its eligibility for a religious exemption, complainants are barred from filing Title IX complaints against that recipient. That is incorrect. In an OCR proceeding, an assurance does not always preclude OCR from investigating a complaint. Rather, even if a recipient shows it is controlled by a religious organization and invokes the exemption, § 106.12 ''does not prevent OCR from investigating or making a finding against a recipient if its religious tenets do not address the conduct at issue. In those cases, OCR will proceed to investigate, and if necessary, make a finding on the merits.'' 85 FR 30026, 30477.

Moreover, even when the allegations in a complaint seem to fall squarely within the scope of a religious exemption, as the Department repeatedly made clear in 2020, ''[i]f a complaint is filed, and the complaint alleges that a recipient improperly applied a religious exemption or any other exemption under Title IX, OCR will carefully consider the complaint, evaluate compliance with the statute and regulations, and respond accordingly.'' 85 FR 59948; *see also* 85 FR 59947; 85 FR 59973 (''If an individual feels the religious exemption under Title IX and these regulations does not apply to an educational institution, that individual may always file a complaint with OCR.''). If, in the context of a specific complaint of unlawful discrimination under Title IX, OCR determines that the complaint's allegations fall within any assurance of a religious exemption that OCR has previously provided, OCR may contact the controlling organization to verify those tenets. If the organization provides an interpretation of tenets that has a different practical impact than that described by the institution or if the organization denies that it controls the institution, OCR will not recognize the exemption.

With respect to comments on a recipient's obligation to identify a conflict with the tenets of its controlling organization, the Department notes that § 106.12(b) states that a recipient's statement seeking assurance of an exemption must ''identify[ ] the provisions of [the regulations] that conflict with a specific tenet of the religious organization.''

Changes: None.

4. Transparency

Comments: Some commenters stated that transparency about the existence and scope of a school's religious exemption is important for students and applicants to know whether they may be treated differently than their peers because of their sexual orientation, gender identity, reproductive history, or personal beliefs.

Discussion: The Department continues to believe, as it did in 2020, that letters exchanged with recipients regarding religious exemptions are subject to Freedom of Information Act requirements, *see* 85 FR 30480, ''including attendant rules regarding public disclosure of commonly requested documents.'' 85 FR 30481; *see* 5 U.S.C. 552(a)(2)(D). Those attendant rules require agencies to make available for public inspection in an electronic format copies of all records that have been requested three or more times or ''that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.'' Consistent with these requirements, because the Department has received a significant number of requests for these documents, it posts correspondence regarding assurances of religious exemptions from Title IX on its website at *www.ed.gov/ocr/correspondence/other.html* (last visited Mar. 12, 2024).

The Department believes its current practice of making OCR religious exemption letters available online or through FOIA requests is responsive to commenters' concerns. The Department further notes that nothing precludes a prospective student or other individual from asking a recipient whether it relies on any exemptions under Title IX and for information about the scope of any such exemptions, to the extent such information may inform their decision to apply to or attend such recipient.

Comments on transparency regarding religious exemptions in a recipient's notice of nondiscrimination are further addressed in the discussion of § 106.8(b).

Changes: None.

5. Religious Individuals

Comments: Some commenters expressed concern that although § 106.12 protects schools controlled by religious organizations, it does not protect individual students or employees who adhere to religious tenets. One commenter urged the Department to extend § 106.12 to individuals, particularly in schools that are not controlled by a religious organization.

Some commenters stated that the religious exemption does not offer a remedy for what the commenters believe to be a conflict with individuals' First Amendment rights to speak on topics such as gender identity or abortion. One commenter urged the Department to make clear that an employee may decline to provide medical care or services when doing so would conflict with their religious beliefs.

One commenter urged the Department to consider expanding application of Title IX's religious exemption to cover religious student groups and argued that the proposed regulations would create problems for student groups that seek to follow a statement of faith that could be deemed offensive.

Discussion: The Department acknowledges that commenters raised concerns about the application of the final regulations to individuals' speech about a variety of specific topics, such as gender identity and abortion. Consistent with § 106.6(d)(1), nothing in the final regulations requires or authorizes a recipient to infringe on individuals' First Amendment or other constitutional rights. The extent to which the final regulations' prohibition on sex-based harassment intersects with First Amendment rights is addressed in the discussion of the definition of sex-based harassment in § 106.2.

While the statute's religious exemption applies to educational institutions controlled by a religious organization, it does not exempt student organizations, individual employees or students, or educational institutions not controlled by religious organizations.

Changes: None.

6. 34 CFR 75.500(d) and 76.500(d)

Comments: Some commenters urged the Department to rescind 34 CFR 75.500(d) and 76.500(d), which prohibit public postsecondary institutions receiving Department grants from enforcing certain non-discrimination policies against religious student organizations, because those regulations undermine the purpose of Title IX, are redundant of constitutional protections, and were issued without congressional authority and in violation of the APA.

Discussion: The Department did not request comments in the July 2022

NPRM on 34 CFR 75.500(d) or 76.500(d), which are outside the scope of this rulemaking. The Department has proposed rescinding these regulations in a separate rulemaking. *See* 88 FR 10857 (Feb. 22, 2023).

Changes: None.

D. Rulemaking Process

Comments: One commenter asserted the Department developed the proposed regulations without employing a rulemaking process that involved a committee of nominated Title IX practitioners and experts to help the Department. One commenter suggested that the Department create a standing advisory group of representatives from various sectors to assist with considering policy issues and implementing the final regulations so that standards can be set based on input gathered from all sectors.

Some commenters argued that by proposing two separate notices of proposed rulemaking to amend the Title IX regulations, the Department deprived the public of proper notice and opportunity to consider the interrelated interests in the proposed regulations. Some commenters urged the Department to republish a comprehensive notice of proposed rulemaking addressing Title IX in its totality rather than moving forward with final regulations. Other commenters urged the Department to issue final regulations that address all the proposed regulations.

Discussion: The Department believes the commenter who mentioned a committee of nominated Title IX practitioners was referring to the negotiated rulemaking requirements in section 492 of the Higher Education Act (HEA). The requirements of section 492 apply exclusively to regulations that implement Title IV of the HEA. Title IX is not part of the HEA; rather, it is part of the Education Amendments of 1972. Although the Department was not required to conduct negotiated rulemaking for Title IX, the Department solicited live and written comments as part of a June 2021 Title IX Public Hearing and conducted listening sessions with stakeholders expressing a variety of views on the 2020 amendments and other aspects of Title IX prior to drafting the proposed regulations. *See* 87 FR 41390, 41395. Recommendations from practitioners and experts were among the hundreds of thousands of comments on the July 2022 NPRM received by the Department during the notice-and-comment rulemaking process for these final regulations. The comments received on the proposed regulations are posted for the public to view on *Regulations.gov*. In addition, information regarding the live and written comments received during the July 2021 Title IX Public Hearing and at stakeholder meetings with the Department prior to issuing the proposed regulations is discussed in the July 2022 NPRM. *See* 87 FR 41390, 41395–96.

Consistent with the requirements of Executive Order 12866, the Department coordinated with other agencies by sharing the proposed regulations with the Office of Management and Budget (OMB) prior to their publication. Through the interagency review process, OMB provided other Federal agencies, including those that also administratively enforce Title IX, an opportunity to review and comment on the proposed regulations before they were published. In addition, in accordance with Executive Order 12250, the Assistant Attorney General for Civil Rights at the Department of Justice reviewed the proposed regulations and approved them for publication in the **Federal Register**.

The Department acknowledges the suggestion that it create a standing advisory group to assist with policy issues and implementing the final regulations, but the previously discussed public hearing, listening sessions, and notice-and-comment process provided a sufficient opportunity for affected entities and individuals to offer input on the final regulations. The Department also notes that nothing in the final regulations precludes recipients from creating their own advisory groups to help them with implementation. In addition, the Department will offer technical assistance, as appropriate, to promote compliance with the final regulations.

The Department considered all of the comments that were submitted in response to the July 2022 NPRM, including those that objected to the Department's decision to issue separate notices of proposed rulemaking. The Department disagrees with commenters who objected to the Department's issuance of two related notices of proposed rulemaking. The July 2022 NPRM made clear that proposed § 106.31(a)(2) would not apply in the context of eligibility criteria for sex-separate athletic teams because Congress recognized that athletics presents unique considerations and that the Department would issue a separate notice of proposed rulemaking to clarify Title IX's application to criteria recipients use to establish students' eligibility to participate on a particular male or female athletic team. 87 FR 41536–38.

The Department recognizes that participation in team sports is associated with many valuable physical, emotional, academic, and interpersonal benefits for students and that recipients seek greater clarity on how to comply with their Title IX obligations when determining students' eligibility to participate on a sex-separate athletic team consistent with their gender identity. Accordingly, on April 13, 2023, the Department issued its Athletics NPRM, which was approximately nine months after the Department issued its July 2022 NPRM. The Department received more than 150,000 detailed comments on the Athletics NPRM. In light of the volume and substance of comments, and to ensure full consideration of the range of views expressed in those comments, the Department intends to publish a notice of final regulations related to sex-related eligibility criteria for male and female athletic teams separate from these final regulations. The Department maintains its authority under the Javits Amendment to promulgate reasonable provisions governing athletics that consider the nature of particular sports, as detailed in the Athletics NPRM. *See* 88 FR 22862–63.

The Department declines commenters' suggestion to issue a new comprehensive notice of proposed rulemaking, as the public received proper notice and opportunity to comment, and these final regulations reflect the Department's careful consideration of those comments.

Changes: None.

E. Length of Public Comment Period and Process for Submitting and Posting Comments

Comments: Some commenters requested that the Department extend the comment period to December 30, 2022. Some commenters criticized the Department for what they perceived to be attempts to limit the solicitation of comments, including by phrasing the deadline for public comment as ''due on,'' rather than ''due before.'' Some commenters urged the Department to extend the comment period because they had difficulty submitting comments through the *Regulations.gov* website.

Some commenters expressed concern that thousands of public comments from *Regulations.gov* had been removed, citing a disparity between the number of comments posted on *Regulations.gov* and on the **Federal Register** website. Some commenters opposed the editing, redacting, or censoring comments posted on *Regulations.gov*.

Discussion: The Department published the July 2022 NPRM in the **Federal Register** on July 12, 2022 (87 FR 41390), for a 60-day comment period, stating specifically that comments must be received on or before September 12, 2022. The APA does not mandate a specific length for the comment period, but rather states that agencies must give interested persons an opportunity to participate in the proceedings. 5 U.S.C. 553(c). This provision has generally been interpreted as requiring a ''meaningful opportunity to comment.'' *See, e.g., Asiana Airlines* v. *FAA,* 134 F.3d 393, 396 (D.C. Cir. 1998). Case law interpreting the APA generally concludes that comment periods should not be less than 30 days.[92] In this case, commenters had 60 days to submit their comments on the July 2022 NPRM.

When a commenter submits a comment on *Regulations.gov*, they receive a tracking number so they can use that number to locate their comment once it is posted. The Department responded to any requests it received for assistance with submitting comments via *Regulations.gov*, including by providing the member of the public with information regarding the *Regulations.gov* help desk and by accepting written comments via mail and email for members of the public who requested an accommodation or could not otherwise submit their comments via *Regulations.gov*. The Department also consulted with the U.S. General Services Administration (GSA), which administers *Regulations.gov*, during the comment period if a member of the public contacted the Department expressing difficulty submitting comments via *Regulations.gov*. GSA indicated to the Department that there were no widespread problems submitting comments through *Regulations.gov* during the comment period. In light of this, the Department did not extend the comment period.

The Department received more than 240,000 comments on the July 2022 NPRM, many of which addressed the substance of the proposed regulations in great detail. The volume and substance of comments on practically every facet of the proposed regulations confirms that the public had meaningful opportunity to comment, and that the public in fact did meaningfully participate in this rulemaking. *Cf. Pangea Legal Servs.* v. *U.S. Dep't of Homeland Sec.,* 501 F. Supp. 3d 792, 820 (N.D. Cal. 2020) (small number of comments received on a rule relative to other, similar rules showed comment period was inadequate); *N.C. Growers' Ass'n, Inc.* v. *United Farm Workers,* 702 F.3d 755, 770 (4th Cir. 2012) (refusal to receive comments on or discuss the substance or merits of the rule did not allow for a meaningful opportunity to participate). The Department reviewed and considered all comments submitted during the comment period, including duplicate comments.

Concerns that the Department removed thousands of public comments on the July 2022 NPRM from *Regulations.gov*, on September 5, 2022, are mistaken. There was no loss of comments on the July 2022 NPRM. Rather, the Department corrected a commenter's erroneous assertion that the comment in question represented the hundreds of thousands of commenters. Specifically, a person who submits a comment on *Regulations.gov* with an attachment may indicate that they represent multiple individuals or organizations. This process allows individuals to upload a submission with multiple signatures or a single submission containing a number of comments from different individuals, and this self-reported number is then included automatically by the *Regulations.gov* system in the count of comments received. In this case, a single commenter submitted a comment with a self-reported number of 201,303 submissions. That comment consisted of a policy memorandum issued by the Consumer Financial Protection Bureau in 2013 and no other information or attachments.[93]

After the self-reported number of submissions for that comment was included in the total number of comments reflected on *Regulations.gov*, the Department determined that the self-reported number of submissions for that comment was inaccurate because the comment was actually submitted on behalf of a single commenter. Once the error was discovered, the Department informed GSA, and GSA corrected the number of submissions for that comment to one.

Further, comment tallies are generated by GSA's *Regulations.gov* and are publicly available on *Regulations.gov*. Neither the Department nor GSA's *Regulations.gov* eliminated comments or types of comments in the Department's tally count. With two narrow exceptions consistent with Department policy, the Department made all material received from members of the public available for public viewing on *Regulations.gov* for the July 2022 NPRM. As explained in the July 2022 NPRM, the Department did not make publicly available (1) portions of comments that contained personally identifiable information about someone other than the commenter or (2) comments that contained threats of harm to another person or to oneself. *See* 87 FR 41390. Prior to making comments available for public viewing on *Regulations.gov*, the Department reviewed each comment for such content. Following this review, the comments without such content were posted for public viewing on *Regulations.gov*. The Department's review process takes time and therefore, there were instances of a lag between the time an individual submitted a comment via *Regulations.gov* and when it was posted publicly. All comments that did not contain personally identifiable information about a person other than the commenter or threats of harm to the commenter or another person were made available in their entirety for public viewing on *Regulations.gov*. In addition, comments that contained personally identifiable information about someone other than the commenter were made available for public viewing on *Regulations.gov* with the personally identifiable information redacted.

The Department does not track individuals who submit comments, including those who oppose the proposed regulations. The Department made comments available for public viewing and reviewed and considered all of the comments submitted during the comment period, including comments that contained threats of harm or personally identifiable information about someone other than the commenter.

Changes: None.

F. Effective Date and Retroactivity

Comments: Some commenters, noting the scope and breadth of the requirements in the proposed regulations, asked the Department to give recipients adequate time to implement the final regulations, with many asking that the final regulations not take effect mid-year. Some commenters explained that the HEA's master calendar gives postsecondary institutions at least eight months to prepare for the adoption of new Federal regulations and requires the regulations to take effect at the start of an academic year.

[92] *See, e.g., Nat'l Lifeline Ass'n* v. *FCC,* 921 F.3d 1102, 1117 (D.C. Cir. 2019) (''When substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment.''); *Nat'l Retired Teachers Ass'n* v. *U.S. Postal Serv.,* 430 F. Supp. 141, 147 (D.D.C. 1977).

[93] The comment is available at *https://www.regulations.gov/comment/ED-2021-OCR-0166-43621* (last visited Mar. 12, 2024).

Some commenters noted the proposed regulations were silent on retroactivity and asked the Department to clarify the effective date. One commenter suggested that the Department state that the applicable grievance procedures are those that were in effect on the date a complaint was made and that the applicable substantive rules are those in effect at the time the alleged conduct occurred. One commenter explained that when the 2020 amendments were released, postsecondary institutions received many questions regarding whether recipients were required to implement the new Title IX grievance procedure requirements for complaints related to conduct that occurred prior to the effective date, but that were unresolved when the 2020 amendments became effective.

Discussion: Under the APA, the effective date for the final regulations cannot be fewer than 30 days after the final regulations are published in the **Federal Register** unless special circumstances justify a statutorily specified exception for an earlier effective date. 5 U.S.C. 553(d)(3). The Department has carefully considered commenters' concerns, including concerns regarding sufficient time to prepare for compliance and the requests to have these final regulations become effective at the start of an academic year.

The Department appreciates suggestions from commenters as to an appropriate length of time between publication of the final regulations and their effective date. The Department notes again that these final regulations are not promulgated under Title IV of the HEA and thus are not subject to the master calendar under the HEA. They also are not limited to institutions of higher education, but address civil rights protections for students and employees in the education programs and activities of all recipients.

For final regulations not subject to the HEA's master calendar, 60 days is generally sufficient for recipients to come into compliance with final regulations. Consistent with the preamble to the 2020 amendments, the Department recognizes the practical necessity of allowing recipients of Federal financial assistance time to plan for implementing these regulations, including to the extent necessary, time to amend their policies and procedures. *See* 85 FR 30026, 30534.

In response to commenters' concerns about the effective date, the Department has determined that the final regulations will be effective August 1, 2024. Recipients will thus have more than 90 days, far more time than the statutory minimum of 30 days, to prepare for compliance with these final regulations. The effective date of August 1, 2024 adequately accommodates the needs of recipients while fulfilling the Department's obligations to fully enforce Title IX's nondiscrimination mandate. The Department also notes that the effective date coincides with the summer break for many recipients, which will provide them time to finalize their Title IX policies and procedures prior to the start of the new academic year.

The Department will not enforce these final regulations retroactively.[94] Federal agencies authorized by statute to promulgate regulations may only create regulations with retroactive effect when the authorizing statute has expressly granted such authority, which is not the case here.[95] The final regulations apply only to sex discrimination that allegedly occurred on or after August 1, 2024. With respect to sex discrimination that allegedly occurred prior to August 1, 2024, regardless of when the alleged sex discrimination was reported, the Department will evaluate the recipient's compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sex discrimination occurred. The Department also notes that regardless of when the final regulations become effective, some reports regarding sex discrimination occurring in a recipient's education program or activity may be handled under these final regulations while others will be addressed under the requirements of the 2020 amendments; this is not arbitrary and occurs any time regulatory requirements are amended prospectively.

The Department understands that recipients may need technical assistance during the transition period between publication of these final regulations in the **Federal Register** and the effective date of August 1, 2024, and after the regulations become effective to assist them in fully implementing the regulations. The Department will offer technical assistance, as appropriate, to promote compliance with the final regulations.

[94] This position is consistent with the Department's general practice. *See* 85 FR 30026, 30061; U.S. Dep't of Educ., Office for Civil Rights, Questions and Answers on the Title IX Regulations on Sexual Harassment, at 10 (July 2021) (updated June 28, 2022), *https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf.*

[95] *See* 5 U.S.C. 551 (Administrative Procedure Act provision defining a ''rule'' as an agency action with ''future effect''); *Bowen,* 488 U.S. at 208 (''[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.).

Changes: The effective date of these final regulations is August 1, 2024.

G. Prevention

Comments: A number of commenters asked the Department to include regulations requiring student-facing education and prevention programming. Some commenters noted the previously recognized benefits of such programming for helping recipients fulfill their longstanding Title IX obligation to prevent future recurrence of harassment. Commenters also recommended a broad array of requirements, such as education regarding healthy relationships, relationship violence, sex education, self-defense, safety awareness training, child sexual abuse, and the role that drugs and alcohol play in sexual assault. In addition, commenters made specific recommendations regarding sex education in schools, which included comments advocating for more comprehensive sex education, comments advocating for abstinence-only sex education, and comments objecting to any form of sex education. One commenter asked the Department to emphasize the importance of physical safety and prevention measures, such as emergency call boxes, campus security officials, and secured doors and windows.

One commenter urged the Department to provide recipients with funding for prevention education because educating and training for students and employees about the attitudes and behaviors that enable sex discrimination and how to stop it would help recipients fulfill their Title IX obligations.

Discussion: The Department acknowledges commenters' suggestions regarding prevention training and sex education for students. However, the Department declines to require certain training practices aside from § 106.8(d), which relates directly to individuals responsible for implementing these regulations. Because the Department does not control school curricula, the Department declines to add requirements that a recipient instruct students on sex-based harassment prevention or sex education but notes that nothing in these final regulations would preclude a recipient from using its discretion to provide educational programming to students that it deems appropriate. *See* 85 FR 30026, 30125–26.

Regarding Department funding for prevention education, the authority to appropriate money for certain activities lies with Congress.

Changes: None.

H. Tenth Amendment

Comments: Some commenters raised federalism concerns, stating that the primary responsibility for education rests with parents and at the State and local levels and that the proposed regulations would violate the Tenth Amendment.

Discussion: These final regulations do not violate the Tenth Amendment, which states: ''The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'' U.S. Const. amend. X. As explained in the 2020 amendments:

> The Supreme Court's position is sufficiently clear on this topic. ''[W]hile [the Federal government] has substantial power under the Constitution to encourage the States to provide for [a set of new rules concerning a national problem], the Constitution does not confer upon [the Federal government] the ability simply to compel the States to do so.'' The Tenth Amendment ''states but a truism that all is retained which has not been surrendered.'' . . . The Supreme Court always has maintained that ''[t]he States unquestionably do retai[n] a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.'' . . . [T]here can be no dispute that the Federal government retains the authority to regulate sex discrimination . . . in education programs or activities that receive Federal financial assistance, even though the same matters also fall within the traditional powers of the States.

85 FR 30459 (footnotes omitted) (citing *New York* v. *United States,* 505 U.S. 144, 149 (1992); *United States* v. *Darby,* 312 U.S. 100, 124 (1941); *Garcia* v. *San Antonio Metro. Transit Auth.,* 469 U. S. 528, 549 (1985)).

The Department maintains its position from the 2020 amendments that ''[t]he Department, through these final regulations, is not compelling the States to do anything. In exchange for Federal funds, recipients—including States and local educational institutions—agree to comply with Title IX and regulations promulgated to implement Title IX as part of the bargain for receiving Federal financial assistance, so that Federal funds are not used to fund sex-discriminatory practices. As a consequence, the final regulations are consistent with the Tenth Amendment.'' 85 FR 30459.

Changes: None.

I. Exceeding Authority

Comments: Some commenters asserted that the Department lacked congressional authorization to issue the proposed regulations. Specifically, some commenters stated Congress did not authorize the Department to unilaterally implement Title IX regulations or to force recipients to end all forms of sexual harassment and provide remedies to survivors. Some commenters expressed that only Congress, rather than the executive branch, has the authority to amend Title IX. Some commenters stated the Supreme Court has ruled that areas such as education should be decided by the people or the States because such areas have not been specifically delegated to the Federal Government in the U.S. Constitution. Some commenters asserted that the proposed changes bypass the authority of State legislatures.

Discussion: The Department has the delegated authority to promulgate the final regulations.

Under 20 U.S.C. 1682, agencies are specifically empowered to effectuate section 1681 through regulations: each agency with the power to extend Federal financial assistance to education programs or activities ''is authorized and directed to effectuate the provisions of section 1681 of this title . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.'' Further, such agencies may ensure compliance ''by the termination of or refusal to grant or to continue assistance'' to a noncompliant recipient's education program or activity. 20 U.S.C. 1682. Thus, as the Supreme Court has recognized, ''[t]he express statutory means of enforcement [of Title IX] is administrative.'' *Gebser,* 524 U.S. at 280. Congress has validly delegated its power to implement Title IX to agencies such as the Department.

Moreover, the Department disagrees with commenters' assertion that this delegation does not extend to prohibitions on sex-based harassment. The Supreme Court has held that sexual harassment is a form of sex discrimination under Title IX. *See id.* at 283 (affirming ''the general proposition that sexual harassment can constitute discrimination on the basis of sex under Title IX''). The Department thus has authority under 20 U.S.C. 1682 to implement the ban on sex discrimination in 20 U.S.C. 1681 by promulgating regulations prohibiting sex-based harassment and requiring recipients to address it. This authority extends to requiring recipients to provide remedies to complainants because such remedies eliminate the harm of sex-based harassment and prevent its recurrence. Contrary to the commenters' assertion, therefore, the regulations do not ''amend'' Title IX but rather are a key part of ''effectuat[ing]'' Title IX's requirement that recipients operate their education programs and activities free from sex discrimination. 20 U.S.C. 1682.

The Department has not bypassed the authority of State legislatures. In contrast to other statutes reflecting a cooperative federalism, such as the Clean Air Act, Congress provided for only Federal agencies, not State agencies, to adopt regulations implementing Title IX. *See* 20 U.S.C. 1682.

Changes: None.

J. Views of Assistant Secretary Lhamon

Comments: Some commenters stated that Assistant Secretary Catherine Lhamon must be recused from the rulemaking process or be removed from her position, asserting that under her previous leadership, OCR created problems that the 2020 amendments were intended to solve, was biased, and overreached by conducting investigations into all aspects of recipients' adjudication processes and campus life. These commenters asserted that due to Assistant Secretary Lhamon's past public statements, her record as Assistant Secretary from 2013 to 2017, and statements made during her Senate confirmation hearing, neither OCR nor the Department can comply with the APA's reasoned decision-making requirement. The commenters explained that these concerns were expressed in two letters sent to the Department in 2022 but said that the Department failed to discuss these concerns in the proposed regulations, thus tainting the rulemaking process and rendering any final regulations arbitrary and capricious.

Discussion: The Department maintains that no statement on the part of Assistant Secretary Lhamon and no actions taken by OCR under Assistant Secretary Lhamon prevent the Department from engaging in reasoned decision making and rulemaking.

In the context of a rulemaking such as this one, an agency member should be ''disqualified only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding.'' *Ass'n of Nat'l Advertisers, Inc.* v. *FTC,* 627 F.2d 1151, 1170 (D.C. Cir. 1979). This high standard recognizes that the ''legitimate functions of a policymaker . . . demand interchange and discussion about important issues'' and that, if an ''agency official is to be effective he

must engage in debate and discussion about the policy matters before him.'' *Id.* at 1168–69. The D.C. Circuit in *Association of National Advertisers* thus concluded that ''mere discussion of policy or advocacy on a legal question . . . is not sufficient to disqualify an administrator.'' *Id.* at 1171.

Here, the remarks noted by commenters indicate that Assistant Secretary Lhamon advocated for robust procedural protections for students, but nothing suggests she had an ''unalterably closed mind'' regarding any particular issue involved in this rulemaking. Moreover, like the official in *Association of National Advertisers,* Assistant Secretary Lhamon ''made the challenged comments before the [agency] adopted its notice of proposed rulemaking.'' *Id.* at 1173. Indeed, she made them even before she assumed her position as Assistant Secretary in the current Administration. Nothing suggests that ''the interchange between rulemaker and the public should be limited prior to the initiation of agency action.'' *Id.* To the contrary, ''[t]he period before [an agency] first decides to take action on a perceived problem is, in fact, the best time for a rulemaker to engage in dialogue with concerned citizens'' because ''[d]iscussion would be futile . . . if the administrator could not test his own views on different audiences'' before initiating the action. *Id.* The same rationale applies to prospective government officials, who must be able to engage the public to determine the sorts of policies they ought to attempt to implement if they later become officials. Engaging in this process and advocating for certain changes does not violate the APA. *See id.* (''an expression of opinion prior to the issuance of a proposed rulemaking does not, without more, show that an agency member cannot maintain an open mind'').

Moreover, the July 2022 NPRM was, and the final regulations are, issued by the Secretary of Education, and the final sign-off comes from the Secretary of Education, not the Assistant Secretary. There is no contention that Secretary Cardona prejudged the issues or had a closed mind.

In addition, the proposed and final regulations differ, significantly in many respects, from the standards regarding sexual harassment that were enforced during Assistant Secretary Lhamon's tenure from 2013 to 2017. This further suggests that Assistant Secretary Lhamon did not have an unalterably closed mind regarding the contents of the updated regulations.

Finally, as this preamble indicates, the Department has engaged with the many commenters who raised questions about, or opposition to, the July 2022 NPRM. The final regulations reflect this engagement, including the full consideration of the significant number of comments received on the proposed regulations, and belies the notion that the Department prejudged any issue addressed in these final regulations.

Changes: None.

K. Regulatory Action Not Necessary

Comments: Some commenters stated that the Department failed to comply with Executive Order 12866, which requires an agency to identify the problem it intends to address and assess the significance of the problem, and Executive Order 14021, which directs the Secretary to review existing regulations, orders, guidance, policies, and similar agency actions that may be inconsistent with the policy that all students should be guaranteed an educational environment free from sex discrimination, including discrimination on the basis of sexual orientation or gender identity. Other commenters asserted that the Department failed to provide substantial evidence that revisions to the 2020 amendments were necessary, particularly because recipients have had little time to assess the impact of the 2020 amendments.

One commenter asserted that the Department failed to cite adequate evidence that sex discrimination remains a serious problem to justify the proposed regulations, particularly in light of evidence that indicates a decrease in the number of Title IX investigations and a lack of data that indicates the prevalence of other forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. One commenter said that the Department's fact sheet about the July 2022 NPRM did not provide information about how the proposed regulations would impact Americans and only addressed the intentions and goals of the Department.

Discussion: The Department complied with all legal requirements, including Executive Orders 12866 and 14021, in promulgating the proposed regulations. In the July 2022 NPRM, the Department explained the need for regulatory action based on its review of Federal case law under Title IX; its enforcement experience; and stakeholder feedback during the June 2021 Title IX Public Hearing, listening sessions, and the meetings held in 2022 under Executive Order 12866. *See* 87 FR 41545.

Notwithstanding commenters' concerns with revising the Title IX regulations given the recency of the 2020 amendments, as discussed below, the Department's experience with application of the 2020 amendments informs its belief that changes are necessary, and that the Department need not wait to compile additional data before addressing the problems it has identified in those rules. *See, e.g., Stilwell* v. *Off. of Thrift Supervision,* 569 F.3d 514, 519 (D.C. Cir. 2009) (''The APA imposes no general obligation on agencies to produce empirical evidence,'' and ''agencies can, of course, adopt prophylactic rules to prevent potential problems before they arise. An agency need not suffer the flood before building the levee.'').

Regarding commenters who questioned the lack or adequacy of data that shows sex discrimination is a serious problem, the Department acknowledged that ''there are limited data quantifying the economic impacts of sex discrimination, including sex-based harassment, on individuals.'' 87 FR 41546. However, the Department also acknowledged ''studies suggest[ing] that there is a cost associated with being subjected to sex discrimination,'' *id.,* and requested comment on these issues, *see id.* at 41548. In response, as discussed in more detail in the discussion of the definition of ''Sex-Based Harassment'' in § 106.2, commenters referred the Department to data and other information consistent with what the Department cited in the July 2022 NPRM, supporting the prevalence and negative effects of sex discrimination, especially with regard to sex-based harassment and sex stereotyping, including information about the effects in certain educational settings and among specific populations, such as LGBTQI+ students and Black girls.

Despite the prevalence of sex discrimination, including sex-based harassment, some recipients have reported a dramatic decline in Title IX complaints since the 2020 amendments went into effect. *See, e.g.,* Heather Hollingsworth, *Campus Sex Assault Rules Fall Short, Prompting Overhaul Call,* Associated Press, June 16, 2022, *https://apnews.com/article/politics-sports-donald-trump-education-5ae8d4c03863cf98072e810c5de37048* (stating that the University of Michigan reported its number of Title IX complaints dropped from more than 1,300 in 2019 to 56 in 2021 and Title IX complaints at the University of Nevada, Las Vegas dropped from 204 in 2019 to 12 in 2021). In addition, the Department notes that Executive Order 12866

specifically directs that ''qualitative measures'' of benefits are ''essential to consider.'' 58 FR 51735. OMB's guidance for implementation of Executive Order 12866 similarly directs agencies to consider qualitative benefits of proposed regulations. *See* Off. of Mgmt. & Budget, Executive Office of the President, OMB Circular A–4 (Sept. 17, 2003), *https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/.* The final regulations will have important qualitative benefits, such as improvements for the psychological wellbeing of students, that cannot be captured in the datasets that certain commenters expected the Department to provide. These benefits support the Department's conclusion that, under Executive Order 12866, regulatory action is warranted. For a detailed discussion of data sources as well as the costs and benefits of these final regulations, see the *Regulatory Impact Analysis.*

Further, we appreciate the opportunity to clarify that the fact sheet issued with the proposed regulations is not part of the proposed regulations themselves but was developed to provide the public with an overview of the requirements in the proposed regulations. The Department has provided information regarding the impact of the regulations, including costs and benefits, in the *Regulatory Impact Analysis* section of the proposed regulations and final regulations.

Changes: None.

L. Need for Long-Lasting, Flexible Regulations

Comments: Some commenters expressed concerns about the shifting Title IX regulatory landscape and asked the Department to develop long-lasting regulations that can be maintained in future administrations. Commenters noted that Title IX requires settled expectations and expressed concern about the uncertainty arising from frequently changing regulations, which can lead to confusion and possible erosion of trust in postsecondary institutions' processes. One commenter explained that time and resources must be spent to update policies and procedures and train students and employees when Title IX regulations are updated, and asserted that this time would be better spent elsewhere. Some commenters expressed that when successive administrations make changes to the Title IX regulations, it undermines students' need for clarity about their rights and responsibilities or otherwise harms professionals who work on Title IX compliance, students, and the larger community.

One commenter noted that the Title IX regulations must be viewed and applied in the context of a wide array of additional considerations, including applicable State law, case law, Federal laws, and institutional and system policies. In light of this, the commenter urged the Department to ensure that the final regulations are flexible enough to be implemented across a variety of postsecondary institutions, incorporate a sensible level of simplicity, and provide clarity regarding Federal expectations. One commenter stated that the regulations need to align with each postsecondary institution's expectations for its educational community, ensure accountability, and provide a safe and secure environment, not punishment.

Discussion: The Department shares the commenters' interest in long-lasting regulations that are balanced, widely acceptable, and that will be maintained over time, and the Department is committed to accomplishing this goal. As explained in the July 2022 NPRM, following an extensive review of the 2020 amendments, live and written comments received during the July 2021 Title IX Public Hearing, and information received during listening sessions with a variety of stakeholders, the Department issued the proposed regulations to provide greater clarity regarding the scope of sex discrimination and better account for the diversity of education programs or activities covered by Title IX. *See* 87 FR 41390. The Department also carefully considered the views expressed in the over 240,000 comments received on the July 2022 NPRM in developing these final regulations. The Department's view is that because the final regulations are balanced and provide needed flexibility for recipients, they are more likely to be long lasting, which will ensure stability in the enforcement of Title IX over time, aid recipients in setting expectations and ensuring accountability, and provide recipients with flexibility to address sex discrimination while ensuring that they will still meet their obligation to fully effectuate Title IX's nondiscrimination mandate.

Further, as noted in the July 2022 NPRM, the final regulations promote the goal of a well-understood regulatory regime and settled expectations by providing greater clarity and restore protections that the 2020 amendments did not address. *See* 87 FR 41459. These include, for example, provisions necessary to ensure the prompt and equitable resolution of complaints of sex discrimination other than sex-based harassment, and recipient obligations to provide lactation space and reasonable modifications to prevent sex discrimination and ensure equal access for students who are pregnant or experiencing pregnancy-related conditions. *See* 87 FR 41458, 41513. The Department also notes the focus was on revising the 2020 amendments to the extent necessary to fully effectuate Title IX's nondiscrimination mandate. Some provisions from the 2020 amendments remain largely unchanged, including requiring recipients to offer and coordinate supportive measures for complainants and respondents; prohibiting bias and conflicts of interest; and permitting consolidation of complaints.

Regarding concerns about the costs associated with regulatory changes, the Department discusses the burden and benefits of the final regulations in more detail in the *Regulatory Impact Analysis.*

Changes: None.

M. Intersection With Other Laws

Comments: A number of commenters expressed concern that the United States Department of Agriculture's (USDA) funding for school meal programs would be conditioned on compliance with the Department's Title IX regulations, while another commenter noted that the USDA issued its own interpretation of Title IX stating that sex discrimination included discrimination based on sexual orientation and gender identity. Other commenters, noting that Section 1557 incorporates sex as a prohibited ground of discrimination by referencing Title IX's prohibition on sex discrimination, suggested that the Department's proposed definition of sex discrimination would significantly impact medical professionals. These commenters stated that the Department must consider the impact on other nondiscrimination laws and must clearly state that the regulations do not apply to conduct covered by these or any other laws, unless that conduct is clearly covered by these Title IX regulations.

Discussion: The Department acknowledges that there are nondiscrimination laws other than Title IX that prohibit sex discrimination and that other Federal agencies have their own Title IX regulations or other regulations interpreting Title IX. For example, as commenters observed, the USDA enforces its own Title IX regulations, and HHS maintains regulations implementing Section 1557. The commenters did not identify any

particular conflict between the proposed regulations and the regulations of other Federal agencies. The Department confirms that the final regulations only apply to recipients of Federal financial assistance from the Department, regardless of whether other agencies' regulations may also apply to a given recipient. The Department has primary responsibility for enforcing Title IX with respect to its recipients. No other Federal agency's funding is conditioned on compliance with these final regulations. When a recipient receives Federal financial assistance from the Department and another Federal agency, the Department expects recipients to comply with the Department's regulations and that other Federal agency's implementing regulations interpreting Title IX. These final regulations are not intended to and do not create a situation in which a recipient cannot comply with all applicable Title IX regulations. Compliance with these final regulations is not related to other Federal agencies' Title IX regulations.

Changes: None.

N. Family Policymaking Assessment

Comments: Some commenters noted that under Section 654 of the Treasury and General Government Appropriations Act of 1999, Federal agencies are required to assess the impact of proposed regulations on families and requested that the Department assess how the regulations will impact families.[96] Commenters stated that the proposed regulations failed to include a Family Policymaking Assessment, which would assess the proposed regulations' impact on family wellbeing, as required by the Treasury and General Government Appropriations Act of 1999, 5 U.S.C. 601 note.

Discussion: The provision of the Treasury and General Government Appropriations Act of 1999 cited by commenters pertains to ''policies and regulations that may affect family well-being.'' 5 U.S.C. 601 note (Assessment of Federal Regulations and Policies on Families). The Department has reviewed and complied with all applicable requirements for promulgating the proposed regulations and these final regulations. These regulations apply to recipients of Federal financial assistance and therefore do not directly regulate families.

Changes: None.

[96] The commenters cited Public Law 105–277.

O. National Origin and Immigration Status

Comments: One commenter recommended that the Department remind recipients in the final regulations that Title IX protects all students regardless of national origin, immigration status, or citizenship status, and referenced Supreme Court case law holding that undocumented students have an equal right to public education in the elementary school and secondary school settings.[97] This commenter also recommended that the final regulations state that threatening students with deportation or invoking a student's immigration status to intimidate or deter a student or their parents or guardians from making a Title IX complaint constitutes retaliation under Title IX.[98]

Discussion: Although Title IX prohibits discrimination on the basis of sex, the Department has stated that the Title IX regulations protect individuals regardless of race, color, national origin, immigration status, or another protected characteristic. *See, e.g.,* 85 FR 30064, 30067. The final regulations clearly define retaliation in § 106.2 and § 106.71 and make clear that retaliation is prohibited. Threatening to take retaliatory action for purposes of interfering with any right or privilege secured by Title IX or its implementing regulations would constitute retaliation. Because threats of deportation and acts of intimidation based on invoking immigration status are covered by the definition of retaliation at § 106.2 if those actions are taken for the purpose of interfering with a protected activity under Title IX, additional language in the text of the final regulations is unnecessary.

Changes: None.

P. Coverage of Employment

Comments: Some commenters objected to § 106.57 as unlawful and unauthorized and stated that the Department has no authority to include employment-related provisions in Title IX because it is an education statute.

Discussion: Title IX, 20 U.S.C. 1681, expressly states: ''No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.'' As the Department stated in the 2020 amendments, Congress did not limit the application of Title IX to students, and the regulations implementing Title IX have consistently prohibited discrimination based on sex in employment-related contexts that occur under a recipient's education program or activity. These final regulations accordingly apply to any person, including employees, in any education program or activity receiving Federal financial assistance. At the same time, nothing in these final regulations shall be read in derogation of any employee's rights under Title VII, as expressly stated in § 106.6(f). *See* 85 FR 30439. Similarly, nothing in these final regulations precludes an employer from complying with Title VII. *Id.* The Department recognizes that employers must fulfill their obligations under both Title VII and Title IX, and there is no inherent conflict between Title VII and Title IX. Nor is there any language in Title VII or Title IX preventing the Department from issuing regulations covering employment. *See* 85 FR 30439.

Changes: None.

Q. Funding for Compliance

Comments: Some commenters were concerned that the proposed regulations would constitute an unfunded mandate for recipients. Some commenters requested that Congress allocate resources for school districts to implement the final regulations, while other commenters urged the Department to allocate funds for prevention and education programming.

Discussion: Title IX imposes certain requirements on recipients of Federal financial assistance, but Congress does not appropriate funding through Title IX itself. These final regulations do not, therefore, address how recipients may acquire the funding they deem necessary to comply with Title IX's requirements. The Department recognizes that, to the extent recipients or parties realize costs as a result of the final regulations, they will need to identify sources of funding to cover those costs. These final regulations are focused on clarifying recipients' legal obligations under Title IX. For a detailed discussion of data sources as well as the costs and benefits of these final regulations, see the *Regulatory Impact Analysis*

Changes: None.

R. Technical Assistance

Comments: Some commenters urged the Department to provide technical assistance to school districts to assist them in implementing the final regulations, including sample policies, procedures, handbooks, training materials, checklists, and webinars to help reduce the implementation burden

[97] The commenter cited *Plyler* v. *Doe,* 457 U.S. 202 (1982).

[98] The commenter cited the 2014 Q&A on Sexual Violence.

for recipients, especially for those that are smaller and less well-resourced, and for elementary schools and secondary schools. Some commenters urged the Department to supplement the final regulations with technical assistance resources addressing interactions between these regulations and FERPA, the Equal Access Act, Title VI, the IDEA, and Section 504.

Discussion: The Department acknowledges the recommendation to provide technical assistance and guidance on various topics. The Department agrees that supporting all stakeholders in implementing these final regulations is important and will offer technical assistance to recipients, including elementary schools and secondary schools, as appropriate, to promote compliance with these final regulations. Individuals, including Title IX Coordinators, may contact OCR at *https://ocrcas.ed.gov/contact-ocr* if they have questions about Title IX or the other civil rights laws that OCR enforces. In addition, the Equity Assistance Centers funded by the Department provide technical assistance and training, upon request by school boards and other responsible government entities, in the nondiscrimination assistance areas of race, sex, national origin, and religion to promote equitable education opportunities. Contact information for the Equity Assistance Centers is available at *https://oese.ed.gov/offices/office-of-formula-grants/program-and-grantee-support-services/training-and-advisory-services-equity-assistance-centers/equity-assistance-centers-training-and-advisory-services-contacts/* (last visited Mar. 12, 2024). Individuals seeking assistance regarding the application of FERPA can contact the Department's Student Privacy Policy Office at *https://studentprivacy.ed.gov/?src=fpco.*

Changes: None.

S. Coordination

Comments: One commenter suggested establishing formal coordination within the Department for programs with similar and overlapping purposes as Title IX, including VAWA 2022, the Clery Act, and the Safe Schools Improvement Act, to provide consistency across programs and lead to more efficient and comprehensive implementation. The commenter also noted that many of these programs have data reporting requirements and that sharing this data would lead to more efficient enforcement. Some commenters encouraged the Department to work with the Department of Justice and other agencies to ensure that the prohibitions in the regulations apply across agencies.

Discussion: The Department understands the importance of intra-agency and interagency coordination. In 1980, President Carter signed Executive Order 12250, which among other things, directs the Attorney General to coordinate the implementation and enforcement of Title IX. The Department is committed to working with our Federal agency partners—including the Department of Justice through their coordinating authority under Executive Order 12250—to promote consistent enforcement. These final regulations apply only to recipients of Federal financial assistance from the Department.

The Department has coordinated and will continue to coordinate, including sharing data when appropriate, among offices within the Department that have jurisdiction over programs that have similar and overlapping purposes as Title IX, as appropriate.

Changes: None.

T. Terminology

Comments: Some commenters suggested the Department use the term ''person'' or ''worker'' rather than ''student'' or ''employee'' to describe the individuals Title IX protects. The commenters asserted these terms are consistent with the statutory text, which prohibits discrimination against ''any person'' under an education program or activity, including visitors and independent contractors, as well as other individuals who are either taking part or trying to take part in a recipient's education program or activity.

Discussion: While the Department acknowledges comments received about the terminology used to describe whom Title IX protects, it has determined that the language used in the final regulations is appropriate. The Department acknowledges that Title IX prohibits a recipient from discriminating on the basis of sex in its education program or activity and extends protections to any ''person'' but notes that this terminology in the Department's Title IX regulations has generally been consistent since the 1975 regulations. The final regulations similarly use ''person'' to ensure that Title IX's nondiscrimination mandate applies to anyone in a recipient's education program or activity. For example, in addition to covering students and employees, the definition of ''complainant'' also covers a person other than a student or employee who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination, and § 106.2 defines hostile environment sex-based harassment as conduct that limits or denies a person's ability to participate in or benefit from the recipient's education program or activity. The Department notes that where the final regulations use terms like ''applicant,'' ''student,'' or ''employee'' such terms are used not to narrow the application of Title IX's nondiscrimination mandate but to require particular actions by the recipient reasonably intended to benefit applicants, students, or employees, or to require a recipient's employees to take particular actions.

Changes: None.

U. Discipline of Student Organizations

Comments: One commenter representing a trade association of men's fraternities asked the Department to clarify how a postsecondary institution must respond to allegations of sex discrimination that impact an entire student organization or group of student organizations. The commenter urged the Department to make clear that student organizations have due process rights, need a way to challenge allegations of sex discrimination, and should not be preemptively punished.

Discussion: Nothing in the final grievance procedure regulations under § 106.45, and if applicable § 106.46, confers due process rights on an organization because an organization cannot be a respondent subject to such a proceeding. *See* § 106.2 (definition of ''respondent''). However, beyond grievance procedures, the Department notes that when a recipient is notified of conduct that reasonably may constitute sex discrimination under Title IX or this part, the recipient must also take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity, and that these steps may pertain to an organization or entity. *See* § 106.44(f)(1)(vii). While the final regulations do not require a recipient to afford due process rights and an opportunity to challenge allegations of sex discrimination to a student organization as part of its Title IX obligations, nothing in the final regulations precludes a recipient from doing so. A recipient might also act against an organization if the recipient concludes that the organization violated the recipient's code of conduct, but that would be an exercise of the recipient's own disciplinary authority independent of these final regulations. Finally, any individual, or group of individuals, who believes a recipient has discriminated against them on the basis of sex in a

manner prohibited under Title IX may file a complaint with OCR, which OCR would evaluate and, if appropriate, investigate and resolve consistent with the requirement under Title IX that a recipient operate its education or activity free from sex discrimination.

Changes: None.

V. Contractors

Comments: One commenter asked the Department to strengthen the requirements in §§ 106.4(c) and 106.51(a)(3) related to contractors to clarify that recipients are responsible for any discriminatory conduct by third-party contractors and vendors, including those that provide monitoring software that discriminates against LGBTQI+ students.

Discussion: The Department acknowledges the concern about discriminatory conduct by contractors. The Department did not propose changes to §§ 106.4(c) or 106.51(a)(3), but the Department appreciates the opportunity to clarify that a recipient may not absolve itself of its Title IX obligations by delegating, whether through express contractual agreement or other less formal arrangement, its operations to contractors. The current regulations require a recipient to provide assurance that its education program or activity will be operated in compliance with the Department's Title IX regulations and authorize OCR ''to specify . . . the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.'' 34 CFR 106.4(a), (c). OCR requires recipients to provide assurance that they ''will ensure that all contractors, subcontractors, subgrantees, or others with whom it arranges to provide services or benefits are not discriminating in violation of [Title IX and other laws enforced by OCR].'' U.S. Dep't of Educ., Office for Civil Rights, Assurance of Compliance—Civil Rights Certificate, *https://www.ed.gov/ocr/letters/boy-scouts-assurance-form.pdf* (last visited Mar. 12, 2024).

The Department declines to opine on how Title IX may apply to monitoring software because its application may depend on a number of factors, including the specific software and how it is used. Anyone who believes a recipient or its contractors has engaged in sex discrimination, including through monitoring of students, may file a complaint with OCR.

Changes: None.

W. Data Collection and Climate Surveys

Comments: Some commenters asked the Department to strengthen the Civil Rights Data Collection (CRDC) by, for example, collecting and disaggregating data on harassment and discipline of students based on pregnancy, parental status, gender identity, sexual orientation status, disability, family status, and economic status.

Some commenters said that the Department should require recipients to conduct or improve campus climate surveys, or that the Department should provide guidance on how to conduct such surveys. One commenter encouraged the Department to require postsecondary institutions to maintain and publish data about their sex-based harassment cases to provide transparency and identify any illegal discrimination in how postsecondary institutions implement their sex-based harassment policies.

Discussion: The Department did not specifically request comments on OCR's CRDC or future data collections in the July 2022 NPRM, and it would be appropriate to specifically solicit public comment about any changes to data collection and publication practices before making such changes. The Department notes that nothing in the final regulations precludes a recipient from collecting demographic data relating to the recipient's Title IX complaints, including sex-based harassment complaints, and from disaggregating such data, provided that it does so consistent with its nondisclosure obligations under § 106.44(j) and other Federal, State, and local laws regarding dissemination of data.

Regarding climate surveys, these final regulations provide recipients with the discretion and flexibility to determine how best to assess their students' and employees' experiences with sex-based harassment or sex discrimination generally, including through a recipient's optional use of such surveys, which may be one way to assess obstacles to equal opportunity. *See* § 106.44(b) (barriers to reporting). In addition, VAWA 2022 requires the Secretary of Education, in consultation with other Federal agencies and experts, to develop an online survey tool regarding postsecondary student experiences with domestic violence, dating violence, sexual assault, sexual harassment, and stalking.[99] Following the development of the online survey tool, postsecondary institutions that receive Federal assistance must administer the online survey and publish campus-level results of the online survey on their website. Although the requirements in VAWA 2022 regarding the creation and administration of an online survey tool are only applicable to postsecondary institutions, once the survey tool is developed, elementary schools and secondary schools may also find it useful to review and adapt for their own purposes. In addition, elementary schools and secondary schools may find it useful to review the information available from the Department's National Center on Safe Supportive Learning Environments at *https://safesupportivelearning.ed.gov* (last visited Mar. 12, 2024) for assistance in conducting a climate survey.

Changes: None.

X. OCR Enforcement Practices

Comments: Some commenters expressed concern that OCR's voluntary resolution agreements are inadequate to deter a recipient from committing additional violations of Title IX and suggested additional penalties for recipients, including fines, lawsuits, referrals to the U.S. Department of Justice, suspension of eligibility for Federal contracts and financial aid, or direct accountability for a recipient's senior leadership and legal officers.

A group of commenters asked the Department to clarify what constitutes a violation of the regulations such that a postsecondary institution would be deemed ineligible for Federal student aid, including Pell grants; how that institution would be notified of the determination; and any review or appeal process for the decision. One commenter expressed concern that OCR's complaint processing procedures are too slow to be effective. One commenter recommended that the Department provide a safe harbor for recipients who lack sufficient resources for full compliance but demonstrate good faith through a variety of means, including maintaining best practices for addressing sex-based harassment and substantial compliance with the essential requirements of Title IX.

Some commenters urged the Department to publicize OCR case resolutions involving discrimination and harassment based on sexual orientation and gender identity. Some commenters asked the Department to collect and report disaggregated OCR complaint data related to complaints of discrimination and harassment based on sexual orientation, gender identity, sex characteristics, including intersex traits, and sex stereotypes.

[99] Public Law 117–103, sec. 153 (Mar. 15, 2022).

Discussion: In connection with suggestions regarding additional penalties for recipients for Title IX violations, the Department's enforcement authority under 20 U.S.C. 1682 and as set forth in 34 CFR 100.8 (incorporated in § 106.81) provides that the Department may seek compliance ''by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law.'' Remedial action required of a recipient for violating Title IX or these final regulations may therefore include any action consistent with 20 U.S.C. 1682, and may include equitable and injunctive actions as well as financial compensation to a complainant, as necessary under the specific facts of a case.

The Department disagrees that voluntary resolution agreements are inadequate to deter recipients from committing additional Title IX violations. In the Department's experience, these resolution agreements have proven effective in correcting Title IX violations.[100] In addition, if a recipient fails to comply with a voluntary resolution agreement, the Department may take additional actions to address non-compliance with Title IX, including the initiation of administrative proceedings to suspend, terminate, or refuse to grant or continue Federal financial assistance or refer the case to the U.S. Department of Justice for judicial proceedings to enforce any rights of the United States. OCR details the entirety of its enforcement process, including the process the Department must follow prior to termination of Federal financial assistance, in its Case Processing Manual.

The Department clarifies that recipients are bound by Title IX and this part as a condition of their eligibility for Department funding. The Department emphasizes that it cannot pursue termination of Federal financial assistance or refer a matter to the Department of Justice unless a recipient refuses to voluntarily correct a violation after the Department has notified the recipient of the violation. *See* 20 U.S.C. 1682; 34 CFR 100.8.

Additionally, in response to the request for OCR to publicize its case resolutions, the Department notes that it already makes OCR's resolution agreements available to the public on its website in a database that can be searched by name of recipient or generally by protected category and that this is sufficient to inform the public of OCR's work. *See, e.g., https://www2.ed.gov/about/offices/list/ocr/frontpage/caseresolutions/sex-cr.html* (last visited Mar. 12, 2024). OCR will continue to highlight specific cases of note to the public through other means as appropriate to ensure awareness.

The Department acknowledges the commenter's concerns about timely resolution of complaints. While the Department strives to resolve cases efficiently and understands the importance of timeliness to the parties, OCR's necessary case processing time will vary based on many factors, including the allegations and facts presented. The Department declines to include a safe harbor for recipients that address sex-based harassment but do not comply with all of the requirements in the final regulations because it is important for all recipients to comply with the regulations in their entirety to ensure that statutory objectives are met.

In addition, the July 2022 NPRM did not specifically propose changes to OCR's complaint procedures generally, including with respect to additional penalties or other means of deterrence, publicizing cases, and collecting and reporting data. It would be appropriate to seek public comment on that issue before making changes.

Changes: None.

Y. Severability

Comments: None.

Discussion: As discussed in the preambles to the 2020 amendments, 85 FR 30538, and the July 2022 NPRM, 87 FR 41398, it is the Department's position that each of the provisions of these final regulations discussed in this preamble serve an important, related, but distinct purpose. Each provision provides a distinct value to recipients (including elementary schools, secondary schools, and postsecondary institutions), other recipients of Federal financial assistance, students, employees, the public, taxpayers, and the Federal government separate from, and in addition to, the value provided by the other provisions. To best serve these purposes, the Department clarifies that the severability clauses in part 106, including §§ 106.9, 106.18 (redesignated in these final regulations as § 106.16), 106.24, 106.46 (redesignated in these final regulations as § 106.48), 106.62, 106.72, and 106.82 continue to be applicable. The Department also confirms that each of the provisions in the final regulations is intended to operate independently of each other and that the potential invalidity of one provision should not affect the other provisions. Thus, for example, the prohibition on retaliation (§ 106.71 of the final regulations) and the provision on application of Title IX to a sex-based hostile environment under a recipient's education program or activity even when some conduct that occurred outside of the recipient's education program or activity or outside of the United States contributed to the hostile environment (§ 106.11 of the final regulations), operate independently of each other and of each of the remaining regulatory provisions of these final regulations. Similarly, specific grievance procedure requirements in the final regulations, such as § 106.45(b)(6), which requires an objective evaluation of all evidence that is relevant and not otherwise impermissible and prohibits credibility determinations based on a person's status as a complainant, respondent, or witness, operate separately from the clarification of the scope of sex discrimination under § 106.10 of the final regulations. Further, as explained in the discussion of final § 106.10, that provision lists bases of discrimination that involve consideration of sex—sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity—which are distinct from the various forms of sex discrimination that may occur, including sex-based harassment, sexual violence, and the prevention of participation consistent with gender identity, which are addressed in §§ 106.2 and 106.31(a) of the final regulations, respectively. The Department believes that every provision of the final regulations is legally supportable, individually and in the aggregate, but includes this discussion to remove any ''doubt that [it] would have adopted the remaining provisions of the Final Rule'' without any of the other provisions, should any of them be deemed unlawful. *Mayor of Baltimore* v. *Azar,* 973 F.3d 258, 292 (4th Cir. 2020) (en banc) (citation and quotation marks omitted).

Changes: None.

Z. Addressing Other Issues

Comments: Some commenters suggested broadening the scope of the proposed regulations to address other issues, for example: removing the regulatory provisions related to single-sex education; school discipline, including with respect to the intersection of sex and race and the disparate impact of discipline on girls of color; systemic discrimination in academia; requiring recipients to publish expenditures on athletic

[100] *See generally* U.S. Dep't of Educ., Office for Civil Rights, Fiscal Year 2022 Annual Report (2023), *https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2022.pdf* (highlighting key enforcement actions in each of OCR's jurisdictional areas).

programs and setting expenditure limits; balancing Federal financial assistance between men's and women's athletic programs; limitations on service of alcohol by on-campus organizations; mandatory availability of rape kits and drug tests in college health centers; advertisement of free legal resources for students and employees; issues impacting students with special needs, students who are immigrants, and students who are English learners; requiring individuals found responsible for sexual assault to register as sex offenders; suicidal ideation among individuals involved in Title IX matters; emphasis on science, technology, engineering, and math (STEM) and career and technical education (CTE); and stronger and more transparent connections between postsecondary administrations and the student body related to student advocacy on sex-based harassment issues, including discussions with community organizations and legal service providers.

Discussion: The July 2022 NPRM did not specifically propose changes related to these issues, including single-sex education; the intersection of sex and race in school discipline; systemic discrimination in academia; funding for athletic programs (including requirements to publish expenditures on these programs and set expenditure limits); alcohol availability on campus; advertising free legal resources; availability of rape kits and drug tests; issues related to students with special needs, immigrants, or English learners; sex offender registries; suicidal ideation; STEM and CTE; and the relationship between a postsecondary institution's administration and its student body related to student advocacy on sex-based harassment. The Department has determined it would be appropriate to specifically seek public comment before regulating on these issues. The Department also notes that, although not required, nothing in the final regulations precludes a recipient from advertising free legal resources or making rape kits and drug tests available in its health center. Similarly, although not required, nothing in the final regulations precludes a postsecondary institution from allowing students to bring representatives from community organizations and legal service providers to discussions with the postsecondary institution on sex-based harassment issues.

The Department notes that all recipients of Federal financial assistance from the Department, including institutions of vocational education and other recipients that operate STEM and CTE programs, must comply with the final regulations. The Department also clarifies that the final regulations do not alter existing regulations under the Department's other civil rights laws, including Title VI, Section 504, and the ADA. The Department will continue to enforce the Department's regulations under those laws. Anyone who believes that a recipient is discriminating on the basis of race, color, national origin, sex, or disability may file a complaint with OCR, which OCR would evaluate and, if appropriate, investigate and resolve consistent with the applicable statute and regulations. The Department also notes that the final regulations at § 106.44(g) require a recipient to offer and coordinate supportive measures as appropriate, which may include counseling for a party who is experiencing suicidal ideation. Additionally, the Department does not have the authority under Title IX to require individuals found responsible for sexual assault to register as sex offenders because sex offender registration is governed by other Federal, State, or local laws.

Changes: None.

AA. Comments Outside the Scope of Title IX

Comments: The Department received a number of comments on issues and concerns that fall outside of the scope of Title IX.

Discussion: The Department does not address comments that raised concerns not directly related to the proposed regulations or Title IX, or that were otherwise outside the scope of the proposed regulations as published in the July 2022 NPRM.

Changes: None.

Regulatory Impact Analysis (RIA)

The Department expects the final regulations to result in wide-ranging benefits for students, teachers, and other employees in federally funded schools and postsecondary institutions as it aims to fulfill Title IX's prohibition on sex discrimination. The final regulations address several topics, including the scope of sex discrimination; recipients' obligations not to discriminate based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity; and recipients' obligations to provide an educational environment free from discrimination on the basis of sex. When implemented, the final regulations will help ensure that all students experiencing sex discrimination receive appropriate support and that recipients' procedures for investigating and resolving complaints of sex discrimination are fair to all involved. The final regulations also embed discretion and flexibility for recipients to account for variations in school size, student populations, and administrative structures, which will minimize burdens.

Among other things, the provisions in the final regulations—in furtherance of the critical purposes of Title IX—protect student complainants who have been subjected to sex-based harassment, including sexual assault, and sex discrimination. They advance educational equity and opportunity and strengthen protections for students who face discrimination based on sexual orientation or gender identity. And they require fair, evenhanded school procedures for complaints of sex discrimination. These and other benefits discussed in this preamble significantly outweigh the modest costs imposed by the final regulations.

In response to its July 2022 NPRM, the Department received many comments on its estimates of the burden of the proposed regulations, principally regarding an anticipated increase in the number of complaints and/or the relative complexity of certain new complaints. In response to those comments, the Department has reviewed its assumptions and estimates, including making updates as discussed below. As a result of these updates, the Department estimates the final regulations will not impose substantial new burdens that are not justified by the significant benefits the Department expects from implementation of the final regulations. Below, the Department addresses comments related to the regulatory impact analysis.

A. Comments on the Department's Model and Baseline Assumptions

1. Regulatory Flexibility Act (Small Business Impacts)

Comments: Commenters offered a variety of opinions on the proposed regulations' potential effects on small entities. For example, some commenters asserted that the proposed regulations give recipients greater flexibility, which they said would benefit small recipients that will have options for compliance that better align with their resources and capacity. Other commenters expressed concern that small entities lack the capacity to handle costs associated with a potential increase in Title IX investigations due to the proposed regulations' requirements. Some commenters asserted that the Department failed to explain the methodology behind the alternative size standard it used, based on enrollment

data. One commenter stated their belief that the Department mischaracterized the Small Business Administration (SBA) threshold for small entities in the education sector as below $7,000,000 in revenue.

Another commenter noted the Department classified 44 percent of four-year educational institutions and 42 percent of two-year educational institutions as small entities under its alternative size standard, but asserted that under SBA size standards and 2017 Statistics of U.S. Businesses data, at least 61 percent of colleges, universities, and professional schools, and 81 percent of junior colleges had revenues below the SBA standard and so should be assessed as small entities.

Some commenters asserted the Department was required under the Regulatory Flexibility Act to analyze how the economic impact of its proposed regulations would differ across subsets of small entities, including small religious educational entities.

Discussion: The final regulations benefit small recipients because the regulations provide compliance options that better align with small recipients' resources and capacity. As discussed in the July 2022 NPRM, the Department's model accounts for this additional flexibility. *See* 87 FR 41546.

The Department acknowledges commenters' concerns that some small entities may lack the capacity to handle costs associated with an increase in Title IX complaints. The Department estimates that inclusion of the additional bases of sex discrimination within the scope of the Department's Title IX regulations may result in a 10 percent increase in the number of investigations conducted annually. *See* 87 FR 41548, 41550 & n.27. The Department carefully considered the potential increase in Title IX investigations in connection with the July 2022 NPRM and did not receive information that requires a change to that assumption or highlights circumstances in which the increase in the number of investigations would increase so dramatically that it would impose prohibitive burdens.

Nor did commenters submit data necessitating a change to the Department's cost estimates. Although one commenter asserted that the Department's projected net increase in costs of $3,090–$8,986 per year inaccurately assesses the impact of the regulations, the commenter did not provide information that would change that estimate. The estimated costs, moreover, may be lower for religious educational entities that claim an exemption under § 106.12.

The Department previously explained the methodology behind the alternative size standard it used. 87 FR 41564. As in the 2020 amendments, for purposes of assessing the impacts on small entities, the Department proposed using enrollment as a basis for defining ''small institutions of higher education (IHE).'' *See* 85 FR 30570. As discussed in the preamble to the 2020 amendments, the Department did not purport to adopt the SBA revenue standard under 13 CFR 121.201 and declines to do so here. Therefore, the comparative percentages, which were based on SBA regulatory size standards, are inapposite. As explained in more detail in the discussion of the Regulatory Flexibility Act below, the Department is not using a $7,000,000 revenue threshold to define small LEAs in the final regulations. The Department acknowledges the suggestion to separately analyze the impact on the smallest entities, but notes that, as stated in the July 2022 NPRM, the Department's model assumes that each small IHE would conduct the same number of investigations per year, on average, as the total universe of all affected IHEs. 87 FR 41564. That assumption probably overstates the costs because it is much more likely that small IHEs will conduct fewer investigations per year and therefore, their actual realized costs will be less than estimated by the Department.

The Department also considered the impact of the final regulations on a subset of smaller entities, noting that, according to data from the Integrated Postsecondary Education Data System (IPEDS), approximately 175 IHEs had total reported annual revenues of less than $900,000, and those IHEs enrolled, on average, 36 students in Fall 2020. *Id.* Similarly, according to data from the National Center for Education Statistics (NCES), in 2018–2019, 123 LEAs had total revenues of less than $1,760,000 and enrolled, on average, 35 students each in the 2018–2019 school year. Based on the significantly lower enrollment at small IHEs and LEAs, the Department does not anticipate that the final regulations will place a substantial burden on smaller IHEs or LEAs because, in the Department's predictive judgment, it is ''highly unlikely'' that these recipients will conduct the number of investigations that would impose significant costs. *Id. See also* the discussion of the Regulatory Flexibility Act below.

While some commenters expressed concern that the Department underestimated the resources required to implement the regulations and overestimated the administrative capacity that is available for recipients that are elementary schools or secondary schools, no new or additional data was provided that would change the Department's model or baseline assumptions on these points. Changes to the model related to nondiscrimination policies and grievance procedures are discussed below.

Changes: None.

2. Taxpayer Costs

Comments: Commenters asserted that the July 2022 NPRM ignores the cost of increased institutional compliance on State taxpayers, although they did not suggest any changes in the Department's cost estimates on that basis.

Discussion: Federal regulations often have a potential effect on State taxpayers, but commenters did not provide data that would change the Department's estimates. Moreover, the qualitative benefits of the final regulations in terms of fulfilling Title IX's mandate, which increases educational opportunities that have lasting, positive economic effects, more than justify any increase in cost.

Changes: None.

3. Cost Estimate

Comments: Some commenters asserted the Department's cost projections in the July 2022 NPRM mention a ''cost estimate'' but lack concrete figures and fail to identify the financial burden the proposed regulations would impose on recipients. Other commenters asserted that the Department underestimated the costs associated with the proposed regulations.

Discussion: The Department disagrees that the cost estimate lacks concrete figures. The July 2022 NPRM contains a detailed analysis of the estimated costs, starting at 87 FR 41551. Although the commenters did not provide any supplementary data upon which the Department could reasonably rely, the RIA of the final regulations includes a detailed analysis of estimated costs, including changes that the Department made in response to comments it received on some of the estimates in the RIA that was included in the July 2022 NPRM. The Department's overall cost estimates have not changed significantly; however, as a result of these changes and other factors outside of the Department's control, such as an increase in the number of affected entities and updated median hourly wage rates, the Department has revised its July 2022 NPRM estimated total monetary cost savings of between $9.8

million to $28.2 million, *see* 87 FR 41546, to an estimated total monetary cost of $4.6 million to $18.8 million over ten years.

Changes: As explained in greater detail below, the Department has revised its assumptions and estimates and made the following updates:

- Updated the number of affected entities to align with the most current data;
- Updated median hourly wage to the most recent Bureau of Labor Statistics data;
- Increased the Department's assumption regarding the number of incidents resulting in an offer of supportive measures; and
- Increased the Department's assumption regarding the number of hours required for Title IX Coordinators to review policies and procedures, revise grievance procedures, and assess related training requirements.

4. Definition of Sex-Based Harassment (§ 106.2)

Comments: Some commenters stated that the proposed definition of ''sex-based harassment'' would result in a significant increase in the volume of complaints and increased litigation and liability costs. One commenter stated the Department failed to consider more reasonable alternatives to its proposed changes to the definition of ''sexual harassment.'' Some commenters were concerned that the proposed definition of hostile environment sex-based harassment would require recipients to address more complaints through their Title IX grievance procedures, which would impose an additional burden and expense on recipients who revised procedures to comply with the 2020 amendments. One of these commenters also noted that, especially at smaller postsecondary institutions, this would divert attention from sexual assault and quid pro quo harassment, which commenters said should be the priority under Title IX.

Discussion: In the July 2022 NPRM, the Department explained at length that it estimates that inclusion of the additional forms of sex discrimination, including sex-based harassment, may result in a 10 percent increase in the number of investigations conducted annually. *See* 87 FR 41550 & n.27. Commenters did not provide any data that would change the Department's estimates. The Department also acknowledged in the July 2022 NPRM that there may be some costs associated with litigation. *See* 87 FR 41561. But commenters did not provide any data that would change the estimates or the Department's recognition that there may be some, but not extensive, costs associated with litigation due to the final regulations.

The Department disagrees that the definition of hostile environment sex-based harassment requires recipients to address significantly more complaints or detracts attention from sexual assault or quid pro quo harassment. At present, under the 2020 amendments, recipients are obligated to address multiple forms of sex-based harassment, including hostile environment, sexual assault, and quid pro quo harassment. Commenters did not provide an adequate basis to reject the estimates associated with the revised definition of hostile environment sex-based harassment, which has been carefully crafted to cover conduct that constitutes sex discrimination and fully effectuate Title IX's nondiscrimination mandate. With respect to the definition of hostile environment sex-based harassment, the Department carefully considered public comments, which are addressed in the discussion of the definition of ''sex-based harassment'' in § 106.2.

The Department considered several alternatives to the final definition of ''sex-based harassment,'' including maintaining the definition of ''sexual harassment'' from the 2020 amendments and different wording options for the definition of hostile environment sex-based harassment and concluded that none captures the benefits of the final definition in § 106.2.

Changes: For explanation of the changes to the definition of ''sex-based harassment,'' see the discussion of the definition of ''sex-based harassment'' in § 106.2.

5. Nondiscrimination Policy and Grievance Procedures (§ 106.8)

Comments: Some commenters asserted the Department underestimated the time and cost it will take recipients to review the regulations and revise their policies, procedures, and nondiscrimination statements.

Some commenters opposed as burdensome, duplicative, and impractical the proposed requirement that a recipient include its notice of nondiscrimination in each handbook, catalog, announcement, bulletin, application form, and recruitment material. One commenter said the Department failed to show there is a benefit that outweighs the costs of requiring a printed notice rather than a link on a recipient's website.

Discussion: The Department acknowledges that, as with any new regulations, it will take some time to review requirements and revise policies and procedures to align with those requirements. The Department, exercising its expertise and applying its knowledge based on past experiences with regulated entities taking time to come into compliance with new requirements, provided detailed estimates of costs related to reading and understanding the regulations; revising policies; publishing notices of nondiscrimination; training Title IX Coordinators; updating training materials; and other compliance-based costs. *See, e.g.,* 87 FR 41563.

In response to commenters who asserted that the costs of implementing new Title IX procedures, and training on those procedures, might be especially burdensome in the elementary school and secondary school context and the vocational context, where the commenters assert that the existing infrastructure for Title IX compliance is not as robust, the Department has factored in those costs. *See* RIA, Cost Estimates (Section 4.C), Review of regulations and policy revisions. Although any predictive judgment about these types of compliance costs includes an element of uncertainty, no commenter provided any statement beyond speculation that the Department underestimated costs in any meaningful way. Out of an abundance of caution, however, and to address commenters' concerns, the model has been updated to reflect an increase from 6 to 12 hours for a recipient's Title IX Coordinator to review the regulations and revise policies, procedures, and notices of nondiscrimination, which increases costs by $14.3 million in the first year when revisions will be necessary.

Recognizing commenter concerns about burden, duplication, and impracticability regarding publication of the notice of nondiscrimination, the Department notes that the final regulations at § 106.8(c)(2) account for space and format limitations and provide recipients flexibility by giving recipients the option to provide a shorter version of the notice of nondiscrimination, if necessary. *See* discussion of § 106.8(c)(2). The short-form notice—a one-sentence statement that the recipient prohibits sex discrimination in any education program or activity that it operates and that individuals may report concerns or questions to the Title IX Coordinator, together with a link to the full notice of nondiscrimination on the recipient's website—provides the minimum information sufficient to ensure campus community member awareness of a recipient's Title IX obligations without unduly burdening recipient resources. In addition, a recipient may include its

notice of nondiscrimination in its handbooks, catalogs, announcements, bulletins, and application forms in the same manner it makes those materials available; in print if it distributes those materials in print, and electronically if it maintains those materials only electronically. This option supports the Department's cost estimate for publishing the notice of nondiscrimination. 87 FR 41563.

Changes: The Department has increased its estimate of the number of hours necessary for a recipient's Title IX Coordinator to review policies, revise grievance procedures as necessary, and assess related training requirements from 6 hours to 12 hours.

6. Training Requirements (§ 106.8(d))

Comments: Some commenters asserted that the Department underestimated the time and expenses related to training requirements in the final regulations.

Discussion: The Department factored in time for the Title IX Coordinator to assess training requirements as part of the estimates of time needed for the Title IX Coordinator to review and revise policies, grievance procedures, and notices of nondiscrimination. As discussed above, the Department increased its estimate for these Title IX Coordinator responsibilities from 6 hours to 12 hours. The Department disagrees that its model in the July 2022 NPRM underestimated time needed to provide training in the first year and in subsequent years. 87 FR 41552.

As explained in the discussion of § 106.8(d) related to frequency of training, several commenters asked the Department to clarify how often training must be conducted and whether a recipient would be required to retrain employees when their duties shift. In response to these comments, the Department has modified § 106.8(d) to require training promptly upon hiring or a change of position that alters an employee's duties under Title IX, and annually thereafter. Training employees is accounted for in the model and does not meaningfully change recipients' annual burden to provide training as compared to the 2020 amendments.

The training obligations with respect to the notification requirements in § 106.44(c) are not unduly burdensome because the information employees will have to learn and convey to students who approach them is straightforward and can be incorporated into already-required training sessions. The Department also reviewed the potential effects of the training requirements on small entities and has determined that the cost will not impose an unreasonable burden. *See* RIA, Cost Estimates (Section 4.C), Revisions to training.

While the Department understands that recipients will need to dedicate some additional resources for training under § 106.8(d), based on the Department's estimates, the benefits of comprehensive training outweigh the costs. *See* discussion of § 106.8(d) and the benefits, time, and expense of training.

Changes: As explained in the discussion of § 106.8(d) related to frequency of training, the Department modified § 106.8(d) to require training promptly upon hiring or a change in position that alters the employee's duties under Title IX, and annually thereafter.

7. Recordkeeping (§ 106.8(f))

Comments: Some commenters stated that proposed § 106.8(f) will significantly increase the administrative burden associated with recordkeeping and case management, arguing that the proposed regulations will cause an increase in reports, outreach, supportive measures, investigations, informal resolutions, and determinations, all of which will require recipients to create and maintain more records. One commenter observed that many K–12 and smaller postsecondary recipients do not have electronic recordkeeping systems.

Discussion: The Department acknowledges the commenters' concerns regarding recordkeeping costs and notes that its estimates acknowledged that not all recipients have electronic recordkeeping systems. *See* 87 FR 41558. In response to comments, and as explained in the discussion of § 106.8(f), the Department has removed the requirement in § 106.8(f) that recipients maintain all records documenting actions the recipient took to meet its obligations under §§ 106.40 and 106.57. In addition, the final regulations require a recipient to make its training materials available upon request for inspection by members of the public, as opposed to making them publicly available on the recipient's website. These changes will relieve some of the administrative burden associated with recordkeeping.

In order to ensure that the Department's estimates fully capture any burdens related to recordkeeping, the Department has not revised its estimate of the burden associated with the requirements of § 106.8(f). The Department believes that the revisions to § 106.8(f) combined with the retained burden estimate are sufficient to address commenters' concerns regarding underestimates of the burden of recordkeeping requirements.

Changes: As explained in more detail in the discussion of § 106.8(f), the Department has modified § 106.8(f) to remove the requirement that recipients maintain all records documenting actions the recipient took to meet its obligations under §§ 106.40 and 106.57 and no longer require a recipient to make its training materials publicly available on its website.

8. Application of Title IX (§ 106.11)

Comments: Some commenters asserted the Department underestimated the costs associated with investigating a hostile environment that may result from an incident that occurred outside of the United States.

Discussion: The Department acknowledges the commenters' feedback on the costs associated with investigating hostile environment sex-based harassment that may result from an incident that occurred outside of the United States. To be clear, § 106.11 does not require recipients to investigate conduct that occurred outside of the United States. That provision requires a recipient to address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside of the recipient's education program or activity or outside the United States. *See* § 106.11 and the accompanying discussion. As stated in the July 2022 NPRM, the Department does not have a basis upon which to develop estimates for this change. 87 FR 41554. Commenters did not provide additional data that would lead the Department to modify its cost projections. In light of the likely small number of investigations of hostile environment sex-based harassment resulting from extraterritorial conduct, the Department maintains its current cost estimates.

Changes: None.

9. Duty To Address Sex Discrimination (§ 106.44)

Comments: Some commenters argued that the Department did not adequately consider factors, explore sufficient data, and make necessary estimates in connection with its removal of the actual knowledge requirement for sexual harassment or allegations of sexual harassment. One commenter stated that the Department must evaluate the costs of removing the actual knowledge requirement together with broadening the requirement that a recipient's administrators report and act in response to ''anything that 'may constitute sex discrimination.' '' The

commenter stated the costs of compliance the Department must consider would also include restrictions on speech to avoid liability.

Discussion: This preamble discusses the actual knowledge standard in connection with § 106.44(a), and the Department disagrees that it did not adequately consider its estimates in connection with these changes. As explained in the discussion of § 106.44(c), in response to comments, the notification requirements in § 106.44(c) have been modified to require an employee with notification duties to take action when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or this part. This change was made to address commenters' concerns that the scope of reportable conduct was unclear. In the Department's estimates, costs associated with these notification requirements are considered as part of training expenses. Other costs related to a recipient's duty to address sex discrimination in its education program or activity are considered in connection with the Title IX Coordinator's duties. Commenters did not provide additional data that would lead the Department to modify its cost projections related to its notification requirements.

The Department disagrees that the costs of compliance must include restrictions on speech to avoid liability. As discussed throughout this preamble, nothing in Title IX and the final regulations requires recipients to infringe on constitutionally protected speech.

Changes: None.

10. Title IX Coordinator Obligations: Duty To Monitor (§ 106.44(b) and (f))

Comments: Some commenters asserted that the Department underestimated the cost of implementing proposed § 106.44(b), in part because new provisions in VAWA 2022 require postsecondary institutions to conduct climate surveys, which the commenter stated will likely be administered by Title IX offices.

One commenter stated that while some recipients already monitor their education programs and activities for barriers to reporting sex discrimination, the Department's assessment that the costs of implementing proposed § 106.44(b) would be de minimis is wrong because it will take some recipients more time to perform tasks such as developing and conducting assessments, evaluating the results, and developing new initiatives or training to monitor and address barriers.

Other commenters stated that Title IX Coordinators would be unduly burdened because, for example, they would not be able to satisfy all the requirements that proposed § 106.44(f) and other proposed provisions would impose on them. In addition, they would not have the capacity to oversee each person or office of a recipient that might assist in performing the required steps and would not be permitted to delegate administrative tasks related to fulfilling these duties.

Discussion: The Department acknowledges commenters' concerns about potential compliance costs, including in light of other compliance obligations related to VAWA 2022, but provisions in statutes other than Title IX are beyond the scope of the final regulations. The Department notes that the July 2022 NPRM provided suggestions and examples of how a recipient could comply with § 106.44(b) while acknowledging that recipients vary in size and resources that may impact how they implement this provision. 87 FR 41436. The Department continues to believe that recipients should have the flexibility to determine which strategies would be most appropriate and effective in their educational setting.

In the July 2022 NPRM, the Department identified several low-cost methods recipients may use to monitor for barriers to reporting, such as incorporating questions designed to elicit information from students and employees about barriers to reporting into existing training materials and incorporating such questions into conversations with students, employees, and others during roundtable discussions or listening sessions with interested stakeholders. 87 FR 41558. The Department also identified steps with a de minimis cost that a recipient could take to remove these barriers, should they be identified, such as reminding students, employees, and others during trainings about the range of reporting options available at a particular recipient or reporting an employee who discourages students from reporting to human resources for violating the recipient's code of ethics standards. *Id.* Commenters did not provide additional data that would lead the Department to modify its cost projections related to monitoring for barriers to reporting.

The Department acknowledges commenters' concerns that § 106.44(f), alone and together with other provisions in the final regulations, impacts and expands the scope of a Title IX Coordinator's duties and responsibilities. The final regulations provide a role for a recipient's Title IX Coordinator that centralizes duties, promotes accountability, and enables effective Title IX compliance. However, nothing in § 106.44(f) precludes a recipient from authorizing its Title IX Coordinator to delegate specific duties to one or more designees as long as one Title IX Coordinator retains ultimate oversight over the assigned duties. *See* § 106.8(a).

A comprehensive response to possible sex discrimination is essential to achieving Title IX compliance so that Title IX Coordinators can respond to patterns, trends, and risk factors. The Title IX Coordinator's oversight of a recipient's response to individual reports and required action to address and prevent future sex discrimination for all participants in a recipient's education program or activity will help recipients provide a nondiscriminatory educational environment as required by Title IX.

Changes: For an explanation of the changes to § 106.44(b) and (f), see the discussions of § 106.44(b) and (f).

11. Notification Requirements (§ 106.44(c))

Comments: Some commenters stated that what they characterized as the requirement that all employees in elementary schools and secondary schools report Title IX violations would be expensive and that the Department has not shown it is necessary.

One commenter asserted that recipients with significant research, volunteer, community outreach, or land-grant programs often employ individuals in temporary or cyclical positions and stated that such employees may shift positions and take on new roles that cause them to change from one notification category to another under proposed § 106.44(c). The commenter stated that the costs of training, re-training, and tracking the training status for all such employees on their notification obligations would be a significant burden.

Another commenter suggested an alternative to proposed § 106.44(c), which the commenter stated would be less costly for recipients to implement. The commenter suggested requiring a recipient to designate some of its employees as confidential employees and to designate all other employees except employees in administrative leadership positions as ''mandatory referrers.''

Discussion: As discussed above, the notification requirements in § 106.44(c) have been modified to require employees with notification duties to take action when the employee has

information about conduct that reasonably may constitute sex discrimination under Title IX or this part. An elementary school or secondary school recipient must require all employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX. This requirement provides greater benefits and lower burdens as compared to the 2020 amendments, which deemed a recipient to have ''actual knowledge'' when any employee of an elementary school or secondary school had notice of allegations of sexual harassment, but provided no clear indication of what they should do with that information.

Costs associated with the final regulations' notification requirements are considered as part of training expenses. The cost associated with an employee's notification of the Title IX Coordinator is de minimis. Costs related to the recipient's duty to address sex discrimination in its education program or activity once the Title IX Coordinator is notified of conduct that reasonably may constitute sex discrimination are considered in connection with the Title IX Coordinator's duties.

As explained in the discussion of § 106.44(c), the Department has modified and streamlined the notification requirements, which will make the training requirements related to notification easier for recipients. For recipients other than elementary schools and secondary schools for whom all employees are treated the same, there are two categories of non-confidential employees with notification requirements when they have information about conduct that reasonably may constitute sex discrimination: (1) employees who have authority to institute corrective measures on behalf of the recipient or who have responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity; and (2) all other non-confidential employees. The first group must notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX; the second group must either notify the Title IX Coordinator or provide the contact information of the Title IX Coordinator and information about how to make a complaint of sex discrimination when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX. These changes make notification less costly than what would have been required by the proposed regulations. Moreover, postsecondary recipients have the discretion to simplify training even further by training all non-confidential employees to notify the Title IX Coordinator.

With respect to the concern that recipients with significant research, volunteer, community outreach, or land-grant programs often employ individuals in temporary or cyclical positions that cause them to change from one notification category to another, the Department disagrees that the costs of training, re-training, and tracking the training status for all such employees on their notification obligations will be a significant burden under the final regulations. Under § 106.8(d)(1)(iii), a recipient must train all employees on all applicable notification requirements under § 106.44. A single training can notify all employees at such recipients of the two different notification requirements, so even if an employee were to move between categories, they would have the requisite information regarding their notification requirements. And, as mentioned above, a recipient can choose to train all employees to notify the Title IX Coordinator. In addition, the Department has revised § 106.8(d) to clarify that training must occur promptly when an employee changes positions that alters their duties under Title IX or the final regulations and annually thereafter so any changes in their notification responsibilities would be covered by this training.

The Department acknowledges the commenter's suggestion to make all non-confidential employees mandatory referrers, but the Department has determined that the final regulations appropriately balance complainant autonomy and a recipient's obligation to respond to sex discrimination. The final regulations, as modified, will more comprehensively protect students from conduct that reasonably may constitute sex discrimination under Title IX.

Changes: For an explanation of the changes to § 106.44(c), see the discussion of § 106.44(c).

12. Provision of Supportive Measures (§ 106.44(f)–(g))

Comments: Some commenters asserted that recipients are likely to provide significantly more supportive measures under the proposed regulations than they provide under the 2020 amendments because the Department proposed to broaden the scope of Title IX. The commenters asserted that the expansion of supportive measures will result in increased costs related to the provision, coordination, and implementation of supportive measures, and, in some cases, litigation. One commenter stated that, under the 2020 amendments, many people preferred supportive measures over filing a complaint and that it is likely the number of individuals accessing supportive measures rather than pursuing the formal grievance process is closer to at least ten to one, and stated this number is likely to increase with additional reports. The commenter did not provide any data or other support for their estimation.

Discussion: Recipients have an obligation under Title IX to address sex discrimination covered by the statute, including ensuring that access to the recipient's education program or activity is not limited or denied by such sex discrimination. Supportive measures are designed to restore or preserve a party's access to the recipient's education program or activity. 87 FR 41421. As such, supportive measures are available for all forms of sex discrimination, which is consistent with the proposed and final definition of ''supportive measures'' in § 106.2 and with § 106.44(a). 87 FR 41448. The Department also clarifies that supportive measures include measures that a recipient deems to be ''reasonably available,'' consistent with the definition of ''supportive measures.''

The Department recognizes that the number of incidents in which the parties would be provided supportive measures would likely increase compared to the 2020 amendments because of the broader range of incidents triggering an offer of them under the final regulations relative to the 2020 amendments. As a result, the Department estimates increases in any related costs associated with providing supportive measures.

As described in Section 4.C of the RIA below, the Department estimates the number of incidents in which supportive measures are offered (and the resulting number of instances in which such measures are provided and their related costs). Specifically, in the July 2022 NPRM, 87 FR 41553–54, the Department estimated that there would be approximately 1.5 times as many incidents in which supportive measures are offered relative to the number of times a recipient initiated its grievance procedures (*e.g.,* if a recipient annually initiated its grievance procedures 10 times, there would be 15 additional instances in which a recipient would offer supportive measures, 90 percent of which would be accepted). In reviewing these assumptions in light of public

comment, the Department recognizes that this initial estimate may have failed to capture the full range of incidents in which supportive measures would be offered. The Department has therefore increased its estimated factor from 1.5 to 2.0, effectively increasing the number of instances in which supportive measures would be offered and, as a result, provided, by 33 percent. The Department has retained its initial estimate that individuals will accept 90 percent of the supportive measures offered to them and of the cost of providing such measures ($250 per incident). For additional explanation of supportive measures, see the discussion of § 106.44(g).

Changes: The Department has increased the assumptions related to the number of incidents in which the parties would be offered supportive measures by 33 percent.

13. Impartial Review of Supportive Measures (§ 106.44(g)(4))

Comment: One commenter asserted that proposed § 106.44(g)(4), which would require an appropriate, impartial employee to consider challenges to supportive measures, would be difficult to implement at small institutions where often the Title IX Coordinator is the only employee trained in the requirements of Title IX. The commenter asserted that the administrative burden imposed by this provision would not be justified in the context of providing supportive measures.

Discussion: The Department disagrees with the commenter's assumption that § 106.44(g)(4) would require recipients to develop an entire administrative structure; it only requires, at minimum, assigning one person to handle challenged decisions. The Department estimates that providing an impartial employee to consider such challenges would incur a negligible monetary cost per incident and that the cumulative annual costs to the recipient would therefore be at a de minimis level. The Department also anticipates that these costs will either be reduced in the long-term or be offset by savings from other proposed changes (*e.g.,* changes to the grievance procedure requirements) and from the anticipated reduction in instances of sex discrimination. Moreover, the importance of this independent review outweighs any burdens it may impose. For additional explanation of the impartial review of supportive measures, see the discussion of § 106.44(g)(4).

Changes: None.

14. Grievance Procedures (§§ 106.45 and 106.46)

Comments: Some commenters, including a system of State postsecondary institutions, supported the proposed regulations as more time- and cost-effective than the existing regulations.

Other commenters disagreed with the Department's cost estimates of the new grievance procedures. For example, some commenters expressed concern that the proposed requirements for grievance procedures would place unmanageable administrative burdens on a recipient. Some commenters suggested the regulations would detract from a recipient's efforts to identify, prevent, and remedy sex discrimination in its education program or activity. And some commenters expressed concern that having one set of grievance procedures to address sex-based harassment and another set for other forms of sex discrimination would create confusion for recipients as to which requirements apply to which complaints.

One commenter said the revised definition of ''sex-based harassment'' and the application of § 106.45 to all other sex discrimination complaints would be more burdensome than the 2020 amendments.

Other commenters argued that, in connection with changes to the grievance procedures, any short-term financial savings to recipients would be offset by costs associated with respondents' diminished due process rights and the lasting economic and intangible costs related to respondents who are erroneously found responsible for sexual misconduct and expelled or dismissed.

Discussion: The Department disagrees with some commenters' assertions that respondents have diminished due process rights under the requirements related to grievance procedures and that the grievance procedures result in respondents being erroneously found responsible for sexual misconduct. As discussed in more detail in the preamble, the final regulations appropriately and fairly safeguard the due process rights of both complainants and respondents and include requirements in grievance procedures that ensure fair, transparent, and reliable outcomes. Specifically, the final regulations provide for notice of the allegations; an opportunity for the parties to respond to the allegations; an adequate, reliable, and impartial investigation; and an objective evaluation of all relevant and not otherwise impermissible evidence. Additional procedures are required for allegations of sex-based harassment involving a student party at postsecondary institutions.

The Department also observes that, under §§ 106.45 and 106.46, recipients retain significant flexibility and discretion, including regarding decisions to implement grievance procedures in a cost-effective manner. That flexibility and discretion extends to designating the reasonable timeframes that will apply to grievance procedures; using a recipient's own employees as investigators and decisionmakers or outsourcing those functions to contractors; using an individual decisionmaker or a panel of decisionmakers; offering informal resolution options; determining which disciplinary sanctions to impose following a determination that sex discrimination occurred; and selecting appeal procedures. The final regulations also remove requirements and prohibitions imposed by the 2020 amendments that stakeholders identified as overly prescriptive, restrictive, and time-consuming, including requirements related to written notice in elementary schools and secondary schools, the requirement to hold a live hearing (although recipients may still choose to hold a live hearing), the prohibition on the single-investigator model, and the requirement to create an investigative report (although recipients may still choose to create an investigative report).

For these reasons, the final regulations account for both the administrative concerns recipients have raised and the need to ensure a nondiscriminatory educational environment through procedures that are designed to promote fair, accurate outcomes in sex discrimination complaints. The 2020 amendments included requirements that applied only to sexual harassment complaints, which invited variations in the grievance procedures recipients implemented for other types of sex discrimination. The final regulations, which apply to all forms of sex discrimination and include discrete additional requirements for sex-based harassment complaints involving students at postsecondary institutions, provide greater clarity and more streamlining under one set of requirements for most of a recipient's Title IX compliance obligations than what is afforded under the 2020 amendments.

Although the streamlining and clarity that the final regulations afford will result in recipients addressing all sex discrimination complaints under § 106.45, and if applicable § 106.46, the

Department disagrees that this approach is unreasonably costly or burdensome in a manner that outweighs the benefits of ensuring that all sex discrimination complaints are resolved through grievance procedures that the Department determined are designed to ensure fair and reliable outcomes that meet the requirements of Title IX. *See* 87 FR 41546–47, 41554–58. In response to the commenter that stated that compliance with the requirements of the 2020 amendments necessitated additional staff and generated significant paperwork, the Department notes that the final regulations include specific changes to the requirements of the 2020 amendments that aim to make grievance procedures less burdensome without reducing their efficacy or fairness. For example, the final regulations leave to a recipient's discretion whether to provide a written notice of allegations outside the context of complaints of sex-based harassment involving a postsecondary student. *See* § 106.45(c). The final regulations also give postsecondary institutions the discretion to assess credibility through a live hearing or through another live questioning process when investigating complaints of sex-based harassment involving a postsecondary student. *See* § 106.46(f)(1). For further explanation of the costs and burdens related to live hearings with questioning by an advisor, see the discussions of § 106.46(f) and (g).

Further, §§ 106.45 and 106.46 provide the benefit of outlining clear requirements for grievance procedures to all parties and recipients. Additionally, the final regulations provide grievance procedures that ensure fair and reliable outcomes in all types of sex discrimination complaints, including sex-based harassment complaints that involve a postsecondary student party. Through its enforcement work, OCR has recognized that reasonably prompt timeframes and an adequate, reliable, impartial investigation, among other requirements in §§ 106.45 and 106.46, are essential to ensuring a prompt and equitable resolution for all sex discrimination complaints, including sex-based harassment. The Department also heard from a range of commenters, including recipients and entities that represent them, that the proposed grievance procedure requirements were well suited to address sex discrimination complaints in their settings. Accordingly, the Department has determined that the benefits of requiring recipients to institute grievance procedures consistent with § 106.45, and if applicable § 106.46, to resolve sex discrimination complaints justify the minimal burdens of compliance.

The Department acknowledges that Title VII and Title IX impose different requirements in some respects and that some recipients will need to comply with both Title VII and Title IX. Although commenters have noted certain differences, they have not explained why it would be impossible or unduly burdensome for a recipient to comply with both standards. There is no inherent conflict between Title VII and Title IX, including in the final regulations. For further explanation, see the discussion of Framework for Grievance Procedures for Complaints of Sex Discrimination (Section II.C).

Changes: For an explanation of the changes to specific provisions of grievance procedures in §§ 106.45 and 106.46, see the discussions of the relevant provisions (Section II.D–E).

15. Regulatory Stability and Reliance Interests

Comments: Some commenters stated that the proposed regulations would be the third set of Title IX regulations in eleven years and that each revision requires a recipient to adopt new policies that students and employees must learn and understand.

Discussion: The Department shares commenters' concerns about the importance of regulatory stability and the need for recipients and members of their educational community to have clear information about their rights and responsibilities under Title IX. By retaining and enhancing many of the requirements in the 2020 amendments, the final regulations provide the regulatory stability that is necessary to promote broad understanding of Title IX's nondiscrimination mandate and the rights and responsibilities it confers in educational settings that receive Federal financial assistance.

The Department acknowledges that a recipient may have relied on or incorporated the 2020 amendments into its policies, practices, or procedures that affect students and employees, including collective bargaining agreements. The Department considered such reliance interests and ultimately determined that certain proposed changes were warranted; however, mindful of such reliance interests, the final regulations either maintain the requirements of the 2020 amendments or make certain provisions permissive rather than mandatory. *See, e.g.,* §§ 106.45(d)(1) and 106.46(g). The Department also notes that collective bargaining agreements generally recognize an entity's obligation to comply with applicable laws and contain procedures for consulting with the union and renegotiating provisions that conflict with applicable laws.

While such negotiations may cause disruptions, the Department has determined that the benefits of the final regulations—both in terms of ensuring that recipients comply with Title IX's nondiscrimination mandate and ensuring that all participants in the grievance procedures receive the process they are due—justify the burdens caused by any renegotiation of a recipient's collective bargaining agreements. Moreover, commenters did not provide, and the Department does not have, data from which to estimate how many collective bargaining agreements would need to be renegotiated and therefore has not included the costs of such renegotiations in its cost projections.

Changes: None.

16. Training for Decisionmakers (§ 106.46(f)(4))

Comments: One commenter objected to proposed § 106.46(f)(4) and asserted it would require extra training for decisionmakers that would increase costs and outweigh any benefits.

Discussion: The Department disagrees that final § 106.46(f)(4) will result in an increase in recipient costs to implement required decisionmaker training. Recipients are already required to train decisionmakers under the 2020 amendments. While the content of the training will be adjusted, it is unlikely that the length of training would have to change for decisionmakers in connection with § 106.46(f)(4); therefore, any associated burden for these individuals would not change as a result of the final regulations. The benefits of training decisionmakers, including by ensuring that grievance procedures are equitable and ensure transparent and reliable outcomes, justify any administrative cost. For further explanation of required changes to the content of training and any associated costs and burdens, see the discussion of § 106.8(d).

Changes: None.

17. Single-Investigator Model (§ 106.45(b)(2))

Comments: Some commenters supported the single-investigator model permitted by § 106.45(b)(2) on the grounds that it would allow recipients to shorten grievance procedure timelines, allow the individual with the most knowledge of the investigation to make the determination, and increase efficiency in scheduling. One commenter stated that although the

Department and commenters asserted that small recipients struggle with the administrative capacity to handle grievance procedures, the Regulatory Impact Analysis in the 2020 amendments indicated that the regulatory changes adopted in 2020 would generate additional costs to small IHEs of only approximately 0.28 percent of annual revenue. The commenter further stated that the Department estimated the average amount of time for an IHE investigator to perform their duties as between 10 and 18 hours per complaint and between 2 and 8 hours for each decisionmaker, leading the commenter to question the Department's conclusion that the prohibition on the single-investigator model results in burdensome costs or elongated complaint resolution processes.

Discussion: The Department's decision to permit the single-investigator model was not based solely on the number of hours required for a decisionmaker to perform their tasks. As explained in the July 2022 NPRM, the single-investigator model supports quality grievance procedures and decision-making, and recipients expressed their belief that the single-investigator model resulted in more students seeking institutional support and resolution of complaints. 87 FR 41467. In light of these benefits, the Department determined that recipients should have the option of utilizing the single-investigator model to resolve complaints of sex discrimination under Title IX. For further explanation of the single-investigator model, see the discussion of § 106.45(b)(2).

Changes: None.

18. Pregnancy or Related Conditions (§§ 106.40 and 106.57(e))

Comments: Some commenters stated that the Department did not adequately estimate the costs of requiring recipients to provide reasonable modifications for students and lactation spaces to students and employees, which the commenters asserted would amount to significant costs for many recipients. One of these commenters stated the Department failed to identify how many schools currently offer a lactation space and reasonable modifications for lactation, or how many lactation spaces the proposed regulations would require. Another commenter stated that the Department must account for reasonable modifications that would be required for parents (other than those who are pregnant or experiencing pregnancy-related conditions). Some commenters raised concerns that the proposed regulations' requirements regarding notifying students of information regarding pregnancy rights under § 106.40(b)(2) or (b)(3)(i) were unduly costly or burdensome to recipients because, for example, they would require additional staff time and training. Some commenters asked about the impact and costs, including litigation costs and costs related to abortion, of the proposed regulations on postsecondary institutions, medical schools, and hospitals.

Discussion: The Department views the final regulations regarding reasonable modifications for students and lactation spaces for students and employees as best effectuating Title IX by preventing sex discrimination and ensuring equal access to a recipient's education program or activity for students who are pregnant or experiencing pregnancy-related conditions. Although there are limited data quantifying the economic impacts of sex discrimination, the Department determined, based on its review of public comments, that barriers related to pregnancy or related conditions can prevent students from obtaining a high school diploma, pursuing higher education, or obtaining a postsecondary degree, which limits their economic opportunities and may have long-term or generational impacts.

The Department does not anticipate significant costs to recipients based on the final regulations related to reasonable modifications for students and lactation spaces for students and employees. For example, the Department points out that some costs noted by commenters are not new given recipients' obligation since 1975 to provide leave in connection with pregnancy, childbirth, termination of pregnancy, and related recovery. *See* 40 FR 24128. Given these existing obligations, some commenters are likely overstating the increased costs or burdens for implementing reasonable modifications. Recipients have existing obligations that are similar to those under § 106.40(b)(3)(ii), which require a recipient to make certain modifications to a policy, practice, or procedure, such as providing a student a larger desk, allowing more frequent bathroom breaks, or permitting temporary access to elevators. 87 FR 41560. As stated in the July 2022 NPRM, the requirement for reasonable modifications because of pregnancy or related conditions builds upon the former ''reasonable and responsive'' standard and sets a clearer framework for how to assess what must be provided. *Id.* As such, the Department does not anticipate that the required steps for compliance with the ''reasonable modifications because of pregnancy or related conditions'' requirement under § 106.40(b) would be significantly more costly than under the prior OCR interpretation of a recipient's duties. Nor do the final regulations, which provide more clarity regarding a recipient's responsibilities in connection with reasonable modifications, change the cost estimates in the model. Even if a recipient were to incur some additional cost due to its new awareness of its previous responsibilities, the Department disagrees that any such minimal additional costs or burdens would outweigh the benefits of clarifying a recipient's obligation to provide, and ensuring that students are able to access, reasonable modifications for pregnancy or related conditions.

In connection with lactation spaces, the final regulations require the minimum acceptable standards for privacy, sanitation, and functionality necessary for students and employees to attend to their lactation needs at school, be free from discrimination, and maintain equal access to the recipient's education program or activity. *See* 87 FR 41522. In addition, nearly all recipients under Title IX are already required to provide a virtually identical physical space for employees under the PUMP Act, 29 U.S.C. 218d.[101] *Id.* Additionally, as explained below, many State and local laws also require recipients to provide lactation spaces. Although it is possible that the regulations' clarification that a lactation space must be available for both students and employees may result in an increase in demand for such a space, any such increase would likely result in a de minimis impact on costs as distributed over all recipients over time. The final regulations do not require recipients to make any particular changes to facilities. In particular, they do not dictate a precise number of spaces that every facility must have as this will be a fact-specific determination that may ebb and flow over time based on factors such as how many people need to use such a space, when, and where on the recipient's campus. As explained in the July 2022 NPRM, the Department anticipates that a recipient currently without a designated lactation space would likely be able to comply with § 106.40(b)(3)(v) using existing space at minimal cost, partly because there is no requirement that a lactation

[101] Although the PUMP Act, which expanded the types of employees entitled to lactation time and space under the FLSA, was signed into law on December 29, 2022 (Pub. L. 117–328), recipients have been subject to similar lactation time and space requirements since March of 2010 as part of the Affordable Care Act amendment to the FLSA that added (r)(1) to § 7. Public Law 111–148, 124 Stat 119 (2023).

space be a particular size, shape, or include features other than being private and clean, and not a bathroom. *See* 87 FR 41559–60. Lactation spaces do not need to be designated as such for 24 hours a day, so there is no need to create new space. If a recipient chose to retrofit a space, for example by adding keypad locks or a chair to an existing space, such costs are minimal. Further, it is the Department's view that these de minimis costs are outweighed by the benefits of requiring a recipient to provide an appropriate space for a student or employee who is lactating, including allowing them to remain in school or employment during the early months or years of a child's life, which helps eliminate a sex-based barrier to education or employment.

With respect to reasonable modifications required for parents (other than those who are pregnant or experiencing pregnancy-related conditions), the Department notes that the final regulations require that recipients provide reasonable modifications only to students who are pregnant or experiencing pregnancy-related conditions and not to their partners, family members, or others not pregnant or experiencing pregnancy-related conditions. Accordingly, the Department did not analyze the costs of modifications not imposed by the final regulations.

Costs associated with the final regulations' notification requirements under § 106.40(b)(2) and (b)(3)(i) are considered as part of the RIA below. *See* RIA, Cost Estimates (Section 4.C), Revisions to training. The cost associated with an employee or Title IX Coordinator informing a student of their rights is de minimis, and the latter is considered in connection with the Title IX Coordinator's duties. Training costs, including those that would address the employee actions required under § 106.40(b)(2) and (b)(3)(i), are explained above in the discussion of training requirements under § 106.40(d).

Sections 106.40 and 106.57(e) of the final regulations do not require a recipient to provide or pay for any benefit or service, including the use of facilities, related to abortion; therefore, commenters' concerns regarding abortion-related costs are unfounded. For further explanation, see the discussion of the definition of ''pregnancy or related conditions'' in § 106.2 (Section III). Other costs identified by the commenters, such as costs to taxpayers due to increased litigation were speculative or unrelated to any requirements of the pregnancy provisions.

Changes: None.

19. Scope of Sex Discrimination (§ 106.10)

Comments: Some commenters argued that the Department failed to calculate the financial, health, administrative, and legal costs to society that commenters asserted would result from the Department's proposed changes. For example, some commenters said the Department failed to consider the effects on recipients of expanding the scope of the regulations to include gender identity discrimination, including an increase in Title IX complaints.

Other commenters asserted that the Department must analyze the benefits and burdens of its proposed regulations with more granularity (*i.e.,* benefits and burdens on men versus women).

Discussion: Although the Department recognizes that clarifying the scope of Title IX could result in increased costs to recipients, especially those recipients that limited the application of their Title IX policies to those bases of discrimination explicitly referenced in the 2020 amendments, the non-monetary benefits of providing clarity and fulfilling the broad scope of Title IX's protections justify the costs associated with the implementation of these robust protections. *See* 87 FR 41562.

The Department has considered the benefits and burdens of the final regulations and their impact on all individuals on the basis of sex. While the Department strongly agrees that recipients have a legitimate interest in protecting all students from sex discrimination, it disagrees that such goals are inconsistent with § 106.10. The Department disagrees that by recognizing discrimination based on gender identity as sex discrimination, it has disregarded potential harms to students or employees and disagrees that additional granularity to quantify benefits and burdens is necessary. For further explanation, see the discussions of §§ 106.10 and 106.31(a)(2).

The Department estimates that inclusion of these bases of sex discrimination within the scope of the Department's Title IX regulations may result in a 10 percent increase in the number of investigations conducted annually. *See* 87 FR 41550 & n.27. In the July 2022 NPRM, the Department also acknowledged that there may be some costs associated with litigation and the Department disagrees with commenters who suggested that litigation costs would increase significantly due to the final regulations. 87 FR 41561. Commenters did not provide any data that would change the estimates or the Department's recognition that there may be some, but not extensive, costs associated with litigation due to the final regulations. It is the Department's view that the final regulations provide clear requirements for recipients to comply with Title IX.

Changes: None.

20. Menstruation or Related Conditions

Comments: The Department received many comments requesting that menstruation or related conditions be included within the scope of the Title IX regulations, as discussed elsewhere in this preamble.

Discussion: The Department clarifies in this preamble that menstruation or related conditions is included within the scope of Title IX as defined in § 106.10. The Department recognizes that clarifying the scope of Title IX could result in a marginal increase in costs to recipients, especially those recipients that limited the application of their Title IX policies to those forms of conduct explicitly referenced in the 2020 amendments, but the non-monetary benefits of providing clarity and fulfilling the broad scope of Title IX's protections justify the costs associated with the implementation of these robust protections. As noted in the discussion of § 106.10, these regulations do not require recipients to incur the cost of providing menstrual products.

Changes: None.

21. Other

Comments: Some commenters stated that, if the Department requires religious educational institutions to prepare a request for religious exemption, the Department would have to calculate the costs to religious educational institutions and to the Department. They also said that the Department should account for costs to religious educational institutions and their students if a request for a religious exemption is denied. One commenter stated that any proposed changes to the existing regulations would impose additional regulatory costs and paperwork burdens which would not justify making a change to the religious exemption.

Other commenters argued that the Department did not take into consideration the costs to religious students in non-religious institutions who will feel pressure to violate their religious beliefs, and who may choose not to attend or work at federally funded schools because of their sincerely held religious beliefs.

Discussion: The Department is not proposing any changes to § 106.12 related to religious exemptions, and nothing in the final regulations alters

assurances that specific religious institutions have already received from OCR. Religious institutions are not required to seek assurance of a religious exemption before asserting it, although they may do so voluntarily, and the Department does not envision an increase in such requests. The final regulations do not require religious students or employees to change their beliefs, because the regulations address conduct that constitutes sex discrimination, which is prohibited by Title IX, and not religious beliefs. Section 106.6(d) explicitly states that nothing in the regulations requires a recipient to restrict rights protected under the First Amendment or other constitutional provisions. The Department, likewise, must act in accordance with the U.S. Constitution. In addition, the Department notes that Title IV of the Civil Rights Act of 1964, which is enforced by the Department of Justice's Civil Rights Division, specifically prohibits public schools and higher education institutions from discriminating based on religion. For further information on the First Amendment and religious exemptions from Title IX, see the discussion of Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2) (Section I.C) and the discussion of Religious Exemptions (Section VII).

Changes: None.

B. Regulatory Impact Analysis (RIA)

Under Executive Order 12866,[102] as amended by Executive Order 14094, the Office of Management and Budget (OMB) must determine whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive Order and subject to review by OMB.[103] Section 3(f) of Executive Order 12866, as amended by Executive Order 14094, defines a ''significant regulatory action'' as an action likely to result in regulations that may—

(1) Have an annual effect on the economy of $200 million or more (as of 2023 but adjusted every 3 years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product), or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or Tribal governments or communities);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise legal or policy issues for which centralized review would meaningfully further the President's priorities, or the principles stated in the Executive Order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

This final regulatory action is ''significant'' and therefore subject to review by OMB under section 3(f)(4) of this Executive Order because it raises legal or policy issues for which centralized review would meaningfully further the President's priorities, or the principles stated in the Executive Order.

The Department has also reviewed the regulations under Executive Order 13563,[104] which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select 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 the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' OIRA has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

Under Executive Order 13563, the Department determined that the benefits of the final regulations justify their costs. In choosing among alternative regulatory approaches, the Department selected those approaches that maximize net benefits. Based on the analysis that follows, the Department determined that the final regulations are consistent with the principles in Executive Order 13563.

The Department has also determined that this regulatory action would not unduly interfere with State, local, territorial, or Tribal governments in the exercise of their governmental functions.

This RIA discusses the need for regulatory action, the potential costs and benefits, assumptions, limitations, and data sources, as well as regulatory alternatives considered. Although most of the costs related to information collection are discussed within this RIA, under the Paperwork Reduction Act of 1995, this notice also identifies and further explains burdens specifically associated with information collection requirements.

1. Need for Regulatory Action

In 2021, the President directed the Department in both Executive Order 13988 [105] and Executive Order 14021 [106] to review its regulations implementing Title IX for consistency with Title IX's statutory prohibition on sex discrimination by a recipient of Federal financial assistance in its education program or activity. Consistent with those Executive Orders, the Department reviewed the regulations based on Federal case law under Title IX, its experience in enforcement, and feedback OCR received from stakeholders, including during the June

[102] *Executive Order on Regulatory Planning and Review,* Exec. Order. No. 12866, 58 FR 51735 (Oct. 4, 1993), *https://www.govinfo.gov/content/pkg/FR-1993-10-04/pdf/FR-1993-10-04.pdf.*

[103] Since the July 2022 NPRM, Executive Order 12866 has been amended and supplemented by *Executive Order on Modernizing Regulatory Review,* Exec. Order No. 14094, 88 FR 21879 (Apr. 6, 2023), *https://www.federalregister.gov/documents/2023/04/11/2023-07760/modernizing-regulatory-review.*

[104] *Executive Order on Improving Regulation and Regulatory Review,* Exec. Order No. 13563, 76 FR 3821 (Jan. 18, 2011), *https://www.govinfo.gov/content/pkg/FR-2011-01-21/pdf/2011-1385.pdf.*

[105] *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation,* Exec. Order No. 13988, 86 FR 7023 (Jan. 25, 2021), *https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf.*

[106] *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity,* Exec. Order No. 14021, 86 FR 13803 (Mar. 11, 2021), *https://www.govinfo.gov/content/pkg/FR-2021-03-11/pdf/2021-05200.pdf.*

2021 Title IX Public Hearing [107] and listening sessions. More than 280 students, parents, teachers, faculty members, school staff, administrators, and other members of the public provided live comments during the June 2021 Title IX Public Hearing, and OCR also received more than 30,000 written comments [108] in connection with the hearing. In addition, a wide variety of stakeholders participated in the listening sessions with OCR, including survivors of sexual violence, students accused of sexual misconduct, LGBTQI+ students, and advocates representing these groups of students; organizations focused on Title IX and athletics; organizations focused on free speech and due process; organizations representing elementary schools and secondary schools (or local educational agencies (LEAs)), as well as postsecondary institutions (or institutions of higher education (IHEs)), teachers, administrators, and parents; attorneys representing complainants, respondents, students, and schools; State attorneys general offices; Title IX Coordinators and other school administrators; individuals who provide training on Title IX to schools; individuals who work in campus law enforcement; and individuals who have participated in school-level Title IX proceedings. Based on this review, the Department concluded that it was necessary to amend its regulations to ensure that all aspects of its regulatory framework under Title IX are well suited to implementing Title IX's prohibition on sex discrimination in education programs or activities that receive Federal financial assistance. The Department intends these changes to improve and promote educational environments free of sex discrimination in a manner that recognizes fairness and safety concerns.

The Department considered feedback received from many stakeholders during the June 2021 Title IX Public Hearing and numerous OCR listening sessions, as well as comments received in response to the July 2022 NPRM, stating that the 2020 amendments include onerous requirements for sexual harassment grievance processes that are unnecessarily adversarial in nature—threatening to decrease students' willingness to make complaints or fully participate in the grievance process. These stakeholders also stated that the requirements in the 2020 amendments for sexual harassment grievance processes unduly increase administrative burden and intrude on a recipient's professional judgment and expertise regarding how best to respond to allegations of student misconduct without improving the recipient's ability to address sex discrimination within their educational environment. During the June 2021 Title IX Public Hearing, some stakeholders expressed support for the 2020 amendments, remarking that the requirements governing a recipient's sexual harassment grievance process should remain in place without change, while other stakeholders suggested the Department amend various provisions in the regulations that they deemed important (including the deliberate indifference standard, the actual knowledge requirement, and specific requirements related to the grievance process for formal complaints of sexual harassment). Many stakeholders expressed concerns regarding the scope of the regulatory definition of ''sexual harassment'' from the 2020 amendments, the requirement that a recipient need only respond to sexual harassment when it has actual knowledge, and that it need only respond in a manner that is not deliberately indifferent. Apart from addressing sexual harassment, many stakeholders asked the Department to clarify protections related to discrimination based on sexual orientation and gender identity, presenting a variety of positions that they urged the Department to adopt, while other stakeholders asked the Department to clarify Title IX's protections against discrimination based on pregnancy or related conditions.

The Department amends its Title IX regulations to address the concerns raised by stakeholders and anticipates that the final regulations will result in many benefits to recipients, students, employees, and others, including by:

- Requiring recipients to adopt grievance procedures that provide for the prompt and equitable resolution of complaints of sex discrimination and take other necessary steps to provide an educational environment free from sex discrimination;
- Clarifying the Department's view of the scope of Title IX's prohibition on sex discrimination, including related to a hostile environment under the recipient's education program or activity, as well as discrimination on the basis of sex stereotypes, sex characteristics, sexual orientation, pregnancy or related conditions, and gender identity;
- Clarifying a recipient's obligations to students and employees who are pregnant or experiencing pregnancy-related conditions;
- Clarifying that, unless otherwise permitted by 20 U.S.C. 1681(a)(1) through (9) and the corresponding regulations at §§ 106.12–106.15, 20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b), a recipient must not carry out any otherwise permissible different treatment or separation on the basis of sex in a way that would cause more than de minimis harm, including by adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity.

As discussed in more detail in the following sections, it is the Department's belief that the regulatory changes will fulfill Title IX's overarching goal: to ensure that no person experiences sex discrimination in education. To that end, the Department aims to ensure that all recipients can implement Title IX's nondiscrimination mandate fully and fairly in their educational environments.

2. Discussion of Costs, Benefits, and Transfers

The Department has analyzed the costs and benefits of complying with the final regulations. Although many of the associated costs and benefits are not easily quantifiable, the Department concludes that the benefits derived from the final regulations justify the associated costs given that the objectives of the rulemaking are to ensure: (1) that sex discrimination does not take place in any education program or activity receiving Federal financial assistance, and (2) that sex discrimination is redressed promptly and effectively if it occurs.

Title IX, which applies to approximately 17,900 LEAs, more than 6,000 IHEs, and numerous other recipients such as libraries and museums, requires a recipient to provide an education program or activity that is free from sex discrimination. The final regulations introduce new obligations and clarify existing obligations of entities subject to the regulations to promote an educational environment free from sex discrimination. The final regulations require recipients to adopt grievance procedures that provide for fair, prompt, and equitable resolution of complaints of sex discrimination and take other necessary steps to provide an

[107] The transcript from the June 2021 Title IX Public Hearing is available at *https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-publichearing-complete.pdf.*

[108] The written comments that OCR received as part of the June 2021 Title IX Public Hearing are available at *https://www2.ed.gov/about/offices/list/ocr/public-hearing.html* (last visited Mar. 20, 2024).

educational environment free from sex discrimination; clarify that Title IX's prohibition on sex discrimination includes sex-based harassment in the form of quid pro quo harassment, hostile environment harassment, and four specific offenses; and clarify that sex discrimination includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. The Department expects that the final regulations will benefit recipients, as well as students, employees, and others by ensuring that students, employees, and others understand their rights and recipients understand their responsibilities under Title IX.

The final regulations will provide numerous important benefits some of which are difficult to quantify. Still, it is the Department's view that the changes just described, in addition to others discussed more fully throughout the RIA and preamble, will reduce the occurrence of sex discrimination in a recipient's education program or activity and facilitate a prompt and equitable resolution when sex discrimination occurs, thereby supporting a recipient's efforts to provide an educational environment free from sex discrimination. Although there are limited data quantifying the economic impacts of sex discrimination, including sex-based harassment, on individuals, studies suggest that there is a cost associated with being subjected to sex discrimination. *See, e.g.,* Ctrs. for Disease Control & Prevention, *Fast Facts: Preventing Sexual Violence, https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html* (last visited Mar. 20, 2024) (describing the economic burden of sexual violence involving physical contact on survivors within their lifetimes); Cora Peterson et al., *Lifetime Economic Burden of Intimate Partner Violence Among U.S. Adults,* 55 Am. J. Preventive Med. 433 (2018) (estimating the cost of intimate partner violence on survivors within their lifetimes). The Department recognizes that sex discrimination in all forms, including sex-based harassment and prohibited retaliation, may have both qualitative and quantitative costs for educational institutions, their students and employees, applicants for admission and employment, their families, and the American educational system and workforce in general, although the Department is unable to quantify reductions in these costs resulting from the final regulations.

Due to the large number of affected recipients (more than 24,000, as discussed more fully in the discussion of Developing the Model (Section 4.B)), the variation in likely responses to any regulatory change, and the limited information available about current practices, particularly at the LEA level, the Department is not able to precisely estimate the likely costs, benefits, and other effects of the final regulations. Despite these limitations, and based on the best available evidence as explained in the discussion of Establishing a Baseline (Section 4.A), the Department estimates that the final regulations will result in an estimated net cost of $18.8 million over ten years at a 7% discount rate and an estimated net cost of $4.6 million over ten years at a 3% discount rate. This is equivalent to an annualized cost of between $543,504 and $2,671,136 depending on the discount rate, over ten years. The final regulations are expected to result in estimated costs of $98,505,145 in the first year following publication of the final regulations, and $12,038,087 in cost savings each year in subsequent years.

Year	Net annual cost
Year 1	$98,505,145
Year 2	(12,038,087)
Year 3	(12,038,087)
Year 4	(12,038,087)
Year 5	(12,038,087)
Year 6	(12,038,087)
Year 7	(12,038,087)
Year 8	(12,038,087)
Year 9	(12,038,087)
Year 10	(12,038,087)
Total Net Present Value (NPV), 7%	18,760,944
Annualized, 7%	2,671,136
Total NPV, 3%	4,636,200
Annualized, 3%	543,504

As discussed in the Cost Estimates (Section 4.C), the Year 1 costs include both one-time costs associated with reviewing and making necessary changes to policies, procedures, and training to implement the final regulations, and on-going costs associated with requirements such as training for Title IX Coordinators, the provision of supportive measures, investigations and adjudications, appeals and informal resolutions, recordkeeping, and monitoring and addressing barriers to reporting sex discrimination. In addition to these estimated Year 1 costs, the Department estimated cost savings in Years 2 through 10, which arise largely from the additional flexibility that recipients will have to design and implement grievance procedures consistent with Title IX under § 106.45, and if applicable § 106.46.

The assumptions, data, methodology, and other relevant materials, as applicable, on which the Department relied in developing its estimates are described throughout this RIA.

3. Benefits of the Final Regulations

This final regulatory action will address the potential gaps in coverage within the regulatory framework that have been raised by stakeholders and commenters and observed by the Department. These include, but are not limited to, the steps a recipient must take with respect to sex discrimination, the requirements for a recipient's grievance procedures for sex discrimination other than sexual harassment, a recipient's obligations toward students and employees who are pregnant or experiencing pregnancy-related conditions, the scope of coverage related to discrimination based on gender identity and sexual orientation, and a recipient's obligation to address prohibited retaliation.

Although the Department cannot quantify in monetary terms the ancillary benefits the final regulations may provide to those who have been subjected to sex discrimination in an educational setting, the Department recognizes that sex discrimination, including sex-based harassment, can have profound and long-lasting economic costs for students, employees, their families, and others who seek to participate in the recipient's education program or activity. Being subjected to sex discrimination in a recipient's education program or activity can affect an applicant's opportunity to enroll in a recipient's education program or activity, a student's ability to learn and thrive inside and outside of the classroom, a prospective or current employee's ability to contribute their talents to the recipient's educational mission, and the opportunity of all participants to benefit, on an equal basis, from the recipient's education program or activity. Likewise, barriers to reporting sex discrimination within a recipient's education program or activity can undermine the recipient's educational environment for the entire community. The final regulations offer a clear and fair framework for fulfilling Title IX's prohibition on sex discrimination in any education program or activity receiving Federal financial assistance.

The final regulations will reduce the long-term costs associated with providing an educational environment free from sex discrimination, thereby producing a demonstrable benefit for students, employees, and others participating or attempting to

participate in the recipient's education program or activity. The Department anticipates those benefits will be realized based on several changes to the regulations. First, the final regulations clarify the scope of Title IX's protection from sex discrimination for students, employees, and others participating or attempting to participate in a federally funded education program or activity and define terms integral to a recipient's obligations under Title IX. Second, the final regulations set out the contours of a recipient's obligation to take action to address sex discrimination, including requiring a recipient's Title IX Coordinator to monitor its education program or activity for barriers to reporting sex discrimination and take steps reasonably calculated to address those barriers. Third, the final regulations modify and strengthen existing training requirements by specifying the range of relevant persons that a recipient must train regarding the recipient's obligations under Title IX and this part. Fourth, the final regulations revise the notification requirements for a recipient, helping to ensure that specific employees notify the Title IX Coordinator when they have information about conduct that reasonably may constitute sex discrimination under Title IX or this part in the recipient's education program or activity. Fifth, the final regulations help ensure the effective provision and implementation of supportive measures, as appropriate, to all complainants and respondents and clarify that when a recipient determines that sex discrimination has occurred, the recipient must provide remedies, as appropriate, to a complainant and any person the recipient identifies as having their equal access to the recipient's education program or activity limited or denied by sex discrimination, and take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity. Sixth, the final regulations revise the requirements for grievance procedures to provide for the prompt and equitable resolution of complaints of any sex discrimination and allow a recipient the ability to adapt its grievance procedures to its size, population served, and administrative structure while ensuring equitable treatment of all parties. Seventh, the final regulations provide clarity on the rights of students and employees who are pregnant or experiencing pregnancy-related conditions including, for example, by requiring a recipient to inform students of the recipient's obligations, making reasonable modifications to its policies, practices, or procedures as necessary to prevent sex discrimination and to ensure a student's equal access to its education program or activity, requiring a recipient to provide employees with reasonable break time to express breast milk or breastfeed as needed and, with respect to both students and employees, ensuring access to an appropriate space for lactation. Finally, the final regulations clarify that, unless otherwise permitted by 20 U.S.C. 1681(a)(1) through (9) and the corresponding regulations at §§ 106.12–106.15, 20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b), a recipient must not carry out any otherwise permissible different treatment or separation on the basis of sex in a way that would cause more than de minimis harm, including by adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity.

The Department expects that the final regulations, when reviewed in their totality, will reduce the likelihood of sex discrimination and the overall prevalence of sex discrimination in recipients' educational settings. Although the Department cannot entirely quantify the economic impacts of these benefits, the benefits noted above are substantial and far outweigh the estimated costs of the final regulations.

4. Costs of the Final Regulations

The Department's analysis reviews the Department's data sources, describes the model used for estimating the likely costs associated with the final regulations, and sets out those estimated costs. Due to limited quantitative data, the Department emphasizes that the monetary estimates reflect only the likely costs of this regulatory action and do not seek to quantify, in monetary terms, the costs of sex discrimination, including sex-based harassment and prohibited retaliation.

As described in the Discussion of Costs, Benefits, and Transfers (Section 2), there are limited data quantifying the economic impacts of sex discrimination, including sex-based harassment, on individuals, and studies suggest that there is a cost associated with being subjected to sex discrimination. *See* Ctrs. for Disease Control & Prevention, *Fast Facts: Preventing Sexual Violence;* Peterson et al., *Lifetime Economic Burden of Intimate Partner Violence Among U.S. Adults,* 55 Am. J. Preventive Med. 433. Nonetheless, the final regulations reduce the harms of sex discrimination in multiple ways, including the following:

First, final § 106.44 clarifies a recipient's obligation to take action to address sex discrimination, including sex-based harassment, and expressly covers more conduct than § 106.44 under the 2020 amendments. Specifically, the final regulations require a recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity to respond promptly and effectively, regardless of whether a complaint is made. Under the 2020 amendments, § 106.44 prescribes only how a recipient must respond to allegations of sexual harassment in its education program or activity when a report is made to certain employees and § 106.44 is silent with respect to a recipient's obligation to respond to other forms of sex discrimination. By prescribing the actions a recipient must take to operate its education program or activity free from sex discrimination, the implemented changes will aid the recipient in reducing—and ultimately eliminating—sex discrimination in its education program or activity. Any initial, short-term costs associated with the implemented change are expected to be both minimal and offset in the longer term by reduced incidence of sex discrimination. The final regulations will increase recipient responsiveness to all reports and complaints of sex discrimination and are also likely to deter or prevent some incidents of sex-based harassment and its associated harms; however, the Department cannot firmly quantify the potential reduction in incidents of sex-based harassment or other forms of sex discrimination.

Second, final § 106.44(f)(1)(ii) and (g) make clear that upon being notified of conduct that reasonably may constitute sex discrimination under Title IX, including sex-based harassment and prohibited retaliation, a Title IX Coordinator must offer and coordinate supportive measures, as appropriate, to the complainant or respondent. Final § 106.44(g) also clarifies that for allegations of sex discrimination other than sex-based harassment or retaliation, a recipient's provision of supportive measures does not require the recipient, its employee, or any other person authorized to provide aid, benefit, or service on the recipient's behalf to alter the alleged discriminatory conduct for the purpose of providing a supportive measure. As the final requirement regarding supportive measures covers prohibited retaliation as well as other forms of sex discrimination not addressed by the

2020 amendments, the Department recognizes that the number of incidents in which the parties will seek supportive measures will likely increase compared to the 2020 amendments, as will any related costs in providing those supportive measures. The Department includes costs associated with such an increase in its model below. As explained in the discussion of supportive measures below, the Department expects that there will be little impact on anticipated costs associated with the final provision requiring supportive measures to be offered to complainants and respondents in connection with forms of sex discrimination other than sex-based harassment because such discrimination will likely relate either to sex discrimination allegations arising out of alleged unequal access to resources or facilities or allegations arising out of alleged sex discrimination in an educational setting such as different treatment on the basis of sex. There will be few appropriate supportive measures for such discrimination, other than eliminating the source of the sex discrimination, which is not required under the definition of ''supportive measures'' and instead may only be provided as a remedy. *See* §§ 106.2, 106.44(g). The Department also anticipates that these costs will either be reduced in the long term or offset by other savings. Those savings may come from other final changes (*e.g.,* changes to the grievance procedure requirements) or from the anticipated reduction in instances of sex discrimination.

The Department expects that the final regulations will increase the use of a recipient's grievance procedures by students and others, thereby resulting in an increase in the prompt and equitable resolution of complaints of sex discrimination in a recipient's education program or activity. The Department has estimated a 10 percent increase in investigations annually. If this estimate holds, it is also reasonable to believe that the final regulations may reduce the prevalence of sex discrimination, including sex-based harassment, as well as the adverse academic, social, emotional, and economic effects of sex discrimination on individuals and recipient communities. Commenters did not provide additional high-quality comprehensive data about the status quo, and the specific choices that recipients will make regarding how to comply with the final regulations; therefore, the Department cannot estimate the effects of the final regulations with absolute precision. However, as discussed below, we estimate the final regulations to result in a net cost of $4,636,200.

4.A. Establishing a Baseline

4.A.1. Data Sources

As discussed in the preamble to the 2020 amendments, the primary challenge associated with estimating the effects of any new regulatory action under Title IX is the lack of comprehensive data on the actions recipients are taking to comply with their current obligations.[109] As part of the comment process on the 2020 amendments and in the July 2022 NPRM, the Department requested information about data sources that would provide this information and which the Department could use to inform its estimates. *See* 83 FR 61484; 87 FR 41546, 41549. The Department did not receive such sources.

In the absence of a recent, high-quality, and comprehensive data source, the Department relies, as it did for the 2020 amendments, on a 2014 report titled Sexual Violence on Campus (2014 Senate Subcommittee Report) issued by the U.S. Senate Subcommittee on Financial and Contracting Oversight.[110] The report included survey data from 440 four-year IHEs regarding the number of investigations of sexual violence that had been conducted during the previous five-year period; however, this report did not address the prevalence of other bases of sex discrimination, including discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. As described in the discussion of Developing the Model (Section 4.B), the Department adjusted these data, using data from other sources such as data submitted under the Clery Act, to account for these exclusions and assumed that the final regulations may result in a 10 percent increase in the number of annual investigations by recipients that did not previously address these bases of sex discrimination. For LEAs, the Department continues to rely on the publicly available data from OCR's Civil Rights Data Collection (CRDC) regarding sexual harassment incidents to estimate the annual number of investigations in those settings.

4.A.2. Estimates of Annual Investigations of Sexual Harassment Prior to the 2020 Amendments to the Title IX Regulations

To estimate the likely impact of the final regulations, the Department must consider the policies and practices of recipients in responding to sexual harassment prior to the promulgation of the 2020 amendments. This consideration is necessary because the 2020 amendments specified in the Department's Title IX regulations, for the first time, the definition of ''sexual harassment'' and the obligation of a recipient to respond to sexual harassment under Title IX. The final regulations require a recipient to take prompt and effective steps to ensure that sex discrimination, including sex-based harassment that creates a hostile environment based on sex, does not continue or recur in the recipient's education program or activity. This required use of a hostile environment standard encompasses conduct that was addressed in enforcement practice prior to the 2020 amendments; as a result, data regarding recipients' actions regarding sexual harassment prior to the 2020 amendments is helpful for estimating the likely effects of the final regulations. Note that the Department is not assuming that information relating to recipient behavior prior to the effective date of the 2020 amendments impacts the baseline (that is, behavior and burdens in the absence of the final regulations), but rather, several of the changes made by the final regulations remove some of the restrictions on recipient responses to sexual harassment imposed by the 2020 amendments. However, the Department notes that the final regulations create different requirements from those established in its enforcement practices prior to the 2020 amendments. As a result, recipient behavior prior to the effective date of the 2020 amendments, in the Department's view, provides some, but not complete, insight into what recipient behavior will be.

In the 2020 amendments, the Department assumed that the number of incidents reported under the Clery Act could be used as an instrument to estimate total incidents of sexual harassment, including those not captured in the 2014 Senate

[109] The Department's model estimates the total costs of the final regulations. While many of these costs would be borne by recipients, some costs estimated herein may be borne by other entities or individuals. Similarly, while many of the costs detailed herein are the result of requirements of the final regulations, the model also accounts for some non-required costs that are likely to result from this regulatory action (*i.e.,* costs likely to be voluntarily borne by recipients or other entities or individuals).

[110] Claire McCaskill, *S. Subcomm. on Financial Contracting Oversight—Majority Staff, Sexual Violence on Campus,* 113th Cong. (2014), *https://www.hsgac.senate.gov/imo/media/doc/2014-07-09SexualViolenceonCampusSurveyReportwithAppendix.pdf.*

Subcommittee Report; as a result, the Department estimated that, prior to the issuance of the 2020 amendments, IHEs conducted approximately 5.7 Title IX investigations of sexual harassment per year per IHE. *See* 85 FR 30026, 30565. The Department based this estimate on an analysis of the 2014 Senate Subcommittee Report and data submitted by IHEs under the Clery Act.

At the LEA level, the Department does not have publicly reported data on the average number of investigations of sexual harassment occurring each year. The 2017–2018 data from the CRDC indicates an average of 3.23 incidents of sexual harassment per LEA per year.[111] The Department, therefore, assumes that this was the number of investigations of sexual harassment occurring, on average, each year in each LEA.

4.A.3. Lack of Data Following the Promulgation of the 2020 Amendments

Commenters did not provide the Department with reliable statistical data sources about actions taken by recipients following the promulgation of the 2020 amendments. As a result, it is difficult for the Department to conclusively estimate the number of investigations that have occurred since the issuance of the 2020 amendments or the number that would likely occur in later years in the absence of the Department's final regulations. This absence of data means the Department could not construct a baseline from which to estimate the likely effects of the final regulations. Instead, the Department has a reasonable framework for understanding the likely actions recipients would take to comply with the final regulations as well as a benchmark for generating baseline estimates of recipients' actions following the promulgation of the 2020 amendments, based on anecdotal information from experts in the field as well as anecdotal information received from comments in response to the July 2022 NPRM, and feedback from the June 2021 Title IX Public Hearing and in numerous OCR listening sessions. These sources provide some reliable information about actions taken by recipients to comply with Title IX prior to the promulgation of the 2020 amendments. However, in using this anecdotal information, the Department is mindful that the 2020 amendments introduced requirements and definitions not previously promulgated and thus actions prior to the 2020 amendments will not capture all aspects of a recipient's actions following the issuance of the 2020 amendments.

The Department is not attempting to estimate the degree of sex discrimination at recipient institutions. Rather, the Department is attempting to estimate the number of times recipients will be required to engage in activities, such as conducting investigations or providing supportive measures. For instance, in the preamble to the 2020 amendments, the Department estimated that approximately 90 percent of LEAs and 50 percent of IHEs would reduce the number of investigations conducted each year. *See* 85 FR 30567. The Department estimated that, on average, these LEAs would conduct 1.29 fewer investigations per year under the 2020 amendments. The Department also estimated that the annual average reduction in investigations would be 2.84 for those IHEs that reduced their number of investigations. Since making those assumptions in the 2020 amendments, OCR has received feedback from a variety of stakeholders, through the June 2021 Title IX Public Hearing, in listening sessions, and from comments received in response to the July 2022 NPRM, that the actual reduction may have been higher due to the deterrent effect of the perceived burden associated with the sexual harassment grievance process requirements on a complainant's willingness to report sexual harassment or participate in a process to resolve a formal complaint of sexual harassment as required by the 2020 amendments. Further, based on anecdotal reports, the Department understands that many recipients that experienced a reduction in the number of sexual harassment complaints filed at their respective institutions after the 2020 amendments shifted their resolution processes away from what would have been a proceeding under § 106.45 of the 2020 amendments to an alternative disciplinary process, such as a general student conduct process outside of the scope of Title IX. Although this information from recipients and others confirms the Department's 2020 estimate related to the decrease in the number of investigations, it is anecdotal and, as such, does not provide the Department with sufficient evidence on which to revise its 2020 estimate. Further, the Department recognizes that the COVID–19 pandemic resulted in many LEAs and IHEs operating remotely, which may have reduced the incidence or reporting of sexual harassment, the willingness of students and others to initiate a recipient's grievance process in response to alleged sexual harassment, or both. Again, however, the Department has not identified, nor have commenters provided, high-quality research studies to inform its analysis. Therefore, the Department continues to assume that the estimates of the 2020 amendments represent the baseline level of a recipient's actions to comply with Title IX in future years when considered in the absence of the final regulations.

Notwithstanding the estimates used for the 2020 amendments, for recipients that saw reductions in the number of investigations conducted each year under the 2020 amendments, the Department estimates, based on stakeholder feedback, comments it received on the July 2022 NPRM, and its enforcement experience, that many alleged incidents that were previously classified as sexual harassment under subregulatory guidance documents but did not meet the definition of ''sexual harassment'' under the 2020 amendments, were handled by a recipient in other disciplinary processes.

4.B. Developing the Model

After the effective date of the 2020 amendments, the Department assumes that recipients complied with the regulatory requirements and fell into one of three groups in how they handled complaints of sexual harassment that fell outside the scope of § 106.45 under the 2020 amendments:

- *Group A:* Recipients did not adopt a new process to handle complaints falling outside the § 106.45 grievance process in the 2020 amendments;
- *Group B:* Recipients handled complaints falling outside the § 106.45 grievance process in the 2020 amendments through a different grievance process; and
- *Group C:* Recipients handled complaints falling outside the § 106.45 grievance process in the 2020 amendments through a resolution process similar to that process.

The Department has not assumed a recipient would behave differently based on its public or private status. Further, the Department does not distinguish cost structures or burden hours based on public or private status,

[111] U.S. Dep't of Educ., Office for Civil Rights, Civil Rights Data Collection for the 2017–2018 School Year, *https://ocrdata.ed.gov/assets/ocr/docs/2017-18-crdc-data.zip* (open ''2017–18 Public Use Files''; then select ''Data''; then select ''SCH''; then select ''CRDC''; then select ''CSV''; then select the ''Harassment and Bullying.csv'' file) (last visited Feb. 20, 2024). The Department notes that CRDC data are now available for the 2020–2021 school year. However, because of the irregular nature of school attendance that year due to the COVID–19 pandemic, the Department continues to rely on data from the 2017–2018 school year, which the Department anticipates are more typical. The CRDC data for the 2020–2021 school year are available at *https://civilrightsdata.ed.gov/data (last visited Feb. 20, 2024).*

but instead applied an average across all recipients in each analytical group. The Department also assumes recipients in all three groups generally complied with the requirements of the 2020 amendments. To the extent that a recipient did not comply with some or all of those requirements, the following estimates may overestimate or underestimate actual costs of the final regulations for that recipient.

To populate each of the three groups, the Department is using the same disbursement it used in the 2020 amendments' analysis. That is, the Department assumes that approximately 5 percent of LEAs, 5 percent of IHEs, and 90 percent of other recipients [112] fall into Group A. Generally, the Department does not anticipate that LEAs or IHEs, which usually have existing disciplinary processes and a history of compliance with Title IX, would adopt the minimal framework of Group A. In contrast, other recipients, as defined in footnote 112, are less likely to have alternative disciplinary processes and the Department assumes that it is unlikely that these other recipients would have established alternative processes based on the 2020 amendments. The Department assumes that a recipient in this group, in response to the final regulations, will experience an increase in the number of incidents investigated each year but would also be likely to revise its grievance procedures to fit the context of its educational environment under final § 106.45. As a result, although the number of investigations may increase, each investigation and adjudication would be less burdensome relative to investigations and adjudications under the 2020 amendments, due to the ability of a recipient under the final regulations to adopt procedures consistent with Title IX that are prompt, equitable, and specifically adapted to its unique circumstances, including its setting, size, and administrative structure. Recipients in this group will see burden increases associated with necessary revision of procedures and recordkeeping.

The Department assumes that approximately 90 percent of LEAs, 50 percent of IHEs, and 5 percent of other recipients fall into Group B. A recipient in this group generally experienced some reduction in the number of sexual harassment investigations conducted under the grievance process requirements of the 2020 amendments, which would have been initiated only by a formal complaint of sexual harassment and, based on anecdotal evidence, would have also addressed at least some incidents that are no longer covered under the grievance process requirements in the 2020 amendments by using an alternative disciplinary process. In the preamble to the 2020 amendments, the Department did not account for such a shift in its estimates; however, the current model assumes such behavior as part of the baseline. The Department assumes that, in response to the final regulations, Group B will see an increase in the total number of investigations under Title IX due to the application of § 106.45 of the final regulations to more than sexual harassment complaints. It is assumed that Group B will benefit from some of the additional flexibilities offered under the final regulations, such as having the option to provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence or a written investigative report that accurately summarizes the evidence under final § 106.46 (subject to the requirement to provide access to the underlying evidence upon the request of any party). A recipient in this group will likely retain many aspects of its current grievance procedures in response to the final regulations. As a result, the Department estimates that the increase in the number of investigations for Group B under the final regulations will be smaller than the increase in the number of investigations for Group A because of the number of investigations and adjudications already occurring under the auspices of an alternative student or employee conduct process. It is estimated that recipients in Group B will see burden increases associated with necessary revision of procedures and recordkeeping under the final regulations.

The Department assumes that approximately 5 percent of LEAs, 45 percent of IHEs, and 5 percent of other recipients fall into Group C. A recipient in this group is assumed to use the grievance process established under the 2020 amendments to also resolve conduct that was not required to be resolved under Title IX. As a result, it is estimated that a recipient in Group C will not see a large increase in the number of investigations conducted annually or a meaningful change in the burden per investigation. However, a recipient in Group C, like those in the other two groups, may see burden increases associated with necessary revision of procedures and recordkeeping.

For recipients in both Groups A and B, the Department assumes that the final regulations' coverage of sex discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity, will result in an increase in the number of investigations conducted annually above the average encountered prior to the promulgation of the 2020 amendments. Although the Department has previously addressed a recipient's obligation to address these bases of sex discrimination, including harassment on these bases, in OCR's prior guidance, at least some recipients may not have fully addressed these incidents absent a more specific regulatory requirement.[113] The Department assumes that the inclusion of these areas in the final regulations may result in a 10 percent increase in the number of investigations conducted annually.[114]

[112] Other recipients include entities other than LEAs and IHEs which operate education programs or activities supported by the Department and may include libraries, museums, and cultural centers, among other types of organizations. This group represents an exceptionally small number of LEAs and IHEs, many of which are likely to be very small in size (*e.g.,* an LEA of fewer than 100 students or an IHE of fewer than 15 students).

[113] This is explained in greater detail in the discussions of Pregnancy and Parental Status (Section III) and Title IX's Coverage of Sex Discrimination (Section IV).

[114] As part of the 2017–2018 CRDC, schools reported 44,864 allegations of harassment and bullying on the basis of sex. That same year, they reported 18,414 allegations of harassment and bullying on the basis of sexual orientation, or approximately 33 percent of the number of allegations of harassment and bullying on the basis of sex. *See* U.S. Dep't of Educ., Office for Civil Rights, Civil Rights Data Collection for the 2017–2018 School Year, *https://ocrdata.ed.gov/assets/ocr/docs/2017-18-crdc-data.zip* (open ''2017–18 Public Use Files''; then select ''Data''; then select ''SCH''; then select ''CRDC''; then select ''CSV''; then select the ''Harassment and Bullying.csv'' file) (last visited Mar. 20, 2024). The sum of the allegations of harassment or bullying on the basis of sexual orientation (18,414) is found in Column L of harassment and bullying.csv in the 2017–2018 CRDC data by excluding cells with reserve codes. Thirty-three percent represents a very high upper bound of the number of additional investigations conducted annually by recipients based on the inclusion of sexual orientation and gender identity in the final regulations. OCR has long recognized that ''[w]hen students are subjected to harassment on the basis of their LGBT status, they may also . . . be subjected to forms of sex discrimination prohibited under Title IX. The fact that the harassment includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment. 2010 Harassment and Bullying Dear Colleague Letter, at 8, *https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf*. It is extremely unlikely that the final regulations will result in such a large increase in the number of investigations occurring annually. First, such an assumption implies that no allegations of harassment and bullying on the basis of sexual orientation were also reported as allegations of harassment and bullying on the basis of sex, which is highly unlikely because the CRDC instructs

Continued

Although the Department notes that final § 106.45(a)(2) will allow a person other than a student or employee who is participating or attempting to participate in a recipient's education program or activity to make a complaint of sex discrimination, the Department assumes this change will result in a minimal increase in a recipient's overall number of complaints of sex discrimination. Specifically, the Department assumes that complaints from non-students and non-employees are somewhat uncommon (and would remain so), but that these complaints serve to inform recipients of at least some incidents of sex discrimination. In the case of a Group A recipient, the Department assumes that the recipient's treatment of information about conduct that reasonably may constitute sex discrimination received from a non-student or non-employee would solely depend on whether the reporting party made a complaint that initiated the recipient's grievance procedures. If the individual declined or was not permitted to make a complaint under the recipient's policy (for example if the individual was not participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination), the Department assumes that the Group A recipient would not take action to address the information. The Department assumes that in contrast to Group A recipients, Group B and Group C recipients would take steps to address a non-student or non-employee allegation of sex discrimination—whether by way of their Title IX grievance procedures, alternative disciplinary process, or other process depending on the circumstances and nature of the report. Thus, although the final regulations may change the process under which a non-student or non-employee allegation of sex discrimination is addressed, the inclusion of such complaints will not meaningfully increase the overall number of complaints processed annually across recipients.

Unless otherwise specified, the Department's model uses median hourly wages for personnel employed in the education sector as reported by the Bureau of Labor Statistics [115] and a loading factor of 2.0 to account for the employer cost of employee compensation and indirect costs (*e.g.,* physical space, equipment, technology costs). In addition, throughout this RIA, some described calculations have results that are fractions (*e.g.,* the described analysis generates an estimate of 4.79655 incidents at LEAs in which supportive measures are offered). To improve readability, the Department presents these results rounded to two decimal places in the text (*e.g.,* 4.80), but retains the unrounded value for purposes of its underlying calculations.

LEAs, IHEs, and other recipients are subject to the final regulations. Estimates regarding the number of affected LEAs and IHEs are based on the most recent data available from the NCES [116] regarding the number of LEAs nationwide with operational schools and the number of IHEs participating in programs under Title IV of the HEA (such as Direct Loans, Federal Work Study, and Pell grants). The estimate regarding the number of other institutions is based on an internal review of the Department's grant portfolio.

- LEAs: It is assumed that 17,916 LEAs would be impacted by the final regulations. Among affected LEAs, total enrollment during the 2021–2022 school year ranged from fewer than 10 students to more than 435,000 students.
- *IHEs:* It is assumed that 6,003 IHEs would be impacted by the final regulations. Among IHEs, recipients range from small, private, professional schools with fewer than 5 full-time students enrolled during the 2022 year to large, public research universities with enrollments of more than 85,000 full-time students and institutions operating mostly virtually with enrollments exceeding 145,000 students.
- *Others:* It is assumed that 828 other recipients would be impacted by the final regulations. Other recipients include both small Tribal cultural centers located in remote rural areas and some of the largest and most well-funded arts centers and museums in the world. They also include State education agencies, State vocational rehabilitation agencies, local libraries, small parent organizations, and a range of other entities that receive Federal grant funds from the Department.

It is important to note that within each of these categories of recipients, there is wide variation in the number of students served, number of employees, administrative structure, and annual revenue. This wide variation has made estimating the effects of the final regulations challenging, and the Department notes that the estimates provided are intended to reflect the average burden across all affected entities. As a result, estimates may be lower than the actual burden realized by, for example, larger recipients or recipients with more complex administrative structures, and larger than those realized by smaller recipients with less complex administrative structures. The Department notes that the estimates in the discussion of Cost Estimates (Section 4.C) were developed based on the RIA from the 2020 amendments, as informed by comments in response to the 2018 NPRM, 83 FR 61462 (Nov. 29, 2018), as well as information received by OCR through the June 2021 Title IX Public Hearing, in listening sessions, and from comments received in response to the July 2022 NPRM. The estimates were further informed by the input of internal subject matter experts.

4.C. Cost Estimates

Review of Regulations and Policy Revisions

The Department assumes that all recipients will need to spend time reading and understanding the final regulations. The time necessary to complete this task across all recipients will likely vary widely, with some recipients opting for a close and time-consuming review of both the regulations and preamble, while others will rely on shorter third-party summaries targeted for specific audiences resulting in a less burdensome and more expedient process. The Department has developed on-average assumptions based on feedback provided by stakeholders in listening sessions and review of comments received in response to the July 2022 NPRM. On average, the

schools to count a single harassment allegation under multiple categories if it meets the definition of more than one category. In addition, such an assumption implies that no allegations of harassment and bullying on the basis of sexual orientation are currently investigated under a recipient's Title IX procedures, which is highly unlikely because harassment based on sexual orientation can be difficult to distinguish from other harassment based on sex and OCR guidance has previously asserted that many incidents of harassment that is based on sexual orientation or that targets LGBTQI+ students are prohibited by Title IX. However, it is unreasonable to assume that the express inclusion of sexual orientation and gender identity in the final regulations would have no effect on the number of investigations occurring annually. Based on the analysis set out here, the Department estimates that the additional clarity provided by the final regulations would result in a 10 percent increase in the number of investigations occurring annually.

[115] U.S. Dep't of Labor, Bureau of Labor Statistics, May 2022 National Industry-Specific Occupational Employment and Wage Estimates: Sector 61—Educational Services, *https://www.bls.gov/oes/current/naics2_61.htm* (last visited Mar. 20, 2024).

[116] U.S. Dep't of Educ., Institute of Education Sciences, National Center for Education Statistics, *http://nces.ed.gov/ccd/elsi/* (last visited Mar. 20, 2024); U.S. Dep't of Educ., Institute of Education Sciences, National Center for Education Statistics, IPEDS Data Center, *https://nces.ed.gov/ipeds/datacenter/InstitutionByName.aspx* (last visited Mar. 20, 2024).

Department assumes that it will take 4 hours each for a Title IX Coordinator ($96.46/hour) and lawyer ($146.58/hour) to complete this task. In total, the Department estimates that reading and understanding the final regulations will have a total one-time cost of approximately $24,058,044 in Year 1 across all recipients.

The Department assumes that all recipients will need to revise their grievance procedures based on the final regulations. At each recipient institution, the Department assumes that these revisions will take, on average, 12 hours for a Title IX Coordinator, 2 hours for an administrator ($96.46/hour), and 6 hours for a lawyer. In total, the Department estimates that revising grievance procedures will have a one-time cost of $55,183,830 in Year 1. This estimate includes the costs of a recipient's revisions to its grievance procedures associated with the Department's proposal to require recipients to comply with its final revisions to § 106.45 rather than § 106.45 of the 2020 amendments, and for IHEs to also comply with final § 106.46.

The final regulations provide substantial clarity on recipient obligations under Title IX. As such, some recipients may choose to engage in supplemental review of their existing policies to determine compliance and to make changes, if needed, in addition to the final changes that may impact a recipient's grievance procedures. The Department did not receive any data to contradict its estimates regarding such behavior, and therefore continues to believe these estimates are sufficient.

Although the 2020 amendments required a recipient to post nondiscrimination statements on the recipient's website, the Department assumes that approximately 40 percent of LEAs, 20 percent of IHEs, and 50 percent of other institutions will experience more than de minimis burden to modify their existing statements to comply with the requirements of the notice of nondiscrimination under final § 106.8(c). These estimates are based, in part, on how recently the 2020 amendments went into effect, potential impacts from the COVID–19 pandemic which likely delayed at least some recipients from complying with the requirement in the 2020 amendments, and any updates to existing content that may be necessary due to the final regulations. For a recipient that has not yet completed this requirement, the Department assumes doing so will take 1 hour from the Title IX Coordinator and 2 hours from a web developer ($67.16/hour).[117] In total, the Department estimates that posting nondiscrimination statements on websites will have a one-time cost of $2,032,842 in Year 1. The Department did not receive any data to contradict its estimates regarding the costs of posting nondiscrimination statements.

Revisions to Training

The final regulations will likely impact the annual training provided to Title IX Coordinators and designees, investigators, decisionmakers, and other persons who are responsible for implementing a recipient's grievance procedures or have the authority to modify or terminate supportive measures. For individuals other than the Title IX Coordinator and designees, it is unlikely that the length of training will have to change, and therefore any associated burden for these individuals will not change based on the final regulations. The Department assumes that Title IX Coordinators will revise existing training materials to incorporate any new content and adjust the remaining parts of the training accordingly to avoid extending the length and cost of administering the training.

Although the Department notes that the final regulations will require all employees to be trained promptly upon hiring or change of position that alters their duties under Title IX or this part, and annually thereafter on the scope of conduct that constitutes sex discrimination, including the definition of ''sex-based harassment,'' and all applicable notification requirements under final §§ 106.40(b)(2) and 106.44, this requirement will not significantly change the overall annual burden related to training requirements for recipient employees. As an initial matter, based on its enforcement experience and discussions with internal subject matter experts, the Department assumes that all employees of recipients receive required trainings each year and that recipients generally strive to ensure that employee trainings are as efficient as possible to avoid detracting employees from performing their core job responsibilities. The Department also assumes that recipients will not budget significant additional funds in response to the modification of the training requirement in the 2020 amendments, and thus will not experience an increased monetary burden that is more than de minimis due to this final change. The Department makes this assumption based on its understanding that recipients make purposeful decisions about the amount of time dedicated to each required training and will make adjustments, as needed, to ensure all required topics are covered. While the Department understands that recipients will need to dedicate resources to train employees, the benefits of comprehensive training justify the costs, which the Department considers to be de minimis. These benefits include ensuring that all employees receive training on aspects of Title IX that are relevant and critical to their specific roles, that those most likely to interact with students in their day-to-day work have the training necessary to understand their role in ensuring a recipient's Title IX compliance, and that all persons involved in implementing a recipient's grievance procedures and the informal resolution process are clearly designated and trained on conducting a fair process. Each of these benefits, in turn, will help ensure that members of a recipient's community are not discriminated against on the basis of sex and have equal access to its education program or activity.

Across all recipients, the Department estimates that updating training materials for individuals other than Title IX Coordinators will take 4 hours for the Title IX Coordinator for a total one-time cost of $9,548,382. In subsequent years, the Department assumes that the burden associated with the annual updating of training materials will be about the same as it would be in the absence of the final regulations.

In contrast, the Department anticipates that the final regulations will require more extensive, longer training for Title IX Coordinators compared to the 2020 amendments. As an initial matter, the Department assumes that a recipient will employ similar means by which to train its Title IX Coordinator in response to the final regulations as the recipient employed in response to the promulgation of the 2020 amendments; however, the Department acknowledges that the development and delivery method of the training varies among recipients. For example, the Department assumes that some recipients hired outside counsel, law firms, and professional organizations to train their Title IX Coordinators while other recipients relied upon internal stakeholders such as the recipient's general counsel. The Department has no reason to believe that a recipient will deviate from its current source of training because of the final regulations.

[117] Note that time burden estimates for this activity are unchanged from those used in the 2020 amendments. *See* 85 FR 30567.

The Department assumes that such trainings will be 2 hours longer for each Title IX Coordinator in Year 1, and 1 hour longer in future years. In total, the Department estimates that the training of Title IX Coordinators will have a cost of $4,774,191 in Year 1 and $2,387,096 in each succeeding year. Costs will also be incurred to update training materials for Title IX Coordinators. These materials may be developed in a variety of ways, depending on the preferences of individual recipients. These materials will be more comprehensive in nature, but certain entities may develop training materials that will be used across many recipients. As a result, the Department assumes training development costs for Title IX Coordinators equal to those estimated for other individuals, equaling a one-time cost of $9,548,382. The Department did not receive any supplementary data upon which it could reasonably rely to further revise its estimates regarding the costs to recipients of revising training materials to comply with the final regulations.

Supportive Measures

With respect to the provision of supportive measures, the Department's final regulations require a recipient to offer supportive measures, as appropriate, to complainants and respondents in response to information about conduct that reasonably may constitute sex discrimination, including sex-based harassment and prohibited retaliation. Although the 2020 amendments only required a recipient to offer supportive measures, as appropriate, to complainants and respondents in response to actual knowledge of sexual harassment, nothing in the 2020 amendments prohibited a recipient from also offering supportive measures in response to information about other types of sex discrimination. The Department assumes that any prohibited retaliation that occurs will most likely occur following a report or complaint of sex-based harassment (as opposed to other forms of sex discrimination) and that, in such instances, the types of supportive measures offered following the initial report or complaint of sex-based harassment will be largely indistinguishable from the types of supportive measures offered in response to prohibited retaliation and will not result in additional measurable cost to the recipient. Further, it is unlikely that there will be an increase in the number of individuals seeking and accepting supportive measures solely to address the impacts of ''prohibited retaliation'' as defined under amended § 106.71.

The Department notes that the final regulations state that for allegations of sex discrimination other than sex-based harassment or prohibited retaliation, the recipient will not be required to alter the conduct that is alleged to be sex discrimination for the purpose of providing a supportive measure. The Department expects that there will be little impact on anticipated costs to recipients associated with the final provision requiring supportive measures to be offered to complainants and respondents in response to information about conduct that reasonably may constitute other forms of sex discrimination. The Department's assumption is based on the belief that such information will likely fall into one of two categories. The first category consists of information a recipient will receive about sex discrimination related to unequal access to resources or facilities (*e.g.,* reports that boys' and girls' bathrooms are not maintained at the same level). In these instances, the Department anticipates that there are few, if any, appropriate supportive measures beyond eliminating the source of sex discrimination (*e.g.,* improving the quality of the facilities). Although it is the Department's belief that this type of information will not likely result in increased costs associated with the provision of supportive measures, there may be additional costs incurred when addressing these types of situations that are unrelated to providing supportive measures.

Likewise, the Department anticipates that complaints of and information about sex discrimination in educational settings (*e.g.,* a teaching assistant treating an individual student differently because of sex), the second category, will be the most likely reason for a request for supportive measures. In these instances, appropriate supportive measures will likely be academic in nature and have relatively minor costs (*e.g.,* allowing a student to attend a section of the same class taught by a different teaching assistant after a complaint of sex discrimination has been made and is proceeding, and/or counseling the teaching assistant).

For supportive measures related to sex-based harassment, the Department assumes that the final regulations will have a negligible effect on the burden per incident. Specifically, as the variety of supportive measures and need to adapt those measures to a particular situation makes estimating the full spectrum of costs impracticable, the Department used the cost of more commonly provided supportive measures when calculating cost estimates. Moreover, as it is likely that many of the supportive measures available to individuals are already provided by recipients, the Department expects that the actual costs of each type of measure will be de minimis; however, the Department has added a flat cost of $250 per incident to account for any potential costs.[118] The Department cannot provide greater specificity regarding specific supportive measures given the wide range of possible measures that could be offered, the varying administrative structures of recipients, and the need to align any supportive measures to the specific facts of each case.

At the LEA level, the Department assumes that, per incident, the provision of supportive measures currently takes 2 hours from a Title IX Coordinator and 2 hours from an administrative assistant ($61.14/hour), with a flat additional cost of $250 per incident. As such, the Department assumes that, on average, the provision of supportive measures at an LEA costs approximately $565 per incident (staff time plus flat additional cost). At the IHE level and at other recipients, the Department assumes that, per incident, the provision of supportive measures currently takes 2 hours from a Title IX Coordinator and 1 hour from an administrative assistant with a flat additional cost of $250 per incident. Therefore, the Department estimates that, on average, the provision of supportive measures at an IHE or other recipient costs approximately $504 per incident. Commenters did not provide any supplementary data upon which the Department could reasonably rely to further modify the Department's estimates. The Department anticipates that the final regulations may increase the number of incidents for which supportive measures are provided per year.

The Department assumes that a recipient offers and potentially provides supportive measures in all instances that, prior to the 2020 amendments, would have triggered an investigation, as well as in many instances that previously would not have triggered an investigation. Across all recipient types, the Department assumes that under the

[118] This flat cost is intended to capture any non-staff time costs associated with the provision of supportive measures, including but not limited to fees for services covered by the recipient (such as for counseling) or foregone fees not collected by the recipient (such as a waiver of fees for housing reassignment). Note that, due to the wide variety of supportive measures that may be offered by recipients and the need to tailor any such measures to the specific circumstances of a particular individual, more precise estimation of the costs associated with the provision of supportive measures is not practicable.

final regulations, the number of incidents prompting an offer and provision of supportive measures will be approximately 100 percent higher than the number of investigations conducted under the 2020 amendments. For example, at LEAs, where the Department assumes an average of 3.23 investigations per year were conducted before the 2020 amendments, the Department assumes that there will be an average annual increase to 6.4 incidents prompting an offer and provision of supportive measures under the final regulations. The Department assumes that, across all recipient types, supportive measures are accepted in approximately 90 percent of the incidents in which they are offered. Thus, the Department assumes that LEAs provide supportive measures 5.81 times per year. At IHEs, the Department assumes 10.26 provisions of supportive measures per year and at other recipients, 3.60 provisions per year. Across all recipient types, the Department estimates that the provision of supportive measures based on pre-2020 amendments incident data costs approximately $91,424,553 per year.

The Department's estimates also reflect an anticipated change in the behavior of complainants across all recipient types due to the final regulations. Specifically, the Department has received anecdotal reports of complainants accepting supportive measures while declining to participate in a recipient's grievance process due to the perceived burden associated with initiating that process. The Department estimates that under the 2020 amendments the number of individuals accepting supportive measures exceeded the number of individuals choosing to pursue resolution through the recipient's grievance process. Under the final regulations, however, the Department estimates that the percentage of individuals who report an incident to a recipient and choose to make a complaint to initiate the recipient's grievance procedures under final § 106.45, and if applicable § 106.46, will increase. This change is also likely to result in large, unquantified benefits to complainants by providing increased opportunities for reporting sex discrimination and accepting supportive measures, as explained in the discussion of Benefits of the Final Regulations (Section 3). In response to the final regulations, the Department assumes, as described in the discussion of Developing the Model (Section 4.B), that all recipients will see an increase in the number of incidents in which a complainant accepts some supportive measures offered. The Department notes that this is not an assumption that the final regulations will increase the number of incidents that may initiate an offer of supportive measures, but rather, this increase likely will be driven by greater clarity regarding the scope of coverage created by the final regulations and enhanced training requirements which will inform individuals who are already eligible for such measures of the availability of these measures. The Department assumes that under the final regulations, each LEA will provide supportive measures 6.40 times per year, each IHE will do so 11.29 times per year, and other recipients will do so 3.96 times each per year. In all, the Department estimates that after the enactment of the final regulations, the provision of supportive measures will cost a total of $100,567,008, for a net increase of $9,142,455 per year.

Investigations and Adjudications

Under the 2020 amendments, the geographic location of an alleged incident affects whether the allegations will be covered under Title IX. As a result, the Department recognizes that recipients spend time investigating whether incidents took place in a location that requires the use of the Title IX grievance process to investigate and adjudicate allegations of sexual harassment. Final § 106.11 clarifies that Title IX applies to every recipient and all prohibited sex discrimination occurring under a recipient's education program or activity. This includes the obligation to address a sex-based hostile environment under a recipient's education program or activity in the United States, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States. The Department emphasizes that recipients do not have an obligation under Title IX to receive and process complaints or commence grievance procedures about or otherwise address conduct occurring outside of the United States, unless the conduct is alleged to have contributed to a sex-based hostile environment under the recipient's education program or activity in the United States. In some instances, such as when an alleged incident occurred outside of the United States and may have contributed to a sex-based hostile environment under the recipient's education program or activity domestically, the Department acknowledges that the resulting investigation may be more time consuming. Although a recipient may decide to investigate other conduct that occurred outside the United States under its existing code of conduct or other policies pertaining to, for example, study abroad programs, the costs associated with such an investigation are not required by the final regulations. Commenters did not provide high-quality data on these issues in response to a request in the July 2022 NPRM, 87 FR 41546, 41549; therefore, the Department does not have a basis upon which to develop estimates of this change.

As noted in the discussion of Developing the Model (Section 4.B), it is the Department's view that recipients will fall into three groups for purposes of categorizing their likely responses to the final regulations. A recipient in Group A will likely experience an increase in the number of Title IX investigations conducted under the final regulations, but it will also likely exercise flexibilities built into the final regulations which will reduce the burden per complaint. It is important to note that the Department assumes that the exercise of these flexibilities will not impact a recipient's ability to ensure fair investigations and adjudications but rather will allow it to develop and maintain prompt and equitable procedures tailored to its educational settings, reducing the burden on the recipient while ensuring the implementation of fair and equitable proceedings for the parties. A recipient in Group B also will likely experience an increase in the number of investigations conducted annually. However, a recipient in Group B will be more likely to maintain the structures required under the 2020 amendments, as these recipients likely already investigate and adjudicate the forms of conduct covered by the final regulations but excluded from the scope of the 2020 amendments, by way of an alternative disciplinary process. Likewise, a recipient in Group C, having complied with the 2020 amendments and having continued to respond to sex discrimination as it had prior to those amendments, will be unlikely to experience any burden changes associated with increased numbers of investigations or changes in the burden of such investigations.

As described in the discussion of Developing the Model (Section 4.B), the Department has a reasonable framework for understanding the likely actions of recipients, including how long it will take for a recipient to investigate a complaint of sex discrimination, including sex-based harassment, based on discussions with organizations that work directly with Title IX Coordinators

at LEAs and IHEs and with internal subject matter experts. For LEAs in Group A, the Department estimates that an investigation currently takes, on average, 3 hours from a Title IX Coordinator, 4 hours from an administrative assistant, 2 hours each from two lawyers/advisors ($146.58/hour) when they are involved, 6 hours from an investigator ($52.10/hour), and 2 hours from an adjudicator ($63.84/hour). Note that the Department assumes that lawyers/advisors will be involved in approximately 15 percent of cases. For IHEs in Group A, the Department assumes an investigation currently takes, on average, 6 hours from a Title IX Coordinator, 8 hours from an administrative assistant, 5 hours each from two lawyers/advisors, 10 hours from an investigator, and 2 hours from an adjudicator. For other recipients in Group A, the Department assumes an investigation currently takes, on average, 2 hours from a Title IX Coordinator, 4 hours from an administrative assistant, 2 hours each from two lawyers/advisors, 1 hour from an investigator, and 2 hours from an adjudicator. Across all recipients in Group A, the Department assumes a flat rate of $100 per adjudication for recording live hearings. The Department estimates that LEAs in Group A currently conduct, on average, 1.94 investigations per year. At the IHE level, the Department estimates that Group A institutions conduct 3.82 investigations per year, while other recipients in Group A conduct, on average, one investigation per year. In total, the Department estimates that investigations and adjudications for recipients in Group A currently cost a total of approximately $6,746,684.

Under the final regulations, the Department estimates that recipients in Group A will develop revised procedures to ensure fair investigations tailored to their educational settings, which will reduce the burden associated with each investigation and adjudication. Removing LEAs from some of the obligations under § 106.45 of the 2020 amendments will mean Group A recipients will no longer be required to supplement the work of their own administrators with specialized individuals when investigating and making a determination on a complaint of sex-based harassment. The Department assumes investigations will require 4 hours from a Title IX Coordinator or other administrator (such as a building-level principal or assistant principal) and 2 hours from an administrative assistant. At the IHE level, the Department assumes each investigation and adjudication will take 5 hours from a Title IX Coordinator, 8 hours from an administrative assistant, 5 hours each from two lawyers/advisors, 10 hours from an investigator, and 2 hours from an adjudicator. For other recipients, the Department anticipates a need for 2 hours from a Title IX Coordinator, 4 hours from an administrative assistant, 2 hours each from two lawyers/advisors, 1 hour from an investigator, and 2 hours from an adjudicator.

The 2020 amendments require IHEs to create an ''audio or audiovisual recording, or transcript'' of all live hearings. As LEAs and other recipients that are not IHEs are not required to hold hearings under the 2020 amendments, the Department assumes that few, if any, have chosen to do so. However, IHEs are required to hold hearings under the 2020 amendments. Now, the final regulations provide that IHEs may, but are not required to, hold live hearings. When a live hearing is conducted, an IHE must make an audio or audiovisual recording or transcript of the live hearing and make it available to the parties for inspection and review. In addition, § 106.46(f)(1)(i)(C) of the final regulations requires a postsecondary institution to create a recording or transcript of individual meetings with a party or witness conducted by the postsecondary institution to satisfy its obligations under § 106.46(f)(1)(i)(A), even if a recipient does not elect to hold a live hearing. The Department has accounted for this cost.

For IHEs and other recipients in Group A, the Department anticipates no change in the flat rate of $100 per investigation associated with meeting the recording requirements. The Department assumes no recording costs for LEAs in Group A. Under the final regulations, the Department assumes that LEAs in Group A will conduct, on average, 3.55 investigations per year; IHEs in Group A will conduct an average of 6.27 investigations per year, and other recipients will conduct, on average, 2.20 investigations per year. The Department therefore estimates that, under the final regulations, investigations and adjudications among recipients in Group A will cost approximately $9,747,693 per year, which represents a net burden increase of $3,001,009 per year. The Department did not receive any data to contradict its estimates regarding the costs of investigations and adjudications.

TABLE I—INVESTIGATIONS AND ADJUDICATIONS BURDEN ESTIMATES—GROUP A RECIPIENTS [119]

Cost category	Baseline			After final regulations		
Sex Discrimination Grievance Procedures	LEAs	IHEs	Other	LEAs	IHEs	Other
Title IX Coordinator	3 hours	6 hours	2 hours	4 hours	5 hours	2 hours.
Adm. Assistant	4 hours	8 hours	4 hours	2 hours	8 hours	4 hours.
Lawyer/Advisor [1]	2 hours [2]	5 hours	2 hours		5 hours	2 hours.
Investigator	6 hours	10 hours	1 hour		10 hours	1 hour.
Adjudicator	2 hours	2 hours	2 hours		2 hours	2 hours.
Recording	$100	$100	$100	$0	$100	$100.
# of Investigations	1.94	3.82	1.00	3.55	6.27	2.20.

[1] When present, the Department assumes two lawyers/advisors per investigation and adjudication.
[2] The Department assumes lawyers/advisors are involved in only 15 percent of investigations and adjudications. This estimate is based on information from a professional organization.

For LEAs in Group B, the Department assumes an investigation under the 2020 amendments requires 3 hours of time from a Title IX Coordinator, 14 hours from an administrative assistant, 8 hours each from two lawyers/advisors

[119] Estimates were based on information provided by national professional organizations and discussions with internal subject matter experts.

in 15 percent of cases, 8 hours from an investigator, and 2 hours from an adjudicator. At the IHE level in Group B, the Department estimates that an investigation under the 2020 amendments requires 6 hours from a Title IX Coordinator, 20 hours from an administrative assistant, 20 hours each from two lawyers/advisors, 20 hours from an investigator, and 10 hours from an adjudicator. At other recipients in Group B, the Department assumes that an investigation under the 2020 amendments requires 8 hours from a Title IX Coordinator, 16 hours from an administrative assistant, 8 hours each from two lawyers/advisors, 5 hours from an investigator, and 2 hours from an adjudicator. At LEAs and other recipients in Group B, the Department estimates that it costs a flat rate of $100 per hearing under the 2020 amendments. At IHEs, the Department assumes a rate of $200 per hearing to account for the possibility that IHEs may want more extensive records of hearings, such as official transcripts, in addition to an audio recording. The Department assumes that under the 2020 amendments LEAs in Group B conduct, on average, 1.94 investigations per year; that IHEs in Group B conduct 3.82 investigations per year, and that other recipients in Group B conduct one investigation per year. In total, therefore, the Department estimates that under the 2020 amendments investigations and adjudications for a recipient in Group B cost approximately $176,459,489 per year.

As noted in the discussion of Lack of Data Following the Promulgation of the 2020 Amendments (Section 4.A.3) and the July 2022 NPRM, 87 FR 41549, the Department assumes that a recipient in Group B shifted approximately 90 percent of those incidents that involved complaints falling outside the § 106.45 grievance process into an alternative disciplinary process rather than not taking any action in response to incidents that were previously covered under their Title IX policies. As described in the discussion of Developing the Model (Section 4.B), the Department has determined, based on stakeholder feedback, comments it received on the July 2022 NPRM, and its enforcement experience, that many recipients developed alternative processes by which to address conduct that fell outside of the parameters of the 2020 amendments. As noted in that section, Group B and Group C recipients created alternative processes that either reflected the recipient's student or employee conduct processes (Group B recipients) or mirrored the § 106.45 grievance process under the 2020 amendments (Group C recipients). The Department assumes that resource and time expenditures for these alternative processes mirror those of the recipient's student conduct process for Group B recipients or the recipient's grievance process under the 2020 amendments for Group C recipients.

At the LEA level, the Department assumes that an alternative disciplinary process requires 3 hours from an administrator ($96.46/hour), 14 hours from an administrative assistant, 6 hours each from two lawyers/advisors in 5 percent of cases, and 6 hours from an investigator. The Department estimates that in 75 percent of LEAs, the process is adjudicated by an administrator for 3 additional hours, while in the other 25 percent of LEAs, an independent adjudicator is needed for 2 hours. At the IHE level, the Department assumes that the alternative disciplinary process requires 6 hours from an administrator, 20 hours from an administrative assistant, 10 hours each from two lawyers/advisors, and 15 hours from an investigator. The Department estimates that in 60 percent of IHEs, the process is adjudicated by an administrator for 6 additional hours, while in the other 40 percent of IHEs, an independent adjudicator is required for 8 hours. At other recipients, the Department assumes that the alternative disciplinary process requires 4 hours from an administrator and 8 hours from an administrative assistant. The Department estimates that LEAs in Group B, on average, shifted 1.16 investigations per year into alternative disciplinary processes in response to the 2020 amendments, while IHEs did the same with 1.70 investigations, and other recipients did so for 0.9 investigations. The Department therefore estimates that under the 2020 amendments a recipient spends approximately $59,998,354 per year on implementing alternative disciplinary processes for incidents that were previously covered under their grievance procedures prior to the 2020 amendments.

Under the final regulations, the Department assumes that all the incidents previously covered under a recipient's grievance procedures prior to the 2020 amendments will be handled under the recipient's Title IX grievance procedures. At LEAs in Group B, the revised procedures will require approximately 4 hours from a Title IX Coordinator or other administrator (such as a building-level principal or assistant principal) and 2 hours from an administrative assistant. The Department assumes that, in approximately 25 percent of instances, LEAs will use an investigator and adjudicator other than the Title IX Coordinator or other administrator. In such instances, the Department assumes that those LEAs will need 2 hours from an investigator and 1 hour from an adjudicator. The Department assumes that, in 5 percent of instances, each party will have a lawyer/advisor each spending 4 hours on the incident. These LEA level estimates represent an assumption that most LEAs will return to their processes from prior to the 2020 amendments due to the removal of LEAs from some of the specific obligations under § 106.45 of the 2020 amendments. At the IHE level in Group B, the revised procedures will require 5 hours from a Title IX Coordinator, 13 hours from an administrative assistant, 15 hours each from two lawyers/advisors, 18 hours from an investigator, and 8 hours from an adjudicator. For other Group B recipients, revised procedures will require 2 hours from a Title IX Coordinator, 6 hours from an administrative assistant, 2 hours each from two lawyers/advisors in 5 percent of proceedings, 2 hours from an investigator, and 1 hour from an adjudicator.

Under the final regulations, Group B LEAs will conduct, on average, 3.55 investigations per year, while IHEs will conduct 6.27 investigations per year, and other recipients will conduct 2.20 investigations per year. Therefore, under the final regulations, investigations and adjudications at a recipient in Group B will cost a total of approximately $172,807,000 per year which represents a net decrease in the burden associated with investigations and hearings by $63,650,843 per year. The Department did not receive any data to contradict its estimates regarding the costs of investigations per year.

TABLE II—INVESTIGATIONS AND ADJUDICATIONS BURDEN ESTIMATES—GROUP B RECIPIENTS

Cost category	Baseline			After final regulations		
Sex Discrimination Grievance Procedures	LEAs	IHEs	Other	LEAs	IHEs	Other
Title IX Coordinator	3 hours	6 hours	8 hours	4 hours	5 hours	2 hours.
Adm. Assistant	14 hours	20 hours	16 hours	2 hours	13 hours	6 hours.
Lawyer/Advisor [1]	8 hours [2]	20 hours	8 hours	4 hours [3]	15 hours	2 hours.
Investigator	8 hours	20 hours	5 hours	2 hours [4]	18 hours	2 hours.
Adjudicator	2 hours	10 hours	2 hours	1 hour [4]	8 hours	1 hour.
Recording	$100	$200	$100		$200	$100.
# of Investigations	1.94	3.82	1.00	3.55	6.27	2.20.
Alternative Process	LEAs	IHEs	Other			
Administrator	3 hours [5]	6 hours [6]	4 hours.			
Adm. Assistant	14 hours	20 hours	8 hours.			
Lawyer/Advisor [1]	6 hours [3]	10 hours.				
Investigator	6 hours	15 hours.				
Adjudicator	2 hours	8 hours.				
Recording	$100	$200	$100.			
# of Investigations	1.16	1.70	0.90.			

[1] When present, the Department assumes two lawyers/advisors per investigation and adjudication.
[2] The Department assumes lawyers/advisors are involved in 15 percent of investigations and adjudications.
[3] The Department assumes lawyers/advisors are involved in 5 percent of investigations and adjudications.
[4] The Department assumes investigators and adjudicators other than the Title IX Coordinator or another administrator will be used in approximately 25 percent of investigations and adjudications.
[5] The Department assumes administrators also serve as adjudicators in 75 percent of instances and their burden doubles in such cases.
[6] The Department assumes administrators also serve as adjudicators in 60 percent of instances and their burden doubles in such cases.

Appeals and Informal Resolution

The Department assumes that nothing in the final regulations will change the nature of the appeal process for fully adjudicated complaints. The Department notes that the final regulations require all recipients to offer an appeal of a dismissal of a sex discrimination complaint. This limited right to an appeal is an expansion of recipients' obligations under the 2020 amendments as it will apply to any dismissal of a sex discrimination complaint, not just to complaints of sex-based harassment. The final regulations no longer require LEAs and other recipients to offer the parties an appeal process for a determination in a sex-based harassment complaint; however, IHEs must continue to offer an appeal process for sex-based harassment complaints involving a student party. In addition, the final regulations require all recipients to offer the parties in a sex discrimination complaint an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints. Although it is possible that at least some portion of recipients have an appeal process as part of their current procedures for resolving complaints of sex discrimination, the Department assumes that its current estimates may overestimate the costs of the final regulations in this area. Assuming that there is a de minimis change regarding the number of recipients that offer an appeal because all recipients will need to offer an appeal from a dismissal of a complaint of sex discrimination, there may be additional costs to a recipient associated with appeals because of the estimated increase in the number of complaints brought under the final regulations and the proportion of decisions that could be appealed.

Across all recipients, the Department estimates that one or more parties in approximately half of all fully adjudicated complaints appeal the determination. This estimate is consistent with estimates from the 2020 amendments. 85 FR 30568. The Department assumes that at the LEA level, the appeal process will require 2 hours each from a Title IX Coordinator, administrative assistant, and two lawyers/advisors as well as an additional 6 hours from an adjudicator, while at the IHE level, the Department assumes that the appeal process requires 2 hours from a Title IX Coordinator, 4 hours from an administrative assistant, 5 hours each from two lawyers/advisors, and 8 hours from an adjudicator. Likewise, at other recipients, the Department assumes that the appeal process requires 2 hours each from a Title IX Coordinator, administrative assistant, and two lawyers/advisors, with an additional 8 hours from an adjudicator. Assuming that LEAs, on average, will handle an additional 1.33 appeals per year as a result of the final regulations, IHEs, on average, will handle an additional 2.35 appeals per year, and other recipients, on average, will handle an additional 0.95 per year, the Department estimates that the increase in appeals stemming from the increase in complaints likely to be made under the final regulations will result in an additional cost of approximately $17,776,304 per year.

The Department expects that the final regulations will have a de minimis change on the proportion of complaints resolved through informal resolution and will not affect the general burden associated with each such resolution. Specifically, although the requirements for grievance procedures will be less burdensome under the final regulations than under the 2020 amendments, the Department expects that most complainants who have elected to proceed with informal resolution under the 2020 amendments will continue to do so under the final regulations because of the elimination of the formal complaint requirement prior to initiating the informal resolution process. Although it is possible that a complainant will decide to make a complaint and pursue an investigation because of the reduced burden under the final regulations, it is the Department's view that there is no basis to assume that a complainant who would have pursued informal resolution under the 2020 amendments is more or less likely to choose informal resolution under the final regulations because

individuals' rationales for choosing an informal resolution process vary widely.

Based on anecdotal reports from commenters, recipients, and other stakeholders, the Department assumes that informal resolutions require more time from a Title IX Coordinator and an administrative assistant than an investigative process. In contrast, the Department assumes that the informal resolution process will remove all costs associated with investigators, adjudicators, and recording at all levels and eliminate costs for lawyers/advisors at the LEA level. At the LEA level, informal resolution may require 1 additional hour from a Title IX Coordinator and 5 hours from an administrative assistant above the level needed for an investigation and adjudication; at the IHE level, the additional burden will be 2.5 hours from a Title IX Coordinator and 1 hour from an administrative assistant, while at other recipients, the additional burden is estimated to be 1 hour from a Title IX Coordinator and 3 hours from an administrative assistant. The Department assumes that, in instances of informal resolution, there will be no burden for investigators or adjudicators at LEAs, IHE, or other recipients, and no burden for lawyers/advisors at LEAs or other recipients. At the IHE level, the Department assumes that, even in instances of informal resolution, there will be a burden of 6 hours each for two lawyers/advisors (one working with each party), assuming that the individuals serving in those roles may become involved earlier in the process than at other educational levels or at other recipients. Based on the increase in complaints that the Department anticipates under the final regulations, the estimated increase in the cost of informal resolutions will be approximately $14,068,164 per year. The Department did not receive any supplementary data upon which it could reasonably rely to further modify its cost estimates.

Recordkeeping

The Department assumes that all recipients will need to modify their existing recordkeeping systems to comply with the final regulations. Specifically, the Department submits that final § 106.8(f) broadens the existing scope of the recordkeeping requirements under § 106.45(b)(10) of the 2020 amendments because the final recordkeeping requirement applies to all notifications to the Title IX Coordinator about conduct that reasonably may constitute sex discrimination and all complaints of sex discrimination. However, the Department assumes that many recipients already maintain records related to sex discrimination under the auspices of State, local, or other requirements and established recordkeeping systems in response to the 2020 amendments. In these instances, final § 106.8(f) will not impose any additional burden on those recipients as their existing recordkeeping activity will likely address all pertinent requirements under the final regulations.

Alternatively, for recipients that only maintain records related to sexual harassment as required by § 106.45(b)(10) of the 2020 amendments and do not preserve information related to other forms of sex discrimination, the changes will increase their burden based on the volume of records they will need to maintain related to forms of sex discrimination other than sexual harassment, as is required by final § 106.8(f). The Department estimates that the final regulations, in general, will increase the recordkeeping burden for these recipients. At the LEA level, the Department estimates that necessary modifications to current practice will require 2 hours each from a Title IX Coordinator and an administrative assistant, whereas at the IHE level, where a recipient is more likely to maintain electronic systems for these records, these changes will require 4 hours from a Title IX Coordinator, 8 hours from an administrative assistant, and 4 hours from a database administrator ($77.54/hour). At other recipients, the Department estimates that modifications will require 2 hours each from a Title IX Coordinator and an administrative assistant. In total, the Department estimates that modifications to recipients' recordkeeping systems will cost approximately $13,022,034 in Year 1.

In future years, the Department assumes the final regulations will necessitate an ongoing increase, above the baseline year, in recordkeeping costs. Specifically, at the LEA level, the Department estimates that recordkeeping will require 1 additional hour each from the Title IX Coordinator and an administrative assistant; at the IHE level, 1 additional hour from the Title IX Coordinator and 5 hours from an administrative assistant; and at other recipients, 1 additional hour each from the Title IX Coordinator and an administrative assistant. In total, the Department estimates the ongoing recordkeeping burden to increase by approximately $5,237,728 per year. The Department did not receive any supplementary data upon which it could reasonably rely to further modify its estimates regarding such costs.

Monitoring the Recipient's Education Program or Activity for Barriers To Reporting Information About Conduct That Reasonably May Constitute Sex Discrimination

The Department's final regulations require a recipient to ensure that its Title IX Coordinator monitors the recipient's education program or activity for barriers to reporting conduct that reasonably may constitute sex discrimination and that the recipient take steps reasonably calculated to address such barriers. Although a recipient was neither required to nor prohibited from monitoring its environment for these barriers under the 2020 amendments, the Department assumes that many recipients, particularly IHEs, currently monitor their education programs or activities for such barriers to avoid potential legal liability because barriers to reporting limit a recipient's ability to ensure that its education program or activity is operating free from sex discrimination. The Department also assumes that Title IX Coordinators are motivated to proactively identify and address sex discrimination in the recipient's education program or activity. Although some recipients may need to create new mechanisms to monitor their environments, many of these recipients will select options with de minimis costs, such as incorporating questions designed to elicit information from students and employees about barriers to reporting into existing training materials, incorporating such questions into conversations with students, employees, and others during roundtable discussions or listening sessions with interested stakeholders, or through other means. The Department similarly assumes that the steps a recipient will need to take to remove these barriers, should they be identified, will likely have a de minimis cost as well (*e.g.,* reminding students, employees, and others during trainings about the range of reporting options available at a particular recipient or reporting an employee who discourages their students from reporting to human resources for violating the recipient's code of ethics standards). That said, the Department recognizes that there is a wide range of possible recipient responses to this final requirement with potentially varying costs and benefits. The Department did not receive any supplementary data upon which it could reasonably rely to modify its estimates regarding such costs and benefits.

4.D. Changes in the Final Regulations Not Estimated to Have Costs

In addition to the changes explained in the discussion of Cost Estimates (Section 4.C) that are estimated to have costs, there are several final changes that the Department does not anticipate will generate costs for regulated entities above and beyond general costs described previously. Below the Department discusses some of these final changes to clarify the basis for that assumption.

Lactation Space for Students and Employees

Although the Title IX regulations since 1975 specifically prohibited discrimination against students and employees based on pregnancy, childbirth, termination of pregnancy, and recovery, the final regulations at §§ 106.2 (defining ''pregnancy or related conditions''), 106.21(c)(2)(ii), 106.40(b)(1), and 106.57(b) clarify that a recipient may not discriminate based on pregnancy or related conditions, including lactation. *See* 40 FR 24128 (codified at 45 CFR 86.21(c)(2), 86.40(b)(2), 86.57(b) (1975)); 34 CFR 106.21(c), 106.40(b)(1), 106.57(b) (current). The final regulations also require a recipient to ensure access to a lactation space for students and employees, as well as reasonable modifications for students and break time for employees to enable them to use of the space as needed. Specifically, final § 106.40(b)(3)(v) requires a recipient to ''[e]nsure that the student can access a lactation space, which must be a space other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed.'' Similarly, final § 106.57(e) requires a recipient to provide ''reasonable break time for an employee to express breast milk or breastfeed as needed'' and to ''ensure that an employee can access a lactation space, which must be a space other than a bathroom that is clean, shielded from view, free from intrusion from others, and may be used by an employee for expressing breast milk or breastfeeding as needed.'' Both measures are critical means for preventing discrimination and ensuring that students and employees can continue pursuing their education and employment, respectively, while taking brief breaks from their classes or job duties as needed to express breast milk or breastfeed.

The Department does not anticipate significant cost to recipients based on this final revision. Although it is possible that the final regulations' clarification that a lactation space must be available for both students and employees may result in an increase in demand for such a space, it is the Department's view that any such increase will likely result in a de minimis impact on costs as distributed over all recipients over time. The Department posits this for several reasons.

First, although it is unknown how many recipients presently offer lactation space for students or employees due to a lack of data, all or virtually all recipients are already required to comply with provisions for lactation time and space for employees covered under the Affordable Care Act's amendments to Section 7 of the FLSA.[120] The FLSA requires employers to provide reasonable break times and a private place, other than a bathroom, to employees covered under Section 7 of the FLSA who are breastfeeding to express milk for one year after their child's birth. 29 U.S.C. 207(r)(1). The space must be ''shielded from view and free from intrusion from coworkers and the public.'' *Id.* The Department of Labor (DOL) has explained that the space must also be ''functional'' and ''available when needed'' and that the ''frequency and duration of breaks needed to express milk will likely vary.'' U.S. Dep't of Labor, Fact Sheet #73: FLSA Protections for Employees to Pump Breast Milk at Work (Jan. 2023), *https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers.* DOL has also clarified that a temporary or converted space is sufficient if the space is available when needed, shielded from view, and free from any intrusion from co-workers and the public. *Id.* Employees who would be covered by the lactation time and space requirements of the FLSA include virtually all full-time and part-time workers in public and private education programs or activities. 29 U.S.C. 203(e). Although at the time of the July 2022 NPRM the FLSA exempted certain employees, such as professors, teachers, and certain academic administrative personnel from coverage, Congress has since amended the statute to cover these employees. 29 U.S.C. 207(r)(1) (FLSA lactation time and space requirement). The Department does not have specific information about existing lactation spaces for employees due to a lack of relevant data. The Department assumes, however, that given the limited requirements for the lactation space itself, that most recipients will be able to locate such a space within their current property or maximize the use of an existing space. The Department's final requirements regarding lactation space are similar to those of the FLSA with the additional requirement that the space be clean. The Department assumes that most, if not all, recipients already clean their facilities, including any existing lactation space, and anticipates that the additional cost of cleaning associated with the final regulations will be negligible.

Second, some States also require a recipient either to provide lactation space to employees or to make reasonable attempts to do so. *See, e.g.,* Minn. Stat. Ann. § 181.939 (2014) (requiring employers to make a reasonable effort to provide a private location, other than a bathroom or toilet stall, in close proximity to the workplace that is shielded from view, free from intrusion, and has an electrical outlet); N.M. Stat. Ann. § 28–20–2 (2007) (requiring employers to provide a clean, private place, not a bathroom, for employees who are breastfeeding to pump); N.Y. Labor Law § 206–C (2007) (requiring that employers make a reasonable attempt to provide employees a private location for lactation); Okla. Stat. tit. 70, § 5–149.3 (2021) (requiring each school district board of education to make a reasonable effort to provide a private, secure, sanitary room or other location, other than a toilet stall, for an employee to express milk or breastfeed a child); R.I. Gen. Laws § 28–5–7.4 (2015) (prohibiting employers from refusing to reasonably accommodate an employee's or prospective employee's condition related to pregnancy, childbirth, or a related medical condition, including but not limited to the need to express breast milk for a nursing child; ''reasonable accommodation'' is defined to include a ''private non-bathroom space for expressing breast milk''); S.C. Code Ann. § 41–1–130 (2020) (requiring employers to make reasonable efforts to provide certain areas where employees may express breast milk); Tenn. Code Ann. § 50–1–305 (1999) (requiring employers to make a reasonable effort to provide a private location, other than a toilet stall, near the workplace for employees' lactation); Utah Code Ann. § 34–49–202 (2015) (requiring public

[120] Under the FLSA, a covered enterprise is ''the related activities performed through unified operation or common control by any person or persons for a common business purpose and . . . is engaged in the operation of . . . a preschool, an elementary or secondary school, or an institution of higher education (whether operated for profit or not for profit)'' or ''is an activity of a public agency.'' U.S. Dep't of Labor, Handy Reference Guide to the Fair Labor Standards Act (Sept. 2016), *https://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa.*

employers to provide employees a clean, private room or location that is not a bathroom and that has an electrical outlet for lactation, as well as access to a refrigerator or freezer for the storage of breast milk); Vt. Stat. Ann. Tit. 21, § 305 (2008) (requiring employers to ''[m]ake a reasonable accommodation [for lactation] to provide appropriate private space that is not a bathroom stall''); Va. Code § 22.1–79.6 (2014) (requiring local school boards to designate private, non-restroom locations for employees and students to express breast milk); Wash. Rev. Code 43.10.005 (2017) (requiring employers to provide a private location, other than a bathroom, for employee lactation, or if no such space exists, work with the employee to identify a convenient location for lactation). As some States already require recipients to provide lactation spaces or make reasonable attempts to do so, the final regulations will be neither burdensome nor costly as many recipients may already be required to comply with similar provisions due to State law.

In addition, for some recipients, lactation space and break times may be the subject of local laws or separate employment agreements, such as collective bargaining agreements. Some recipients may simply provide lactation space and break time voluntarily. In short, the Department anticipates that its final regulations will impose de minimis cost on a recipient that is already providing lactation space and breaks to its staff.

The Department acknowledges that in some cases, the final regulations may result in increased demand for lactation space or break time. It is difficult to quantify the extent to which demand might increase or how demand might vary over time as the Department is not aware of any available data source that tracks the numbers of students or employees in need of lactation space. The Department anticipates that demand will vary across recipients, based on the composition of the student and employee population at any time, further reducing the impact to individual recipients.

When a recipient already has a lactation space, the Department anticipates that it is likely that the space will meet the Department's final requirements for the reasons already discussed. In addition, because a lactation space is only in use by any given person for a limited time period, it is possible that many recipients already have sufficient capacity to accommodate additional users; however, the Department anticipates that a recipient that does not currently provide lactation space will be able to comply with the final regulations using existing space at minimal cost. For example, the final regulations do not require that a lactation space be of a particular size, shape, or include features other than being private and clean. Similarly, the Department anticipates that a recipient that currently provides lactation space will already have a system in place to administer use of the space (for example, through a sign-up system) to the extent needed and that this could be adapted to accommodate new demand with minimal cost.

With respect to the Department's final requirement that a recipient provide its employees with reasonable break time for lactation, the Department also anticipates that any increased demand could be managed through an existing system for coverage of employees who require brief breaks for other reasons. This is more likely to be necessary for LEA school teachers, whose breaks may require coverage because of the nature of school schedules, rather than employees at IHEs who may not require coverage during breaks needed for lactation because those employees do not typically have supervisory responsibility for children. The Department also recognizes that at some IHEs and other types of recipients, some employees will have access to a private office that is sufficient for lactation needs.

Finally, the Department anticipates that its final regulations regarding lactation time and space will also likely improve the recipient's retention of its students and employees. For example, a student-parent may be more comfortable remaining in an education program or activity in which the recipient is reducing barriers to remaining in school during the early months and years of a child's life. Likewise, an employee who has access to sufficient lactation time and space may also be more likely to return to the workplace or return earlier from parental leave than one who does not have such access because the employee knows that they can continue to breastfeed after returning to work. For these reasons, this provision will impose de minimis costs and will provide important benefits in terms of eliminating sex-based barriers to education and employment. The Department did not receive any supplementary data upon which it could reasonably rely to modify its estimates.

Reasonable Modifications for Students Because of Pregnancy or Related Conditions

The Department does not anticipate significant cost to a recipient based on final § 106.40(b)(3)(ii), which requires that a recipient make reasonable modifications because of a student's ''pregnancy or related conditions'' as defined by final § 106.2, because this requirement is similar to OCR's previous discussion of a recipient's obligations in this context. 2013 Pregnancy Pamphlet, at 9. The Title IX regulations since 1975 have also prohibited a recipient from discriminating against or excluding ''any student from its education program or activity, including any class or extracurricular activity, on the basis of the student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.'' *See* 40 FR 24128 (codified at 45 CFR 86.40(b)(1) (1975)); 34 CFR 106.40(b)(1) (current). Likewise, § 106.40(b)(4) since 1975 has required a recipient to treat pregnancy or related conditions similarly to other temporary disabilities ''with respect to any medical or hospital benefit, service, plan, or policy [the] recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.'' *See* 40 FR 24128 (codified at 45 CFR 86.40(b)(4) (1975)); 34 CFR 106.40(b)(4) (current).

OCR's 2013 Pregnancy Pamphlet clarified that to ''ensure a pregnant student's access to its educational program, when necessary, a school must make adjustments to the regular program that are reasonable and responsive to the student's temporary pregnancy status. For example, a school might be required to provide a larger desk, allow frequent trips to the bathroom, or permit temporary access to elevators.'' 2013 Pregnancy Pamphlet, at 9. As the requirement for reasonable modifications because of pregnancy or related conditions builds upon the former ''reasonable and responsive'' standard and sets a clearer framework for how to assess what must be provided, the Department does not anticipate that the required steps for compliance with the amended reasonable modifications standard under § 106.40(b)(3)(ii) will be more costly than under the prior OCR interpretation of a recipient's duties. The Department did not receive any supplementary data upon which it

could reasonably rely to modify its estimates regarding such costs.

Participation Consistent With Gender Identity

The Department does not anticipate significant cost to a recipient above and beyond the general costs described in the discussion of Costs of the Final Regulations (Section 4) to comply with final § 106.31(a)(2). Final § 106.31(a)(2) clarifies that in the limited circumstances in which different treatment or separation on the basis of sex is permitted, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, except as permitted by 20 U.S.C. 1681(a)(1) through (9) and the corresponding regulations at §§ 106.12–106.15, 20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b). Final § 106.31(a)(2) also clarifies that adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity causes more than de minimis harm on the basis of sex. As described in the discussion of Coverage of Sex Discrimination (Section IV), the final regulations' prohibition on preventing a person from participating in an education program or activity consistent with their gender identity is consistent with the analysis of some Federal courts that have addressed how Title IX protects students from discrimination based on sex stereotypes and gender identity. Some stakeholders have expressed concern about costs associated with permitting students to participate in a recipient's education program or activity consistent with their gender identity. Compliance with final § 106.31(a)(2) may require updating of policies or training materials, but will not require significant expenditures, such as construction of new facilities or creation of new programs. For the many schools that have long maintained policies and practices that generally permit students to participate in school consistent with their gender identity, the final regulations may not require any change. *See, e.g.,* Cal. Dep't of Educ., Legal Advisory regarding application of California's antidiscrimination statutes to transgender youth in schools (updated Sept. 16, 2021), *https://www.cde.ca.gov/re/di/eo/legaladvisory.asp* (describing obligation under California and Federal law that schools afford students equal opportunity and access to the school's facilities, activities, and programs, in a manner that is consistent with each student's gender identity); Washoe Cnty. Sch. Dist., Administrative Regulation 5161: Gender Identity and Gender Non-Conformity—Students (2019), *https://www.wcsdpolicy.net/pdf_files/administrative_regulations/5161_Reg-Gender_Identify-v2.pdf* (permitting students to participate in sex-separate activities in accordance with their gender identity). A recipient that maintains policies and practices that prevent students from participating in school consistent with their gender identity will be required to review and update those policies and practices under the final regulations; however, the Department anticipates that the costs of these modifications will be subsumed into the general costs of updating policies and procedures to comply with the final regulations, which is reflected in the costs described in the discussion of the Nondiscrimination Policy and Grievance Procedures (§ 106.8) section of the RIA.

The Department notes that some other costs associated with final § 106.31(a)(2) may be addressed elsewhere in the RIA. For instance, to the extent that a recipient's failure to comply with final § 106.31(a)(2) will lead to additional investigations of alleged discrimination, those costs are addressed in the discussion of costs associated with the proposal to clarify Title IX's coverage of gender identity discrimination. Similarly, to the extent that a recipient will take steps to train employees or students on gender identity discrimination, those costs are addressed in the discussion of costs associated with training. As this is an evolving area of the law, the Department anticipates there may be some costs associated with potential litigation. Litigation costs related to commenters' concerns about specific provisions in the final regulations, including the definition of ''sex-based harassment'' (§ 106.2), supportive measures (§ 106.44(g)), pregnancy or related conditions (§§ 106.40 and 106.57(e)), and the scope of sex discrimination (§ 106.10), are discussed above.

5. Regulatory Alternatives Considered

The Department reviewed and assessed various alternatives prior to issuing the final regulations, drawing from internal sources, as well as feedback OCR received from stakeholders, including during the June 2021 Title IX Public Hearing and numerous listening sessions, and from comments received in response to the July 2022 NPRM. In particular, the Department considered the following alternative actions: (1) leaving the 2020 amendments without amendment; (2) rescinding the 2020 amendments in their entirety and reissuing past guidance, including the 2001 Revised Sexual Harassment Guidance, the 2011 Dear Colleague Letter on Sexual Violence, and the 2014 Q&A on Sexual Violence; (3) rescinding the 2020 amendments, either in whole or in part, and issuing new guidance; (4) proposing narrower amendments to the 2020 amendments; or (5) issuing completely new final amendments to address significant areas (*e.g.,* clarifying that coverage includes gender identity, applying regulatory grievance procedure requirements to all sex discrimination complaints, and adding regulatory provisions regarding a recipient's obligation to students and employees who are pregnant or experiencing pregnancy-related conditions).

The Department determined that a combination of (4) and (5), which involves issuing final amendments, is the better alternative. The combination of these alternatives means amending the 2020 amendments to make noteworthy adjustments that will better achieve the objectives of the statute, are consistent with recent case law, and account for the feedback OCR received from stakeholders, including during the June 2021 Title IX Public Hearing and numerous listening sessions, and the comments received in response to the July 2022 NPRM. Based on its internal review, the Department's view is that the 2020 amendments did not fully address all prohibited sex discrimination in a recipient's education program or activity or offer sufficient safeguards to reduce—and ultimately remove—sex discrimination in the educational setting. The approach adopted in the 2020 amendments may have created a gap in implementing Title IX's prohibition on sex discrimination: a recipient may have information about possible sex discrimination in its education program or activity and yet may have no obligation to take any action to address it if a formal complaint is not filed and the recipient's Title IX Coordinator determines that the allegations do not warrant overriding a complainant's wishes and initiating a complaint. Numerous stakeholders and commenters shared their concerns with the Department, specifically that certain requirements in the 2020 amendments may impede a recipient from taking prompt and effective action in response to allegations of sexual harassment in the recipient's education program or activity. By creating extensive obligations related only to certain forms

of sexual harassment and leaving a recipient's obligations with respect to the necessary grievance procedures to respond to other forms of sex-based harassment and sex discrimination unaddressed, the 2020 amendments may have created a risk that Title IX's prohibition on sex discrimination would be underenforced. In addition, it is the Department's view that greater clarity is required than what is in the 2020 amendments with respect to the scope of sex discrimination, including with respect to discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. The Department is concerned that equal access to a recipient's education program or activity may be impaired absent this clarity.

For reasons explained in the RIA as well as throughout the preamble, and in light of stakeholder feedback received in 2021 and 2022 and comments in response to the July 2022 NPRM, alternative (1) was not a reasonable option. Alternatives (2) and (3) were rejected because the Department continues to believe that it is necessary to establish, through regulations, the legal obligations of a recipient to ensure that its education program or activity is free from sex discrimination; guidance documents, which are not legally binding on a recipient, will not serve that function.

After careful consideration of these alternatives, the Department determines that adopting alternatives (4) and (5) is the best approach for five reasons. Such an approach: (a) best fulfills Title IX's guarantee of nondiscrimination on the basis of sex by a recipient of Federal funds in its education program or activity; (b) ensures that a recipient understands its obligations to address sex discrimination in all forms, including sex-based harassment, so that students and others can participate in the educational environment free from discrimination based on sex; (c) safeguards fairness for all who participate in a recipient's grievance procedures for sex discrimination, including sex-based harassment; (d) protects a person's rights under Title IX by requiring a recipient to provide appropriate supportive measures to the complainant and the respondent and remedies to a complainant or any other person the recipient identifies as having their equal access to the recipient's education program or activity limited or denied by sex discrimination; and (e) ensures that a recipient understands its obligations to prevent discrimination against and ensure equal access for students and employees who are pregnant or experiencing pregnancy-related conditions.

In addition to reviewing stakeholder feedback and comments in response to the July 2022 NPRM, the Department considered alternatives to the final regulations based upon its internal analysis of the costs and benefits of various options.

Clarification of the Scope of Title IX

During its review of various alternatives to the final regulations, the Department considered whether to clarify and define the scope of Title IX. Specifically, although the 2020 amendments define ''sexual harassment,'' they did not clarify the scope of Title IX's prohibition on sex discrimination. The Department considered several options to address this area and chooses to specify in the final regulations that Title IX's prohibition on sex discrimination includes discrimination on the basis of pregnancy or related conditions, sex stereotypes, sex characteristics, sexual orientation, and gender identity. Although the Department recognizes that clarifying the scope of Title IX could result in increased costs to recipients, especially those recipients that had not previously addressed discrimination on the bases explicitly referenced in the regulations, the non-monetary benefits of providing clarity and recognizing the broad scope of Title IX's protections justify the costs associated with the implementation of these robust protections.

Clarification of the Geographic Scope of Title IX's Prohibition on Sex Discrimination

The Department also considered retaining the 2020 amendments' scope of coverage with respect to conduct that occurs off campus and off school grounds. Numerous stakeholders in OCR's June 2021 Title IX Public Hearing, OCR's listening sessions, and the comments received in response to the July 2022 NPRM requested that the Department explicitly include additional instances of off-campus conduct within the scope of its final regulations. Specifically, these stakeholders commented that excluding such conduct denied students, employees, and others equal access to a recipient's education program or activity and failed to fully implement Title IX. As explained in greater detail in the discussion of investigations and adjudications in Cost Estimates (Section 4.C), the Department acknowledges the potential cost increase for a recipient in addressing all sex discrimination that occurs under a recipient's education program or activity, including conduct subject to a recipient's disciplinary authority, and also in addressing a sex-based hostile environment under the recipient's education program or activity even when some conduct alleged to be contributing to the hostile environment occurs outside of a recipient's education program or activity. However, the Department expects that many recipients are already addressing such conduct and incurring related costs through their creation and implementation of alternative disciplinary proceedings to address discriminatory conduct previously addressed through their Title IX procedures prior to the 2020 amendments. Moreover, the conduct excluded from the 2020 amendments may have profound and long-lasting economic impacts on students, employees, a recipient's educational environment, and the general public and that the benefits of addressing this conduct through the final regulations justifies any associated costs.

Distinguishing Between Educational Levels

The Department also considered whether to distinguish between educational levels in the final regulations. Specifically, during the June 2021 Title IX Public Hearing, in listening sessions, and in comments received in response to the July 2022 NPRM, stakeholders associated with LEAs expressed concerns that certain requirements in the 2020 amendments impeded their ability to successfully address sexual harassment in their day-to-day school environment. Likewise, the Department considered whether all students and employees should remain subject to identical regulations or whether, for the reasons set out in the preamble, fair treatment under Title IX would be best ensured by amending the regulations in ways that require IHEs to be responsive to the unique needs of their students. For reasons explained in the discussions of Benefits of the Final Regulations (Section 3) and Costs of the Final Regulations (Section 4), the Department is unable to quantify the benefits or costs of enabling recipients to adapt fair grievance procedures to their educational environment; however, as discussed throughout the preamble, not doing so will result in continuing impediments to full implementation of Title IX's nondiscrimination guarantee. Alternatively, the final regulations create the benefit of enabling all recipients to respond promptly and effectively to sex discrimination in their program or activity, remedy that

discrimination as appropriate, and increase access and the opportunity to participate free from sex discrimination.

6. Accounting Statement

As required by OMB Circular A–4,[121] the following table is the Department's accounting statement showing the classification of the expenditures associated with the provisions of the final regulations. The regulations are expected to result in estimated costs of $98,505,145 in the first year following publication of the final regulations, and $12,038,087 in cost savings in subsequent years. This table provides the Department's best estimate of the changes in annualized monetized costs, benefits, and transfers as a result of the final regulations.

Category	Benefits (calculated on an annual basis)	
Address gaps in coverage in 2020 amendments	Not quantified.	
Clarify scope of Title IX's protection	Not quantified.	
Clarify responsibilities toward students and employees based on pregnancy or related conditions	Not quantified.	
	Costs (calculated on an annual basis)	
Discount rate	3%	7%
Reading and Understanding the Regulations	$2,738,191	$3,201,238
Policy Revisions	6,280,804	7,342,931
Publishing Notice of Nondiscrimination	231,370	270,496
Training of Title IX Coordinators	2,658,785	2,704,730
Updating Training Materials	2,173,518	2,541,074
Supportive Measures	9,142,455	9,142,455
Group A Investigations	3,001,009	3,001,009
Group B Investigations	(63,650,843)	(63,650,843)
Appeal Process	17,776,304	17,776,304
Informal Resolutions	14,068,164	14,068,164
Creation and Maintenance of Documentation	6,262,994	6,591,433
Total	543,504	2,671,136

C. Regulatory Flexibility Act (Small Business Impacts)

1. Introduction

This analysis, required by the Regulatory Flexibility Act (RFA), presents an estimate of the effect of the final regulations on small entities. The SBA Size Standards for proprietary IHEs are set out in 13 CFR 121.201. Nonprofit IHEs are defined as small entities if they are independently owned and operated and not dominant in their field of operation. *See* 5 U.S.C. 601(4). ''Public institutions and LEAs'' are defined as small organizations if they are operated by a government overseeing a population below 50,000. *See* 5 U.S.C. 601(5).

2. Final Regulatory Flexibility Analysis

As explained in the discussion of Lack of Data Following the Promulgation of the 2020 Amendments (Section 4.A.3) of the RIA, there is a lack of high quality, comprehensive data about recipients' Title IX compliance activities and burdens following the implementation of the 2020 amendments. As a result, the Department could not definitively conclude that burdens on small entities, particularly among recipients other than IHEs or LEAs, will be sufficiently low to justify certification under the RFA. If an agency is unable to make such a certification, it must prepare a Final Regulatory Flexibility Analysis (FRFA) as described in the RFA. Based on the data available, the Department has completed a FRFA.

The purpose of this analysis is to identify the number of small entities affected, assess the economic impact of the final regulations on those small entities, and consider alternatives that may be less burdensome to small entities that meet the Department's regulatory objectives. Specifically, the Department estimates the number of small entities potentially impacted by the final regulations in the discussion of the FRFA, Estimated Number of Small Entities (Section 2.B), assesses the potential economic impact of the final regulations on those small entities in the discussion of the FRFA, Estimate of the Projected Burden of the Final Regulations on Small Entities (Section 2.C), and examines and considers less burdensome alternatives to the final regulations for small entities in the FRFA, Discussion of Significant Alternatives (Section 2.D).

2.A. Reasons for Regulating

The Department's review of the 2020 amendments and of feedback received during and pursuant to the June 2021 Title IX Public Hearing, as well as stakeholder listening sessions and from comments received in response to the July 2022 NPRM, suggests that the 2020 amendments do not best fulfill the requirement of Title IX that recipients of Federal financial assistance eliminate discrimination based on sex in their education programs or activities. The Department has determined that more clarity and greater specificity will better equip recipients to create and maintain educational environments free from sex discrimination. This, in turn, will help recipients ensure that all persons have equal access to educational opportunities in accordance with Title IX's nondiscrimination mandate.

The goal of the Department's final regulations is to fully effectuate Title IX by clarifying and specifying the scope and application of Title IX's protections and recipients' obligation not to discriminate based on sex. Specifically, the final regulations focus on ensuring that recipients prevent and address sex discrimination, including but not limited to sex-based harassment, in their education programs and activities;

[121] As explained above, Executive Order 12866 has been amended and supplemented by Executive Order 14094 of April 6, 2023, which directs the Director of the Office of Management and Budget to issue within one year of April 6, 2023, revisions to OMB Circular A–4. Updated OMB Circular A–4 does not apply to the final regulations.

clarifying the scope of Title IX's protection for students and others who are participating or attempting to participate in a recipient's education program or activity; defining important terms related to a recipient's obligations under Title IX; ensuring the provision of supportive measures, as appropriate, to restore or preserve a complainant's or respondent's access to the recipient's education program or activity; clarifying a recipient's responsibilities toward students who are pregnant or experiencing pregnancy-related conditions; and clarifying that Title IX's prohibition on sex discrimination encompasses discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. In addressing confusion about coverage of sex-based harassment in the 2020 amendments, the Department's final regulations also set out requirements that enable recipients to meet their obligations in settings that vary in size, student populations, and administrative structure. The final regulations will strengthen the current framework, clarify the scope and application of Title IX, and fully align the Title IX regulations with the nondiscrimination mandate of Title IX.

2.B. Estimated Number of Small Entities

As noted above, SBA defines small proprietary IHEs based on revenue. These regulations apply, however, to all postsecondary IHEs, which cannot be compared across IHEs and sectors using the SBA revenue size standard because non-profit and public sector IHEs are not measured based on revenue. As a result, for purposes of the final regulations, the Department defines ''small entities'' by reference to enrollment, as it has done in other rulemakings, to allow meaningful comparison of regulatory impact across all types of IHEs in the for-profit, non-profit, and public sectors.[122] The Department notes that enrollment and revenue are generally correlated for all IHEs and that IHEs with higher enrollment tend to have the resources and infrastructure in place to more easily comply with the Department's regulations in general and the final regulations in particular. Since enrollment data is more readily available to the Department for all IHEs, the Department has used enrollment as the basis to identify small IHEs in prior rulemakings and continues to use enrollment to identify small IHEs in the final regulations. This approach also allows the Department to use the same metric to identify small IHEs across the for-profit, non-profit, and public sectors. It also treats public IHEs operated at the behest of jurisdictions with a population of more than 50,000 but with low enrollment as small, which the SBA's standard would not treat as small. Lastly, the North American Industry Classification System (NAICS), under which SBA's revenue standards in 13 CFR 121.201 are generally established, set different revenue thresholds for IHEs that provide different areas of instruction (*e.g.,* cosmetology, computer training, and similar programs) and there is no existing data that aligns those different revenue standards to the different types of regulated institutions. Similarly, where an IHE provides instruction in several of these areas, it is unclear which revenue threshold to apply for purposes of the Department's RFA analysis. The Department received several comments regarding its alternative size standard, which are addressed in the discussion of Comments on the Department's Model and Baseline Assumptions, Regulatory Flexibility Act (Small Business Impacts).

As explained above, the enrollment-based size standard remains the most relevant standard for identifying all IHEs subject to the final regulations. Therefore, instead of the SBA's revenue-based size standard, which applies only to proprietary IHEs, the Department has defined ''small IHE'' as (1) a less-than-two-year IHE with an enrollment of fewer than 750 students, or (2) an at-least-two-year-but-less-than-four-year IHE, or a four-year institution, with enrollment of fewer than 1,000 students.[123] As a result of discussions with the SBA, this is an update from the standard used in some prior rules, such as the July 2022 NPRM associated with the final regulations, ''Financial Value Transparency and Gainful Employment (GE), Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit (ATB),'' published in the **Federal Register** on May 19, 2023, 88 FR 32300, ''Improving Income Driven Repayment for the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan (FFEL) Program, published in the **Federal Register** on July 10, 2023, 88 FR 43820, and the final regulations, ''Pell Grants for Prison Education Programs; Determining the Amount of Federal Education Assistance Funds Received by Institutions of Higher Education (90/10); Change in Ownership and Change in Control,'' published in the **Federal Register** on October 28, 2022. 87 FR 65426. Those prior regulations applied an enrollment standard for a small two-year IHE of less than 500 full-time-equivalent (FTE) students and for a small 4-year IHE, less than 1,000 FTE students.[124] The Department consulted with the SBA Office of Advocacy on the revised alternative standard for this rulemaking. The Department continues to believe this approach most accurately reflects a common basis for determining size categories that is linked to the provision of educational services and that it captures a similar universe of small entities as the SBA's revenue standard. We note that the Department's revised alternative size standard and the SBA's revenue standard identify a similar number of total proprietary IHEs, with greater than 93 percent agreement between the two standards. Using the Department's revised alternative size standard, approximately 61 percent of all IHEs would be classified as small for these purposes. Based on data from NCES, in 2022, small IHEs had an average enrollment of

[122] *See* the proposed 2020 amendments for more background on the Department's justification for using an enrollment-based size standard. 83 FR 61462 (Nov. 29, 2018). *See, also, e.g.,* ''Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program'' proposed rule, published in the **Federal Register** on July 31, 2018, 83 FR 37242, and final rule, published in the **Federal Register** on September 23, 2019, 84 FR 49788; and ''Gainful Employment'' (GE) final rule published in the **Federal Register** on July 1, 2019, 84 FR 31392. The Department notes that the alternative size standards that are used in the final regulations are identical to the alternative size standards used in the GE regulations published in the **Federal Register** on October 10, 2023. *See* 88 FR 70175.

[123] In regulations prior to 2016, the Department categorized small businesses based on tax status. Those regulations defined ''nonprofit organizations'' as ''small organizations'' if they were independently owned and operated and not dominant in their field of operation, or as ''small entities'' if they were institutions controlled by governmental entities with populations below 50,000. Those definitions resulted in the categorization of all private nonprofit organizations as small and no public institutions as small. Under the previous definition, proprietary institutions were considered small if they are independently owned and operated and not dominant in their field of operation with total annual revenue below $7,000,000. Using FY 2017 IPEDs finance data for proprietary institutions, 50 percent of 4-year and 90 percent of 2-year or less proprietary institutions would be considered small. By contrast, an enrollment-based definition applies the same metric to all types of institutions, allowing consistent comparison across all types.

[124] In those prior rules, at least two but less-than-four-years institutions were considered in the broader two-year category. In this iteration, after consulting with the SBA Office of Advocacy, we separate this group into its own category. Based on this consultation, we have also increased the enrollment threshold for less-than-two-year institutions from 500 to 750 in order to treat a similar number of institutions as small under the alternative enrollment standard as would be captured under a revenue standard.

approximately 289 students. In contrast, all other IHEs had an average enrollment of approximately 5,509 students.

TABLE 1—NUMBER OF SMALL IHES UNDER ENROLLMENT BASED DEFINITION

	4-year	2-year	Less than 2-year	Total
Not Small	1,612	667	89	2,368
Small	1,155	908	1,572	3,635
Total	2,767	1,575	1,661	6,003

Source: 2022 IPEDS data reported to the Department.

In addition, the Department defines ''small LEA'' as either an LEA that is (1) a traditional public school district located in a county with a total population of less than 50,000, or (2) a charter school LEA. With regard to charter school LEAs, given their average size and their inherent geographic limitations, which limit their ability to be ''dominant'' in the field, it is reasonable to treat all charter school LEAs as small LEAs for purposes of this analysis. Under this analysis, 8,914 of all LEAs would be considered ''small.''

Entity type	Small LEAs		Not small LEAs	
	Avg. revenue	Avg. enrollment	Avg. revenue	Avg. enrollment
Traditional LEA	$17,903,420	1,223	$84,430,327	5,032
Charter LEA	8,750,165	730		

2.C. Estimate of the Projected Burden of the Final Regulations on Small Entities

As discussed throughout the RIA, Group A IHEs are those most likely to see a net cost increase from the final regulations. As such, a Group A IHE will incur greater costs than an IHE in Group B or Group C. Based on the model described in the discussion of RIA, Developing the Model (Section 4.B), an IHE in Group A will see a net increase in costs of approximately $8,477 per year. For purposes of assessing the impacts on small entities, the Department defines a ''small IHE'' as a less than two-year IHE with an enrollment of less than 750 FTE and two-year or four-year IHEs with an enrollment of less than 1,000 FTE, based on official 2022 FTE enrollment. The Department notes that this estimate assumes that each small IHE will conduct the same number of investigations per year, on average, as the total universe of all affected IHEs. It is much more likely that small IHEs will conduct fewer investigations per year and therefore, their actual realized costs will be less than those estimated herein. According to data from the IPEDS, in FY 2022, small IHEs had, on average, total revenues of approximately $8,282,318.[125] Therefore, the Department estimates that the final regulations could generate a net cost for small IHEs equal to approximately 0.10 percent of annual revenue. According to data from IPEDS, approximately 684 IHEs had total reported annual revenues of less than $847,700 for which the costs estimated above will potentially exceed 1 percent of total revenues. Those IHEs enrolled, on average, 60 students in 2022. For institutions of this size, it will be highly unlikely for the recipient to conduct 6.3 investigations per year, which represents a rate of investigations approximately 45 times higher than all other institutions, on average. The Department therefore does not anticipate that the final regulations will place a substantial burden on small IHEs.

For the purpose of assessing the impacts on small entities, the Department defines ''small LEA'' as either an LEA that is (1) a traditional public school district located in a county with a total population of less than 50,000, or (2) a charter school LEA. While the Department recognizes that governance structures with respect to traditional public school districts vary both across and within States, the Department's definition with respect to these entities is intended to serve as a reasonable proxy for the SBA's standard definition of a small government entity as one with a jurisdiction of less than 50,000 people. Based on the model described in the discussion of RIA, Developing the Model (Section 4.B), an LEA in Group A will see a net increase in costs of approximately $2,623 per year. The Department notes that these estimates assume small LEAs conduct the same number of investigations per year, on average, as all other LEAs. To the extent that smaller LEAs conduct fewer investigations, on average, than all LEAs, these annual costs will be overestimated for small LEAs. Based on data from NCES, the average ''small LEA,'' as defined above, had total annual revenues of approximately $13,565,288 during the 2019–2020 academic year. As such, the Department estimates that the proposed regulations would impose gross costs on small LEAs of approximately 0.02% of their total annual revenues. Of the small LEAs, approximately 117 reported total revenues in that year of $262,300 or less, where the estimated costs would potentially exceed 1% of total revenues. On average, these schools reported an enrollment of 45 students. For these exceptionally small LEAs, it is reasonable to assume that cost structures may be different than those estimated above in the RIA. For LEAs of this size, it is highly unlikely for the recipient to conduct 3.6 investigations per year, which represent a rate of investigations approximately 63 times higher than all other LEAs, on average. The Department, therefore, does not anticipate that the final regulations will place a substantial burden on small LEAs.

Based on the model described in the discussion of the RIA, Developing the Model (Section 4.B), ''other'' recipients in Group A will see a net increase in costs of approximately $3,754 per year. As explained in the discussion of small IHEs and small LEAs, the Department

[125] Based on data reported for FY 2022 for ''total revenue and other additions'' for public institutions and ''total revenues and investment return'' for private not-for-profit and private for-profit institutions.

notes that these estimates assume other small entities will conduct the same number of investigations per year, on average, as all other recipients in this category. To the extent that smaller entities conduct fewer investigations on average than all other recipients, these annual costs will be overestimated for small other recipients. Although the Department does not have revenue data for all other recipients, for purposes of this analysis, the Department will assume that, among other recipients with annual revenues of less than $7,000,000, the average annual revenue is approximately $3,500,000, which assumes that recipient revenues are normally distributed within the range of $0 to $7,000,000. At this level, the estimated cost will constitute approximately 0.08 percent of total revenues. The Department notes that, for estimated costs to exceed 1 percent of total revenues, ''other'' recipients will need total annual revenues of less than $375,400. Very few other recipients will fall into this category, in part, because in FY 2023, among other recipients receiving less than $1,000,000 in grant funds from the Department, the average grantee received approximately $358,976 in Federal grant funds. Among those receiving less than $500,000 in funding from the Department, the average other recipient received approximately $245,223 in grant funds in FY 2023. Even with very small amounts of non-Federal funding, it is unlikely that costs of compliance with the final regulations would exceed 1 percent of annual revenues for these recipients. The Department, therefore, does not expect that the final regulations will place a substantial burden on small other recipients.

2.D. Discussion of Significant Alternatives

The Department also considered alternatives that could potentially reduce the burden for small entities. One alternative would be to extend the effective date of the Title IX regulations for small entities such that they would have additional time to implement key components of the regulations. An extension of the effective date will delay the efforts of small entities to ensure that their education programs or activities are free from sex discrimination, thereby depriving students, employees, and others of their rights under Title IX. Another alternative would be to waive certain requirements for small entities to help facilitate their compliance with Title IX. The Department declines this approach because the final regulations are critical to ensuring that all education programs or activities that receive Federal funding do not discriminate based on sex. In addition, the final regulations are more adaptable than the 2020 amendments and will provide greater opportunities for small entities to tailor their compliance efforts to their settings. Finally, the Department considered proposing different requirements for smaller-sized recipients than for mid-sized or larger ones. The Department rejects this alternative because the Title IX rights of students, employees, and other members of a recipient's educational community do not depend on the size of a recipient, and the final regulations are sufficiently adaptable for small entities to adopt the approach that works best for them. Being subjected to sex discrimination in a recipient's education program or activity can affect an applicant's opportunity to enroll in a recipient's education program or activity, a student's ability to learn and thrive inside and outside of the classroom, a prospective or current employee's ability to contribute their talents to the recipient's educational mission, and the opportunity of all participants to benefit, on an equal basis, from the recipient's education program or activity. Thus, permitting a small entity the opportunity to delay implementation of the final regulations, waiving certain requirements for smaller entities, or having different requirements for small entities could jeopardize these important civil rights and harm students, employees, and others.

Executive Order 12250 on Leadership and Coordination of Nondiscrimination Laws

Pursuant to Executive Order 12250, the President's authority under 20 U.S.C. 1682 ''relating to the approval of rules, regulations, and orders'' implementing Title IX has been delegated to the Attorney General. Executive Order 12250 at § 1–102, 45 FR 72995 (Nov. 2, 1980). The final regulations were reviewed and approved by the Attorney General.

Paperwork Reduction Act of 1995

As part of its continuing effort to reduce paperwork and the burden of responding, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This requirement helps ensure that: (1) the public understands the Department's collection instructions; (2) respondents can provide the requested data in the desired format; (3) reporting burden (time and financial resources) is minimized; (4) collection instruments are clearly understood; and (5) the Department can properly assess the impact of collection requirements on respondents.

As discussed in the RIA, Cost Estimates (Section 4.C.), the Department estimates that all regulated entities will experience an increased recordkeeping burden under the final regulations as a result of the changes to recordkeeping requirements in final § 106.8(f). Specifically, in Year 1, the Department estimates that compliance would require an additional 4 hours of recordkeeping burden per LEA, 16 hours per IHE, and 4 hours per other recipient. In total, the Department estimates the Year 1 recordkeeping burden associated with the final regulations to be a net increase of 171,024 hours.

In subsequent years, the Department estimates that the final regulations will require an additional ongoing burden of 2 hours per LEA, 6 hours per IHE, and 2 hours per other recipient. In total, the Department estimates an ongoing annual recordkeeping burden increase of 73,506 hours. However, the Department's view is that final § 106.8(f) will not result in a change of disclosure requirements. Specifically, there are three main reasons for this assumption: (1) recipients were already required to maintain all records related to sexual harassment under the 2020 amendments; (2) many recipients (based on anecdotal reports) were already conducting and maintaining records related to alternative disciplinary proceedings addressing conduct outside of the coverage area of the 2020 amendments; and (3) based upon anecdotal reports, many recipients were already maintaining their records related to sex discrimination. As a result, recipients falling within one or more of these categories will experience a de minimis increase in the number of disclosures.

Regulatory section	Information collection	OMB control No. and estimated change in burden
106.8(f)	This regulatory provision requires a recipient to maintain certain documentation related to Title IX activities.	OMB 1870–0505 Changes will increase burden over the first seven years by $44,448,753 612,060 hours.

The Department prepared an Information Collection Request (ICR) for this collection. This collection was identified as proposed collection OMB control number 1870–0505.

Assessment of Educational Impact

In the July 2022 NPRM the Department requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available. 87 FR 41566.

Based on the response to the July 2022 NPRM and on the Department's review, the final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

Federalism

Executive Order 13132 requires the Department to ensure meaningful and timely input by State and local elected officials in the development of regulatory policies that have federalism implications. ''Federalism implications'' means substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

In the July 2022 NPRM, the Department identified specific sections that could potentially have had federalism implications and encouraged State and local elected officials to review and provide comments on the proposed regulations. *Id.* In the preamble, the Department discusses any comments received on this subject.

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List of Subjects in 34 CFR Part 106

Civil rights, Education, Sex discrimination, Youth organizations.

Miguel A. Cardona,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary amends part 106 of title 34 of the Code of Federal Regulations as follows:

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

■ 1. The authority citation for part 106 continues to read as follows:

Authority: 20 U.S.C. 1681 *et seq.,* unless otherwise noted.

■ 2. Section 106.1 is revised to read as follows:

§ 106.1 Purpose.

The purpose of this part is to effectuate Title IX, which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Public Law 93–380, 88 Stat. 484.

■ 3. Section 106.2 is revised to read as follows:

§ 106.2 Definitions.

As used in this part, the term:

Administrative law judge means a person appointed by the reviewing authority to preside over a hearing held under § 106.81.

Administratively separate unit means a school, department, or college of an educational institution (other than a local educational agency), admission to which is independent of admission to any other component of such institution.

Admission means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

Applicant, as used in the definition of educational institution in this section and as used in § 106.4, means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

Assistant Secretary means the Assistant Secretary for Civil Rights of the Department.

Complainant means:

(1) A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part; or

(2) A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part and who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination.

Complaint means an oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX or this part.

Confidential employee means:

(1) An employee of a recipient whose communications are privileged or confidential under Federal or State law. The employee's confidential status, for purposes of this part, is only with respect to information received while the employee is functioning within the scope of their duties to which privilege or confidentiality applies;

(2) An employee of a recipient whom the recipient has designated as confidential under this part for the purpose of providing services to persons related to sex discrimination. If the employee also has a duty not associated with providing those services, the

employee's confidential status is only with respect to information received about sex discrimination in connection with providing those services; or

(3) An employee of a postsecondary institution who is conducting an Institutional Review Board-approved human-subjects research study designed to gather information about sex discrimination—but the employee's confidential status is only with respect to information received while conducting the study.

Department means the Department of Education.

Disciplinary sanctions means consequences imposed on a respondent following a determination under Title IX that the respondent violated the recipient's prohibition on sex discrimination.

Educational institution means a local educational agency (LEA) as defined by section 8101 of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (20 U.S.C. 7801(30)), a preschool, a private elementary or secondary school, or an applicant or recipient that is an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education.

Elementary school means elementary school as defined by section 8101 of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (20 U.S.C. 7801(19)), and a public or private preschool.

Federal financial assistance means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages, or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

Institution of graduate higher education means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

Institution of professional education means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary.

Institution of undergraduate higher education means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

Institution of vocational education means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

Parental status, as used in §§ 106.21(c)(2)(i), 106.37(a)(3), 106.40(a), and 106.57(a)(1), means the status of a person who, with respect to another person who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is:

(1) A biological parent;

(2) An adoptive parent;

(3) A foster parent;

(4) A stepparent;

(5) A legal custodian or guardian;

(6) In loco parentis with respect to such a person; or

(7) Actively seeking legal custody, guardianship, visitation, or adoption of such a person.

Party means a complainant or respondent.

Peer retaliation means retaliation by a student against another student.

Postsecondary institution means an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education that serves postsecondary school students.

Pregnancy or related conditions means:

(1) Pregnancy, childbirth, termination of pregnancy, or lactation;

(2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or

(3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

Program or activity and *program* means all of the operations of—

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or local government; or

(ii) The entity of a State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity that is established by two or more of the entities described in paragraph (1), (2), or (3) of this definition, any part of which is extended Federal financial assistance.

Recipient means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.

Relevant means related to the allegations of sex discrimination under investigation as part of the grievance procedures under § 106.45, and if applicable § 106.46. Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

Remedies means measures provided, as appropriate, to a complainant or any other person the recipient identifies as having had their equal access to the recipient's education program or activity limited or denied by sex discrimination. These measures are provided to restore or preserve that person's access to the recipient's education program or activity after a recipient determines that sex discrimination occurred.

Respondent means a person who is alleged to have violated the recipient's prohibition on sex discrimination.

Retaliation means intimidation, threats, coercion, or discrimination against any person by the recipient, a student, or an employee or other person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity, for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part, including in an informal resolution process under § 106.44(k), in grievance procedures under § 106.45, and if applicable § 106.46, and in any other actions taken by a recipient under § 106.44(f)(1). Nothing in this definition or this part precludes a recipient from requiring an employee or other person authorized by a recipient to provide aid, benefit, or service under the recipient's education program or activity to participate as a witness in, or otherwise assist with, an investigation, proceeding, or hearing under this part.

Reviewing authority means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

Secondary school means secondary school as defined by section 8101 of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (20 U.S.C. 7801(45)), and an institution of vocational education that serves secondary school students.

Secretary means the Secretary of Education.

Sex-based harassment prohibited by this part is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the bases described in § 106.10, that is:

(1) *Quid pro quo harassment.* An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;

(2) *Hostile environment harassment.* Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.,* creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:

(i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;

(ii) The type, frequency, and duration of the conduct;

(iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;

(iv) The location of the conduct and the context in which the conduct occurred; and

(v) Other sex-based harassment in the recipient's education program or activity; or

(3) *Specific offenses.* (i) Sexual assault meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation;

(ii) Dating violence meaning violence committed by a person:

(A) Who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(B) Where the existence of such a relationship shall be determined based on a consideration of the following factors:

(*1*) The length of the relationship;

(*2*) The type of relationship; and

(*3*) The frequency of interaction between the persons involved in the relationship;

(iii) Domestic violence meaning felony or misdemeanor crimes committed by a person who:

(A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim;

(B) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;

(C) Shares a child in common with the victim; or

(D) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction; or

(iv) Stalking meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

(A) Fear for the person's safety or the safety of others; or

(B) Suffer substantial emotional distress.

Note 1 to the definition of sex-based harassment: The Assistant Secretary will not require a recipient to adopt a particular definition of consent, where that term is applicable with respect to sex-based harassment.

Student means a person who has gained admission.

Student with a disability means a student who is an individual with a disability as defined in the Rehabilitation Act of 1973, as amended, 29 U.S.C. 705(9)(B), (20)(B), or a child with a disability as defined in the Individuals with Disabilities Education Act, 20 U.S.C. 1401(3).

Supportive measures means individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a complainant or respondent, not for punitive or disciplinary reasons, and without fee or charge to the complainant or respondent to:

(1) Restore or preserve that party's access to the recipient's education program or activity, including measures that are designed to protect the safety of the parties or the recipient's educational environment; or

(2) Provide support during the recipient's grievance procedures under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(k).

Title IX means Title IX of the Education Amendments of 1972 (Pub. L. 92–318; 20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688, 1689), as amended.

§ 106.3 [Amended]

■ 4. Section 106.3 is amended by removing paragraphs (c) and (d).

■ 5. Section 106.6 is amended by:

■ a. Revising paragraphs (b), (e), and (g).

■ b. Removing paragraph (h). The revisions read as follows:

§ 106.6 Effect of other requirements and preservation of rights.

* * * * *

(b) *Effect of State or local law or other requirements.* The obligation to comply with Title IX and this part is not obviated or alleviated by any State or local law or other requirement that conflicts with Title IX or this part.

* * * * *

(e) *Effect of Section 444 of General Education Provisions Act (GEPA)/ Family Educational Rights and Privacy Act (FERPA).* The obligation to comply with Title IX and this part is not obviated or alleviated by FERPA, 20 U.S.C. 1232g, or its implementing regulations, 34 CFR part 99.

* * * * *

(g) *Exercise of rights by parents, guardians, or other authorized legal representatives.* Nothing in Title IX or this part may be read in derogation of any legal right of a parent, guardian, or other authorized legal representative to act on behalf of a complainant, respondent, or other person, subject to paragraph (e) of this section, including but not limited to making a complaint through the recipient's grievance procedures for complaints of sex discrimination.

■ 6. Section 106.8 is revised to read as follows:

§ 106.8 Designation of coordinator; nondiscrimination policy; grievance procedures; notice of nondiscrimination; training; students with disabilities; and recordkeeping.

(a) *Designation of a Title IX Coordinator.* (1) *Title IX Coordinator.* Each recipient mustdesignate and authorize at least one employee, referred to herein as a Title IX Coordinator, to coordinate its efforts to comply with its responsibilities under Title IX and this part. If a recipient has more than one Title IX Coordinator, it must designate one of its Title IX Coordinators to retain ultimate oversight over those responsibilities and ensure the recipient's consistent compliance with its responsibilities under Title IX and this part.

(2) *Delegation to designees.* As appropriate, a recipient may delegate, or permit a Title IX Coordinator to delegate, specific duties to one or more designees.

(b) *Adoption, publication, and implementation of nondiscrimination policy and grievance procedures.* (1) *Nondiscrimination policy.* Each recipient must adopt, publish, and implement a policy stating that the recipient does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and this part, including in admission (unless subpart C of this part does not apply) and employment.

(2) *Grievance procedures.* A recipient must adopt, publish, and implement grievance procedures consistent with the requirements of § 106.45, and if applicable § 106.46, that provide for the prompt and equitable resolution of complaints made by students, employees, or other individuals who are participating or attempting to participate in the recipient's education program or activity, or by the Title IX Coordinator, alleging any action that would be prohibited by Title IX or this part.

(c) *Notice of nondiscrimination.* A recipient must provide a notice of nondiscrimination to students; parents, guardians, or other authorized legal representatives of elementary school and secondary school students; employees; applicants for admission and employment; and all unions and professional organizations holding collective bargaining or professional agreements with the recipient.

(1) *Contents of notice of nondiscrimination.* (i) The notice of nondiscrimination must include the following elements:

(A) A statement that the recipient does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and this part, including in admission (unless subpart C of this part does not apply) and employment;

(B) A statement that inquiries about the application of Title IX and this part to the recipient may be referred to the recipient's Title IX Coordinator, the Office for Civil Rights, or both;

(C) The name or title, office address, email address, and telephone number of the recipient's Title IX Coordinator;

(D) How to locate the recipient's nondiscrimination policy under paragraph (b)(1) of this section; and the recipient's grievance procedures under paragraph (b)(2) of this section; and

(E) How to report information about conduct that may constitute sex discrimination under Title IX; and how to make a complaint of sex discrimination under this part.

(ii) Nothing in this part prevents a recipient from including in its notice of nondiscrimination information about any exceptions or exemptions applicable to the recipient under Title IX.

(2) *Publication of notice of nondiscrimination.* (i) Each recipient must prominently include all elements of its notice of nondiscrimination set out in paragraphs (c)(1)(i)(A) through (E) of this section on its website and in each handbook, catalog, announcement, bulletin, and application form that it makes available to persons entitled to notice under paragraph (c) of this section, or which are otherwise used in connection with the recruitment of students or employees.

(ii) If necessary, due to the format or size of any publication under paragraph (c)(2)(i) of this section, the recipient may instead include in those publications a statement that the recipient prohibits sex discrimination in any education program or activity that it operates and that individuals may report concerns or questions to the Title IX Coordinator, and provide the location of the notice on the recipient's website.

(iii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex, except as such treatment is permitted by Title IX or this part.

(d) *Training.* The recipient must ensure that the persons described in paragraphs (d)(1) through (4) of this section receive training related to their duties under Title IX promptly upon hiring or change of position that alters their duties under Title IX or this part,

and annually thereafter. This training must not rely on sex stereotypes.

(1) *All employees.* All employees must be trained on:

(i) The recipient's obligation to address sex discrimination in its education program or activity;

(ii) The scope of conduct that constitutes sex discrimination under Title IX and this part, including the definition of sex-based harassment; and

(iii) All applicable notification and information requirements under §§ 106.40(b)(2) and 106.44.

(2) *Investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures or have the authority to modify or terminate supportive measures.* In addition to the training requirements in paragraph (d)(1) of this section, all investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures or have the authority to modify or terminate supportive measures under § 106.44(g)(4) must be trained on the following topics to the extent related to their responsibilities:

(i) The recipient's obligations under § 106.44;

(ii) The recipient's grievance procedures under § 106.45, and if applicable § 106.46;

(iii) How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and

(iv) The meaning and application of the term ''relevant'' in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance under § 106.45, and if applicable § 106.46.

(3) *Facilitators of informal resolution process.* In addition to the training requirements in paragraph (d)(1) of this section, all facilitators of an informal resolution process under § 106.44(k) must be trained on the rules and practices associated with the recipient's informal resolution process and on how to serve impartially, including by avoiding conflicts of interest and bias.

(4) *Title IX Coordinator and designees.* In addition to the training requirements in paragraphs (d)(1) through (3) of this section, the Title IX Coordinator and any designees under paragraph (a) of this section must be trained on their specific responsibilities under paragraph (a) of this section, §§ 106.40(b)(3), 106.44(f) and (g), the recipient's recordkeeping system and the requirements of paragraph (f) of this section, and any other training necessary to coordinate the recipient's compliance with Title IX.

(e) *Students with disabilities.* If a complainant or respondent is an elementary or secondary student with a disability, the recipient must require the Title IX Coordinator to consult with one or more members, as appropriate, of the student's Individualized Education Program (IEP) team, 34 CFR 300.321, if any, or one or more members, as appropriate, of the group of persons responsible for the student's placement decision under 34 CFR 104.35(c), if any, to determine how to comply with the requirements of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.,* and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, throughout the recipient's implementation of grievance procedures under § 106.45. If a complainant or respondent is a postsecondary student with a disability, the Title IX Coordinator may consult, as appropriate, with the individual or office that the recipient has designated to provide support to students with disabilities to determine how to comply with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

(f) *Recordkeeping.* A recipient must maintain for a period of at least seven years:

(1) For each complaint of sex discrimination, records documenting the informal resolution process under § 106.44(k) or the grievance procedures under § 106.45, and if applicable § 106.46, and the resulting outcome.

(2) For each notification the Title IX Coordinator receives of information about conduct that reasonably may constitute sex discrimination under Title IX or this part, including notifications under § 106.44(c)(1) or (2), records documenting the actions the recipient took to meet its obligations under § 106.44.

(3) All materials used to provide training under paragraph (d) of this section. A recipient must make these training materials available upon request for inspection by members of the public.

■ 7. Section 106.10 is added to subpart B to read as follows:

§ 106.10 Scope.

Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

■ 8. Section 106.11 is revised to read as follows:

§ 106.11 Application.

Except as provided in this subpart, this part applies to every recipient and to all sex discrimination occurring under a recipient's education program or activity in the United States. For purposes of this section, conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and conduct that is subject to the recipient's disciplinary authority. A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

■ 9. Section 106.15 is amended by revising paragraph (b) to read as follows:

§ 106.15 Admissions.

* * * * *

(b) *Administratively separate units.* For purposes only of this section and subpart C, each administratively separate unit shall be deemed to be an educational institution.

* * * * *

§ 106.16 [Removed]

■ 10. Section 106.16 is removed.

§ 106.17 [Removed]

■ 11. Section 106.17 is removed.

§ 106.18 [Redesignated as § 106.16]

■ 12. Section 106.18 is redesignated as § 106.16 in subpart B.

■ 13. Section 106.21 is amended by revising paragraphs (a) and (c) to read as follows:

§ 106.21 Admissions.

(a) *Status generally.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies.

* * * * *

(c) *Parental, family, or marital status; pregnancy or related conditions.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Must treat pregnancy or related conditions in the same manner and under the same policies as any other temporary medical conditions; and

(2) Must not:

(i) Adopt or implement any policy, practice, or procedure concerning the current, potential, or past parental, family, or marital status of a student or applicant that treats persons differently on the basis of sex;

(ii) Discriminate against any person on the basis of current, potential, or past pregnancy or related conditions, or adopt or implement any policy, practice, or procedure that so discriminates; and

(iii) Make a pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is ''Miss or Mrs.'' A recipient may ask an applicant to self-identify their sex, but only if this question is asked of all applicants and if the response is not used as a basis for discrimination prohibited by this part.

§ 106.30 [Removed]

■ 14. Section 106.30 is removed.

■ 15. Section 106.31 is amended by revising paragraph (a) to read as follows:

§ 106.31 Education programs or activities.

(a) *General.* (1) Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that receives Federal financial assistance.

(2) In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, except as permitted by 20 U.S.C. 1681(a)(1) through (9) and the corresponding regulations §§ 106.12 through 106.15, 20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b). Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.

(3) This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of:

(i) A recipient to which subpart C does not apply; or

(ii) An entity, not a recipient, to which subpart C would not apply if the entity were a recipient.

* * * * *

■ 16. Section 106.40 is revised to read as follows:

§ 106.40 Parental, family, or marital status; pregnancy or related conditions.

(a) *Status generally.* A recipient must not adopt or implement any policy, practice, or procedure concerning a student's current, potential, or past parental, family, or marital status that treats students differently on the basis of sex.

(b) *Pregnancy or related conditions.* (1) *Nondiscrimination.* A recipient must not discriminate in its education program or activity against any student based on the student's current, potential, or past pregnancy or related conditions. A recipient does not engage in prohibited discrimination when it allows a student, based on pregnancy or related conditions, to voluntarily participate in a separate portion of its education program or activity provided the recipient ensures that the separate portion is comparable to that offered to students who are not pregnant and do not have related conditions.

(2) *Responsibility to provide Title IX Coordinator contact and other information.* A recipient must ensure that when a student, or a person who has a legal right to act on behalf of the student, informs any employee of the student's pregnancy or related conditions, unless the employee reasonably believes that the Title IX Coordinator has been notified, the employee promptly provides that person with the Title IX Coordinator's contact information and informs that person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the recipient's education program or activity.

(3) *Specific actions to prevent discrimination and ensure equal access.* A recipient must take specific actions under paragraphs (b)(3)(i) through (vi) of this section to promptly and effectively prevent sex discrimination and ensure equal access to the recipient's education program or activity once the student, or a person who has a legal right to act on behalf of the student, notifies the Title IX Coordinator of the student's pregnancy or related conditions. The Title IX Coordinator must coordinate these actions.

(i) *Responsibility to provide information about recipient obligations.* The recipient must inform the student, and if applicable, the person who notified the Title IX Coordinator of the student's pregnancy or related conditions and has a legal right to act on behalf of the student, of the recipient's obligations under paragraphs (b)(1) through (5) of this section and § 106.44(j) and provide the recipient's notice of nondiscrimination under § 106.8(c)(1).

(ii) *Reasonable modifications.* (A) The recipient must make reasonable modifications to the recipient's policies, practices, or procedures as necessary to prevent sex discrimination and ensure equal access to the recipient's education program or activity. Each reasonable modification must be based on the student's individualized needs. In determining what modifications are required under this paragraph, the recipient must consult with the student. A modification that a recipient can demonstrate would fundamentally alter the nature of its education program or activity is not a reasonable modification.

(B) The student has discretion to accept or decline each reasonable modification offered by the recipient. If a student accepts a recipient's offered reasonable modification, the recipient must implement it.

(C) Reasonable modifications may include, but are not limited to, breaks during class to express breast milk, breastfeed, or attend to health needs associated with pregnancy or related conditions, including eating, drinking, or using the restroom; intermittent absences to attend medical appointments; access to online or homebound education; changes in schedule or course sequence; extensions of time for coursework and rescheduling of tests and examinations; allowing a student to sit or stand, or carry or keep water nearby; counseling; changes in physical space or supplies (for example, access to a larger desk or a footrest); elevator access; or other changes to policies, practices, or procedures.

(iii) *Voluntary access to separate and comparable portion of program or activity.* The recipient must allow the student to voluntarily access any separate and comparable portion of the recipient's education program or activity under paragraph (b)(1) of this section.

(iv) *Voluntary leaves of absence.* The recipient must allow the student to voluntarily take a leave of absence from the recipient's education program or activity to cover, at minimum, the period of time deemed medically necessary by the student's licensed healthcare provider. To the extent that a student qualifies for leave under a leave policy maintained by a recipient that allows a greater period of time than the medically necessary period, the recipient must permit the student to take voluntary leave under that policy instead if the student so chooses. When the student returns to the recipient's education program or activity, the student must be reinstated to the academic status and, as practicable, to the extracurricular status that the student held when the voluntary leave began.

(v) *Lactation space.* The recipient must ensure that the student can access a lactation space, which must be a space other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed.

(vi) *Limitation on supporting documentation.* A recipient must not require supporting documentation under paragraphs (b)(3)(ii) through (v) unless the documentation is necessary and reasonable for the recipient to determine the reasonable modifications to make or whether to take additional specific actions under paragraphs (b)(3)(ii) through (v). Examples of situations when requiring supporting documentation is not necessary and reasonable include, but are not limited to, when the student's need for a specific action under paragraphs (b)(3)(ii) through (v) is obvious, such as when a student who is pregnant needs a bigger uniform; when the student has previously provided the recipient with sufficient supporting documentation; when the reasonable modification because of pregnancy or related conditions at issue is allowing a student to carry or keep water nearby and drink, use a bigger desk, sit or stand, or take breaks to eat, drink, or use the restroom; when the student has lactation needs; or when the specific action under paragraphs (b)(3)(ii) through (v) is available to students for reasons other than pregnancy or related conditions without submitting supporting documentation.

(4) *Comparable treatment to other temporary medical conditions.* To the extent consistent with paragraph (b)(3) of this section, a recipient must treat pregnancy or related conditions in the same manner and under the same policies as any other temporary medical conditions with respect to any medical or hospital benefit, service, plan, or policy the recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's education program or activity.

(5) *Certification to participate.* A recipient must not require a student who is pregnant or has related conditions to provide certification from a healthcare provider or any other person that the student is physically able to participate in the recipient's class, program, or extracurricular activity unless:

(i) The certified level of physical ability or health is necessary for participation in the class, program, or extracurricular activity;

(ii) The recipient requires such certification of all students participating in the class, program, or extracurricular activity; and

(iii) The information obtained is not used as a basis for discrimination prohibited by this part.

§ 106.41 [Amended]

■ 17. Section 106.41 is amended by removing paragraph (d).

■ 18. Section 106.44 is revised to read as follows:

§ 106.44 Recipient's response to sex discrimination.

(a) *General.* (1) A recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively; and

(2) A recipient must also comply with this section to address sex discrimination in its education program or activity.

(b) *Barriers to reporting.* A recipient must require its Title IX Coordinator to:

(1) Monitor the recipient's education program or activity for barriers to reporting information about conduct that reasonably may constitute sex discrimination under Title IX or this part; and

(2) Take steps reasonably calculated to address such barriers.

(c) *Notification requirements.* (1) An elementary school or secondary school recipient must require all of its employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or this part.

(2) All other recipients must, at a minimum, require:

(i) Any employee who is not a confidential employee and who either has authority to institute corrective measures on behalf of the recipient or has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or this part; and

(ii) All other employees who are not confidential employees and not covered by paragraph (c)(2)(i) of this section to either:

(A) Notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or this part; or

(B) Provide the contact information of the Title IX Coordinator and information about how to make a complaint of sex discrimination to any person who provides the employee with information about conduct that reasonably may constitute sex discrimination under Title IX or this part.

(3) A postsecondary institution must reasonably determine and specify whether and under what circumstances a person who is both a student and an employee is subject to the requirements of paragraph (c)(2) of this section.

(4) The requirements of paragraphs (c)(1) and (2) of this section do not apply to an employee who has personally been subject to conduct that reasonably may constitute sex discrimination under Title IX or this part.

(d) *Confidential employee requirements.* (1) A recipient must notify all participants in the recipient's education program or activity of how to contact its confidential employees, if any, excluding any employee whose confidential status is only with respect to their conducting an Institutional Review Board-approved human-subjects research study designed to gather information about sex discrimination as set out in the definition of confidential employee in § 106.2.

(2) A recipient must require a confidential employee to explain to any person who informs the confidential employee of conduct that reasonably may constitute sex discrimination under Title IX or this part:

(i) The employee's status as confidential for purposes of this part, including the circumstances in which the employee is not required to notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination;

(ii) How to contact the recipient's Title IX Coordinator and how to make a complaint of sex discrimination; and

(iii) That the Title IX Coordinator may be able to offer and coordinate supportive measures, as well as initiate an informal resolution process or an investigation under the grievance procedures.

(e) *Public awareness events.* When a postsecondary institution's Title IX Coordinator is notified of information about conduct that reasonably may constitute sex-based harassment under Title IX or this part that was provided by a person during a public event to raise awareness about sex-based harassment that was held on the postsecondary institution's campus or through an online platform sponsored by a postsecondary institution, the

postsecondary institution is not obligated to act in response to the information, unless it indicates an imminent and serious threat to the health or safety of a complainant, any students, employees, or other persons. However, in all cases the postsecondary institution must use this information to inform its efforts to prevent sex-based harassment, including by providing tailored training to address alleged sex-based harassment in a particular part of its education program or activity or at a specific location when information indicates there may be multiple incidents of sex-based harassment. Nothing in Title IX or this part obligates a postsecondary institution to require its Title IX Coordinator or any other employee to attend such public awareness events.

(f) *Title IX Coordinator requirements.* The Title IX Coordinator is responsible for coordinating the recipient's compliance with its obligations under Title IX and this part.

(1) A recipient must require its Title IX Coordinator, when notified of conduct that reasonably may constitute sex discrimination under Title IX or this part, to take the following actions to promptly and effectively end any sex discrimination in its education program or activity, prevent its recurrence, and remedy its effects:

(i) Treat the complainant and respondent equitably;

(ii) Offer and coordinate supportive measures under paragraph (g) of this section, as appropriate, for the complainant. In addition, if the recipient has initiated grievance procedures under § 106.45, and if applicable § 106.46, or offered an informal resolution process under paragraph (k) of this section to the respondent, offer and coordinate supportive measures under paragraph (g) of this section, as appropriate, for the respondent;

(iii)(A) Notify the complainant or, if the complainant is unknown, the individual who reported the conduct, of the grievance procedures under § 106.45, and if applicable § 106.46, and the informal resolution process under paragraph (k) of this section, if available and appropriate; and

(B) If a complaint is made, notify the respondent of the grievance procedures under § 106.45, and if applicable § 106.46, and the informal resolution process under paragraph (k) of this section, if available and appropriate;

(iv) In response to a complaint, initiate the grievance procedures under § 106.45, and if applicable § 106.46, or the informal resolution process under paragraph (k) of this section, if available and appropriate and requested by all parties;

(v) In the absence of a complaint or the withdrawal of any or all of the allegations in a complaint, and in the absence or termination of an informal resolution process, determine whether to initiate a complaint of sex discrimination that complies with the grievance procedures under § 106.45, and if applicable § 106.46.

(A) To make this fact-specific determination, the Title IX Coordinator must consider, at a minimum, the following factors:

(*1*) The complainant's request not to proceed with initiation of a complaint;

(*2*) The complainant's reasonable safety concerns regarding initiation of a complaint;

(*3*) The risk that additional acts of sex discrimination would occur if a complaint is not initiated;

(*4*) The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence;

(*5*) The age and relationship of the parties, including whether the respondent is an employee of the recipient;

(*6*) The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals;

(*7*) The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred; and

(*8*) Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures under § 106.45, and if applicable § 106.46.

(B) If, after considering these and other relevant factors, the Title IX Coordinator determines that the conduct as alleged presents an imminent and serious threat to the health or safety of the complainant or other person, or that the conduct as alleged prevents the recipient from ensuring equal access on the basis of sex to its education program or activity, the Title IX Coordinator may initiate a complaint.

(vi) If initiating a complaint under paragraph (f)(1)(v) of this section, notify the complainant prior to doing so and appropriately address reasonable concerns about the complainant's safety or the safety of others, including by providing supportive measures consistent with paragraph (g) of this section; and

(vii) Regardless of whether a complaint is initiated, take other appropriate prompt and effective steps, in addition to steps necessary to effectuate the remedies provided to an individual complainant, if any, to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.

(2) A Title IX Coordinator is not required to comply with paragraphs (f)(1)(i) through (vii) of this section upon being notified of conduct that may constitute sex discrimination if the Title IX Coordinator reasonably determines that the conduct as alleged could not constitute sex discrimination under Title IX or this part.

(g) *Supportive measures.* Under paragraph (f) of this section, a recipient must offer and coordinate supportive measures, as appropriate, as described in paragraphs (g)(1) through (6) of this section. For allegations of sex discrimination other than sex-based harassment or retaliation, a recipient's provision of supportive measures does not require the recipient, its employee, or any other person authorized to provide aid, benefit, or service on the recipient's behalf to alter the alleged discriminatory conduct for the purpose of providing a supportive measure.

(1) Supportive measures may vary depending on what the recipient deems to be reasonably available. These measures may include but are not limited to: counseling; extensions of deadlines and other course-related adjustments; campus escort services; increased security and monitoring of certain areas of the campus; restrictions on contact applied to one or more parties; leaves of absence; changes in class, work, housing, or extracurricular or any other activity, regardless of whether there is or is not a comparable alternative; and training and education programs related to sex-based harassment.

(2) Supportive measures must not unreasonably burden either party and must be designed to protect the safety of the parties or the recipient's educational environment, or to provide support during the recipient's grievance procedures under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(k). A recipient must not impose such measures for punitive or disciplinary reasons.

(3) A recipient may, as appropriate, modify or terminate supportive measures at the conclusion of the grievance procedures under § 106.45, and if applicable § 106.46, or at the

conclusion of the informal resolution process under paragraph (k) of this section, or the recipient may continue them beyond that point.

(4) A recipient must provide a complainant or respondent with a timely opportunity to seek, from an appropriate and impartial employee, modification or reversal of the recipient's decision to provide, deny, modify, or terminate supportive measures applicable to them. The impartial employee must be someone other than the employee who made the challenged decision and must have authority to modify or reverse the decision, if the impartial employee determines that the decision to provide, deny, modify, or terminate the supportive measure was inconsistent with the definition of supportive measures in § 106.2. A recipient must also provide a party with the opportunity to seek additional modification or termination of a supportive measure applicable to them if circumstances change materially.

(5) A recipient must not disclose information about any supportive measures to persons other than the person to whom they apply, including informing one party of supportive measures provided to another party, unless necessary to provide the supportive measure or restore or preserve a party's access to the education program or activity, or when an exception in § 106.44(j)(1) through (5) applies.

(6)(i) If the complainant or respondent is an elementary or secondary student with a disability, the recipient must require the Title IX Coordinator to consult with one or more members, as appropriate, of the student's Individualized Education Program (IEP) team, 34 CFR 300.321, if any, or one or more members, as appropriate, of the group of persons responsible for the student's placement decision under 34 CFR 104.35(c), if any, to determine how to comply with the requirements of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.,* and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, in the implementation of supportive measures.

(ii) If the complainant or respondent is a postsecondary student with a disability, the Title IX Coordinator may consult, as appropriate, with the individual or office that the recipient has designated to provide support to students with disabilities to determine how to comply with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, in the implementation of supportive measures.

(h) *Emergency removal.* Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an imminent and serious threat to the health or safety of a complainant or any students, employees, or other persons arising from the allegations of sex discrimination justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision must not be construed to modify any rights under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.,* Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, or the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*

(i) *Administrative leave.* Nothing in this part precludes a recipient from placing an employee respondent on administrative leave from employment responsibilities during the pendency of the recipient's grievance procedures. This provision must not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, or the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*

(j) *Prohibited disclosures of personally identifiable information.* A recipient must not disclose personally identifiable information obtained in the course of complying with this part, except in the following circumstances:

(1) When the recipient has obtained prior written consent from a person with the legal right to consent to the disclosure;

(2) When the information is disclosed to a parent, guardian, or other authorized legal representative with the legal right to receive disclosures on behalf of the person whose personally identifiable information is at issue;

(3) To carry out the purposes of this part, including action taken to address conduct that reasonably may constitute sex discrimination under Title IX in the recipient's education program or activity;

(4) As required by Federal law, Federal regulations, or the terms and conditions of a Federal award, including a grant award or other funding agreement; or

(5) To the extent such disclosures are not otherwise in conflict with Title IX or this part, when required by State or local law or when permitted under FERPA, 20 U.S.C. 1232g, or its implementing regulations, 34 CFR part 99.

(k) *Discretion to offer informal resolution in some circumstances.* (1) At any time prior to determining whether sex discrimination occurred under § 106.45, and if applicable § 106.46, a recipient may offer to a complainant and respondent an informal resolution process, unless the complaint includes allegations that an employee engaged in sex-based harassment of an elementary school or secondary school student or such a process would conflict with Federal, State or local law. A recipient that provides the parties an informal resolution process must, to the extent necessary, also require its Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.

(i) Subject to the limitations in paragraph (k)(1) of this section, a recipient has discretion to determine whether it is appropriate to offer an informal resolution process when it receives information about conduct that reasonably may constitute sex discrimination under Title IX or this part or when a complaint of sex discrimination is made, and may decline to offer informal resolution despite one or more of the parties' wishes.

(ii) In addition to the limitations in paragraph (k)(1) of this section, circumstances when a recipient may decline to allow informal resolution include but are not limited to when the recipient determines that the alleged conduct would present a future risk of harm to others.

(2) A recipient must not require or pressure the parties to participate in an informal resolution process. The recipient must obtain the parties' voluntary consent to the informal resolution process and must not require waiver of the right to an investigation and determination of a complaint as a condition of enrollment or continuing enrollment, or employment or continuing employment, or exercise of any other right.

(3) Before initiation of an informal resolution process, the recipient must provide to the parties notice that explains:

(i) The allegations;

(ii) The requirements of the informal resolution process;

(iii) That, prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the recipient's grievance procedures;

(iv) That the parties' agreement to a resolution at the conclusion of the informal resolution process would

preclude the parties from initiating or resuming grievance procedures arising from the same allegations;

(v) The potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties; and

(vi) What information the recipient will maintain and whether and how the recipient could disclose such information for use in grievance procedures under § 106.45, and if applicable § 106.46, if grievance procedures are initiated or resumed.

(4) The facilitator for the informal resolution process must not be the same person as the investigator or the decisionmaker in the recipient's grievance procedures. Any person designated by a recipient to facilitate an informal resolution process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. Any person facilitating informal resolution must receive training under § 106.8(d)(3).

(5) Potential terms that may be included in an informal resolution agreement include but are not limited to:

(i) Restrictions on contact; and

(ii) Restrictions on the respondent's participation in one or more of the recipient's programs or activities or attendance at specific events, including restrictions the recipient could have imposed as remedies or disciplinary sanctions had the recipient determined at the conclusion of the recipient's grievance procedures that sex discrimination occurred.

■ 19. Section 106.45 is revised to read as follows:

§ 106.45 Grievance procedures for the prompt and equitable resolution of complaints of sex discrimination.

(a)(1) *General.* A recipient's grievance procedures for the prompt and equitable resolution of complaints of sex discrimination must be in writing and include provisions that incorporate the requirements of this section. The requirements related to a respondent apply only to sex discrimination complaints alleging that a person violated the recipient's prohibition on sex discrimination. When a sex discrimination complaint alleges that a recipient's policy or practice discriminates on the basis of sex, the recipient is not considered a respondent.

(2) *Complaint.* The following persons have a right to make a complaint of sex discrimination, including complaints of sex-based harassment, requesting that the recipient investigate and make a determination about alleged discrimination under Title IX or this part:

(i) A complainant;

(ii) A parent, guardian, or other authorized legal representative with the legal right to act on behalf of a complainant;

(iii) The Title IX Coordinator, after making the determination specified in § 106.44(f)(1)(v);

(iv) With respect to complaints of sex discrimination other than sex-based harassment, in addition to the persons listed in paragraphs (a)(2)(i) through (iii) of this section,

(A) Any student or employee; or

(B) Any person other than a student or employee who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination.

(b) *Basic requirements for grievance procedures.* A recipient's grievance procedures must:

(1) Treat complainants and respondents equitably;

(2) Require that any person designated as a Title IX Coordinator, investigator, or decisionmaker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. The decisionmaker may be the same person as the Title IX Coordinator or investigator;

(3) Include a presumption that the respondent is not responsible for the alleged sex discrimination until a determination is made at the conclusion of the recipient's grievance procedures for complaints of sex discrimination;

(4) Establish reasonably prompt timeframes for the major stages of the grievance procedures, including a process that allows for the reasonable extension of timeframes on a case-by-case basis for good cause with notice to the parties that includes the reason for the delay. Major stages include, for example, evaluation (*i.e.,* the recipient's decision whether to dismiss or investigate a complaint of sex discrimination); investigation; determination; and appeal, if any;

(5) Require the recipient to take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient's grievance procedures, provided that the steps do not restrict the ability of the parties to: obtain and present evidence, including by speaking to witnesses, subject to § 106.71; consult with their family members, confidential resources, or advisors; or otherwise prepare for or participate in the grievance procedures;

(6) Require an objective evaluation of all evidence that is relevant, as defined in § 106.2, and not otherwise impermissible under paragraph (b)(7) of this section—including both inculpatory and exculpatory evidence—and provide that credibility determinations must not be based on a person's status as a complainant, respondent, or witness;

(7) Exclude the following types of evidence, and questions seeking that evidence, as impermissible (*i.e.,* must not be accessed or considered, except by the recipient to determine whether an exception in paragraphs (i) through (iii) applies; must not be disclosed; and must not otherwise be used), regardless of whether they are relevant:

(i) Evidence that is protected under a privilege as recognized by Federal or State law or evidence provided to a confidential employee, unless the person to whom the privilege or confidentiality is owed has voluntarily waived the privilege or confidentiality;

(ii) A party's or witness's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party or witness, unless the recipient obtains that party's or witness's voluntary, written consent for use in the recipient's grievance procedures; and

(iii) Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment. The fact of prior consensual sexual conduct between the complainant and respondent does not by itself demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred; and

(8) If a recipient adopts grievance procedures that apply to the resolution of some, but not all, complaints articulate consistent principles for how the recipient will determine which procedures apply.

(c) *Notice of allegations.* Upon initiation of the recipient's grievance procedures, a recipient must provide notice of the allegations to the parties whose identities are known.

(1) The notice must include:

(i) The recipient's grievance procedures under this section, and if

applicable § 106.46, and any informal resolution process under § 106.44(k);

(ii) Sufficient information available at the time to allow the parties to respond to the allegations. Sufficient information includes the identities of the parties involved in the incident(s), the conduct alleged to constitute sex discrimination under Title IX or this part, and the date(s) and location(s) of the alleged incident(s), to the extent that information is available to the recipient;

(iii) A statement that retaliation is prohibited; and

(iv) A statement that the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence or an accurate description of this evidence as set out in paragraph (f)(4) of this section; and if the recipient provides a description of the evidence, the parties are entitled to an equal opportunity to access to the relevant and not otherwise impermissible evidence upon the request of any party.

(2) If, in the course of an investigation, the recipient decides to investigate additional allegations of sex discrimination by the respondent toward the complainant that are not included in the notice provided under paragraph (c) of this section or that are included in a complaint that is consolidated under paragraph (e) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

(d) *Dismissal of a complaint.* (1) A recipient may dismiss a complaint of sex discrimination made through its grievance procedures under this section, and if applicable § 106.46, for any of the following reasons:

(i) The recipient is unable to identify the respondent after taking reasonable steps to do so;

(ii) The respondent is not participating in the recipient's education program or activity and is not employed by the recipient;

(iii) The complainant voluntarily withdraws any or all of the allegations in the complaint, the Title IX Coordinator declines to initiate a complaint under § 106.44(f)(1)(v), and the recipient determines that, without the complainant's withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX or this part even if proven; or

(iv) The recipient determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX or this part. Prior to dismissing the complaint under this paragraph, the recipient must make reasonable efforts to clarify the allegations with the complainant.

(2) Upon dismissal, a recipient must promptly notify the complainant of the basis for the dismissal. If the dismissal occurs after the respondent has been notified of the allegations, then the recipient must also notify the respondent of the dismissal and the basis for the dismissal promptly following notification to the complainant, or simultaneously if notification is in writing.

(3) A recipient must notify the complainant that a dismissal may be appealed and provide the complainant with an opportunity to appeal the dismissal of a complaint on the bases set out in § 106.46(i)(1). If the dismissal occurs after the respondent has been notified of the allegations, then the recipient must also notify the respondent that the dismissal may be appealed on the bases set out in § 106.46(i)(1). If the dismissal is appealed, the recipient must:

(i) Notify the parties of any appeal, including notice of the allegations consistent with paragraph (c) of this section if notice was not previously provided to the respondent;

(ii) Implement appeal procedures equally for the parties;

(iii) Ensure that the decisionmaker for the appeal did not take part in an investigation of the allegations or dismissal of the complaint;

(iv) Ensure that the decisionmaker for the appeal has been trained as set out in § 106.8(d)(2);

(v) Provide the parties a reasonable and equal opportunity to make a statement in support of, or challenging, the outcome; and

(vi) Notify the parties of the result of the appeal and the rationale for the result.

(4) A recipient that dismisses a complaint must, at a minimum:

(i) Offer supportive measures to the complainant as appropriate under § 106.44(g);

(ii) For dismissals under paragraph (d)(1)(iii) or (iv) of this section in which the respondent has been notified of the allegations, offer supportive measures to the respondent as appropriate under § 106.44(g); and

(iii) Require its Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity under § 106.44(f)(1)(vii).

(e) *Consolidation of complaints.* A recipient may consolidate complaints of sex discrimination against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party, when the allegations of sex discrimination arise out of the same facts or circumstances. If one of the complaints to be consolidated is a complaint of sex-based harassment involving a student complainant or student respondent at a postsecondary institution, the grievance procedures for investigating and resolving the consolidated complaint must comply with the requirements of § 106.46 in addition to the requirements of this section. When more than one complainant or more than one respondent is involved, references in this section and in § 106.46 to a party, complainant, or respondent include the plural, as applicable.

(f) *Complaint investigation.* A recipient must provide for adequate, reliable, and impartial investigation of complaints. To do so, the recipient must:

(1) Ensure that the burden is on the recipient—not on the parties—to conduct an investigation that gathers sufficient evidence to determine whether sex discrimination occurred;

(2) Provide an equal opportunity for the parties to present fact witnesses and other inculpatory and exculpatory evidence that are relevant and not otherwise impermissible;

(3) Review all evidence gathered through the investigation and determine what evidence is relevant and what evidence is impermissible regardless of relevance, consistent with § 106.2 and with paragraph (b)(7) of this section; and

(4) Provide each party with an equal opportunity to access the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible, consistent with § 106.2 and with paragraph (b)(7) of this section, in the following manner:

(i) A recipient must provide an equal opportunity to access either the relevant and not otherwise impermissible evidence, or an accurate description of this evidence. If the recipient provides a description of the evidence, it must further provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party;

(ii) A recipient must provide a reasonable opportunity to respond to the evidence or to the accurate description of the evidence described in paragraph (f)(4)(i) of this section; and

(iii) A recipient must take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance procedures. For purposes

of this paragraph, disclosures of such information and evidence for purposes of administrative proceedings or litigation related to the complaint of sex discrimination are authorized.

(g) *Questioning parties and witnesses to aid in evaluating allegations and assessing credibility.* A recipient must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.

(h) *Determination whether sex discrimination occurred.* Following an investigation and evaluation of all relevant and not otherwise impermissible evidence under paragraphs (f) and (g) of this section, the recipient must:

(1) Use the preponderance of the evidence standard of proof to determine whether sex discrimination occurred, unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints, in which case the recipient may elect to use that standard of proof in determining whether sex discrimination occurred. Both standards of proof require the decisionmaker to evaluate relevant and not otherwise impermissible evidence for its persuasiveness; if the decisionmaker is not persuaded under the applicable standard by the evidence that sex discrimination occurred, whatever the quantity of the evidence is, the decisionmaker must not determine that sex discrimination occurred.

(2) Notify the parties in writing of the determination whether sex discrimination occurred under Title IX or this part including the rationale for such determination, and the procedures and permissible bases for the complainant and respondent to appeal, if applicable;

(3) If there is a determination that sex discrimination occurred, as appropriate, require the Title IX Coordinator to coordinate the provision and implementation of remedies to a complainant and other persons the recipient identifies as having had equal access to the recipient's education program or activity limited or denied by sex discrimination, coordinate the imposition of any disciplinary sanctions on a respondent, including notification to the complainant of any such disciplinary sanctions, and require the Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity under § 106.44(f)(1)(vii). A recipient may not impose discipline on a respondent for sex discrimination prohibited by Title IX unless there is a determination at the conclusion of the recipient's grievance procedures that the respondent engaged in prohibited sex discrimination;

(4) Comply with § 106.45, and if applicable § 106.46, before the imposition of any disciplinary sanctions against a respondent; and

(5) Not discipline a party, witness, or others participating in a recipient's grievance procedures for making a false statement or for engaging in consensual sexual conduct based solely on the recipient's determination whether sex discrimination occurred.

(i) *Appeals.* In addition to an appeal of a dismissal consistent with paragraph (d)(3) of this section, a recipient must offer the parties an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints. For a complaint of sex-based harassment involving a student complainant or student respondent, a postsecondary institution must also offer an appeal on the bases set out in § 106.46(i)(1).

(j) *Additional provisions.* If a recipient adopts additional provisions as part of its grievance procedures for handling complaints of sex discrimination, including sex-based harassment, such additional provisions must apply equally to the parties.

(k) *Informal resolution.* In lieu of resolving a complaint through the recipient's grievance procedures, the parties may instead elect to participate in an informal resolution process under § 106.44(k) if provided by the recipient consistent with that paragraph.

(l) *Provisions limited to sex-based harassment complaints.* For complaints alleging sex-based harassment, the grievance procedures must:

(1) Describe the range of supportive measures available to complainants and respondents under § 106.44(g); and

(2) List, or describe the range of, the possible disciplinary sanctions that the recipient may impose and remedies that the recipient may provide following a determination that sex-based harassment occurred.

§ 106.46 [Redesignated as § 106.48]

■ 20. Section 106.46 is redesignated as § 106.48 in subpart D.

■ 21. Add a new § 106.46 to subpart D to read as follows:

§ 106.46 Grievance procedures for the prompt and equitable resolution of complaints of sex-based harassment involving student complainants or student respondents at postsecondary institutions.

(a) *General.* A postsecondary institution's written grievance procedures for prompt and equitable resolution of complaints of sex-based harassment involving a student complainant or student respondent must include provisions that incorporate the requirements of § 106.45 and this section.

(b) *Student employees.* When a complainant or respondent is both a student and an employee of a postsecondary institution, the postsecondary institution must make a fact-specific inquiry to determine whether the requirements of this section apply. In making this determination, a postsecondary institution must, at a minimum, consider whether the party's primary relationship with the postsecondary institution is to receive an education and whether the alleged sex-based harassment occurred while the party was performing employment-related work.

(c) *Written notice of allegations.* Upon the initiation of the postsecondary institution's sex-based harassment grievance procedures under this section, a postsecondary institution must provide written notice to the parties whose identities are known with sufficient time for the parties to prepare a response before any initial interview.

(1) The written notice must include all information required under § 106.45(c)(1)(i) through (iii) and also inform the parties that:

(i) The respondent is presumed not responsible for the alleged sex-based harassment until a determination is made at the conclusion of the grievance procedures under this section and that prior to the determination, the parties will have an opportunity to present relevant and not otherwise impermissible evidence to a trained, impartial decisionmaker;

(ii) They may have an advisor of their choice to serve in the role set out in paragraph (e)(2) of this section, and that the advisor may be, but is not required to be, an attorney;

(iii) They are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence or an investigative report that accurately summarizes this evidence as set out in paragraph (e)(6) of this section; and if the postsecondary institution provides access to an investigative report, the parties are entitled to an equal opportunity to access to the relevant and not otherwise impermissible

evidence upon the request of any party; and

(iv) If applicable, the postsecondary institution's code of conduct prohibits knowingly making false statements or knowingly submitting false information during the grievance procedure.

(2) If, in the course of an investigation, the recipient decides to investigate additional allegations of sex-based harassment by the respondent toward the complainant that are not included in the written notice provided under paragraph (c) of this section or that are included in a complaint that is consolidated under § 106.45(e), the recipient must provide written notice of the additional allegations to the parties whose identities are known.

(3) To the extent the postsecondary institution has reasonable concerns for the safety of any person as a result of providing this notice, the postsecondary institution may reasonably delay providing written notice of the allegations in order to address the safety concern appropriately. Reasonable concerns must be based on individualized safety and risk analysis and not on mere speculation or stereotypes.

(d) *Dismissal of a complaint.* When dismissing a complaint alleging sex-based harassment involving a student complainant or a student respondent, a postsecondary institution must:

(1) Provide the parties, simultaneously, with written notice of the dismissal and the basis for the dismissal, if dismissing a complaint under any of the bases in § 106.45(d)(1), except if the dismissal occurs before the respondent has been notified of the allegations, in which case the recipient must provide such written notice only to the complainant; and

(2) Obtain the complainant's withdrawal in writing if dismissing a complaint based on the complainant's voluntary withdrawal of the complaint or allegations under § 106.45(d)(1)(iii).

(e) *Complaint investigation.* When investigating a complaint alleging sex-based harassment and throughout the postsecondary institution's grievance procedures for complaints of sex-based harassment involving a student complainant or a student respondent, a postsecondary institution:

(1) Must provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all meetings or proceedings with sufficient time for the party to prepare to participate;

(2) Must provide the parties with the same opportunities to be accompanied to any meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of the advisor for the complainant or respondent in any meeting or proceeding; however, the postsecondary institution may establish restrictions regarding the extent to which the advisor may participate in the grievance procedures, as long as the restrictions apply equally to the parties;

(3) Must provide the parties with the same opportunities, if any, to have persons other than the advisor of the parties' choice present during any meeting or proceeding;

(4) Has discretion to determine whether the parties may present expert witnesses as long as the determination applies equally to the parties;

(5) Must allow for the reasonable extension of timeframes on a case-by-case basis for good cause with written notice to the parties that includes the reason for the delay; and

(6) Must provide each party and the party's advisor, if any, with an equal opportunity to access the evidence that is relevant to the allegations of sex-based harassment and not otherwise impermissible, consistent with §§ 106.2 and 106.45(b)(7), in the following manner:

(i) A postsecondary institution must provide an equal opportunity to access either the relevant and not otherwise impermissible evidence, or the same written investigative report that accurately summarizes this evidence. If the postsecondary institution provides access to an investigative report, it must further provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party;

(ii) A postsecondary institution must provide the parties with a reasonable opportunity to review and respond to the evidence or the investigative report described in paragraph (e)(6)(i) of this section prior to the determination whether sex-based harassment occurred. If a postsecondary institution conducts a live hearing as part of its grievance procedures, it must provide this opportunity to review the evidence in advance of the live hearing; it is at the postsecondary institution's discretion whether to provide this opportunity to respond prior to the live hearing, during the live hearing, or both prior to and during the live hearing;

(iii) A postsecondary institution must take reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosure of information and evidence obtained solely through the sex-based harassment grievance procedures. For purposes of this paragraph, disclosures of such information and evidence for purposes of administrative proceedings or litigation related to the complaint of sex-based harassment are authorized; and

(iv) Compliance with paragraph (e)(6) of this section satisfies the requirements of § 106.45(f)(4).

(f) *Questioning parties and witnesses to aid in evaluating allegations and assessing credibility.* (1) *Process for questioning parties and witnesses.* A postsecondary institution must provide a process as specified in this subpart that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex-based harassment. Questioning of the parties and witnesses must take place consistent with the following provisions before determining whether sex-based harassment occurred:

(i) When a postsecondary institution chooses not to conduct a live hearing under paragraph (g) of this section, the process for proposing and asking relevant and not otherwise impermissible questions and follow-up questions of parties and witnesses under §§ 106.2 and 106.45(b)(7), including questions challenging credibility, must:

(A) Allow the investigator or decisionmaker to ask such questions during individual meetings with a party or witness;

(B) Allow each party to propose such questions that the party wants asked of any party or witness and have those questions asked by the investigator or decisionmaker during one or more individual meetings, including follow-up meetings, with a party or witness, subject to the requirements in paragraph (f)(3) of this section; and

(C) Provide each party with an audio or audiovisual recording or transcript with enough time for the party to have a reasonable opportunity to propose follow-up questions.

(ii) When a postsecondary institution chooses to conduct a live hearing under paragraph (g) of this section, the process for proposing and asking relevant and not otherwise impermissible questions and follow-up questions of parties and witnesses under §§ 106.2 and 106.45(b)(7), including questions challenging credibility, must allow the decisionmaker to ask such questions, and either:

(A) Allow each party to propose such questions that the party wants asked of any party or witness and have those questions asked by the decisionmaker,

subject to the requirements under paragraph (f)(3) of this section; or

(B) Allow each party's advisor to ask any party or witness such questions, subject to the requirements under paragraph (f)(3) of this section. Such questioning must never be conducted by a party personally. If a postsecondary institution permits advisor-conducted questioning and a party does not have an advisor to ask questions on their behalf, the postsecondary institution must provide the party with an advisor of the postsecondary institution's choice, without charge to the party, for the purpose of advisor-conducted questioning. In those instances, the postsecondary institution must not appoint a confidential employee and may appoint, but is not required to appoint, an attorney to serve as an advisor.

(2) *Compliance with § 106.45(g).* Compliance with paragraph (f)(1)(i) or (ii) of this section satisfies the requirements of § 106.45(g).

(3) *Procedures for the decisionmaker to evaluate the questions and limitations on questions.* The decisionmaker must determine whether a proposed question is relevant under § 106.2 and not otherwise impermissible under § 106.45(b)(7), prior to the question being posed, and must explain any decision to exclude a question as not relevant or otherwise impermissible. If a decisionmaker determines that a party's question is relevant and not otherwise impermissible, then the question must be asked except that a postsecondary institution must not permit questions that are unclear or harassing of the party or witness being questioned. The decisionmaker must give a party an opportunity to clarify or revise a question that the decisionmaker has determined is unclear or harassing and, if the party sufficiently clarifies or revises a question to satisfy the terms of this paragraph, the question must be asked. A postsecondary institution may also adopt and apply other reasonable rules regarding decorum, provided they apply equally to the parties.

(4) *Refusal to respond to questions and inferences based on refusal to respond to questions.* A decisionmaker may choose to place less or no weight upon statements by a party or witness who refuses to respond to questions deemed relevant and not impermissible. The decisionmaker must not draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond to such questions.

(g) *Live hearing procedures.* A postsecondary institution's sex-based harassment grievance procedures may, but need not, provide for a live hearing. If a postsecondary institution chooses to conduct a live hearing, it may conduct the live hearing with the parties physically present in the same geographic location. At the postsecondary institution's discretion the institution may, or upon the request of either party it must, conduct the live hearing with the parties physically present in separate locations, with technology enabling the decisionmaker and parties to simultaneously see and hear the party or the witness while that person is speaking. A postsecondary institution must create an audio or audiovisual recording or transcript, of any live hearing and make it available to the parties for inspection and review.

(h) *Written determination whether sex-based harassment occurred.* The postsecondary institution must provide the determination whether sex-based harassment occurred in writing to the parties simultaneously.

(1) The written determination must include:

(i) A description of the alleged sex-based harassment;

(ii) Information about the policies and procedures that the postsecondary institution used to evaluate the allegations;

(iii) The decisionmaker's evaluation of the relevant and not otherwise impermissible evidence and determination whether sex-based harassment occurred;

(iv) When the decisionmaker finds that sex-based harassment occurred, any disciplinary sanctions the postsecondary institution will impose on the respondent, whether remedies other than the imposition of disciplinary sanctions will be provided by the postsecondary institution to the complainant, and, to the extent appropriate, other students identified by the postsecondary institution to be experiencing the effects of the sex-based harassment; and

(v) The postsecondary institution's procedures for the complainant and respondent to appeal.

(2) The determination regarding responsibility becomes final either on the date that the postsecondary institution provides the parties with the written determination of the result of any appeal, or, if no party appeals, the date on which an appeal would no longer be considered timely.

(i) *Appeals.* (1) A postsecondary institution must offer the parties an appeal from a determination whether sex-based harassment occurred, and from a postsecondary institution's dismissal of a complaint or any allegations therein, on the following bases:

(i) Procedural irregularity that would change the outcome;

(ii) New evidence that would change the outcome and that was not reasonably available when the determination whether sex-based harassment occurred or dismissal was made; and

(iii) The Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome.

(2) A postsecondary institution may offer an appeal to the parties on additional bases, so long as the procedures and additional bases for appeal are equally available to all parties.

(3) As to all appeals, the postsecondary institution must comply with the requirements in § 106.45(d)(3)(i), (v), and (vi) in writing.

(j) *Informal resolution.* If a postsecondary institution offers or provides the parties to the grievance procedures under § 106.45 and under this section with an informal resolution process under § 106.44(k), the postsecondary institution must inform the parties in writing of the offer and their rights and responsibilities in the informal resolution process and otherwise comply with the provisions of § 106.44(k)(3) in writing.

■ 22. Section 106.47 is added to subpart D to read as follows:

§ 106.47 Assistant Secretary review of sex-based harassment complaints.

The Assistant Secretary will not deem a recipient to have violated this part solely because the Assistant Secretary would have reached a different determination in a particular complaint alleging sex-based harassment than a recipient reached under § 106.45, and if applicable § 106.46, based on the Assistant Secretary's independent weighing of the evidence.

■ 23. Section 106.51 is amended by revising paragraph (b)(6) to read as follows:

§ 106.51 Employment.

* * * * *

(b) * * *

(6) Granting and return from leaves of absence, leave for pregnancy or related conditions, leave for persons of either sex to care for children or dependents, or any other leave;

* * * * *

■ 24. Section 106.57 is revised to read as follows:

§ 106.57 Parental, family, or marital status; pregnancy or related conditions.

(a) *Status generally.* A recipient must not adopt or implement any policy, practice, or procedure, or take any employment action, on the basis of sex:

(1) Concerning the current, potential, or past parental, family, or marital status of an employee or applicant for employment, which treats persons differently; or

(2) That is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy or related conditions.* A recipient must not discriminate against any employee or applicant for employment on the basis of current, potential, or past pregnancy or related conditions.

(c) *Comparable treatment to other temporary medical conditions.* A recipient must treat pregnancy or related conditions as any other temporary medical conditions for all job-related purposes, including commencement, duration and extensions of leave; payment of disability income; accrual of seniority and any other benefit or service; and reinstatement; and under any fringe benefit offered to employees by virtue of employment.

(d) *Voluntary leaves of absence.* In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient must treat pregnancy or related conditions as a justification for a voluntary leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(e) *Lactation time and space.* (1) A recipient must provide reasonable break time for an employee to express breast milk or breastfeed as needed.

(2) A recipient must ensure that an employee can access a lactation space, which must be a space other than a bathroom that is clean, shielded from view, free from intrusion from others, and may be used by an employee for expressing breast milk or breastfeeding as needed.

■ 25. Section 106.60 is revised to read as follows:

§ 106.60 Pre-employment inquiries.

(a) *Marital status.* A recipient must not make a pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is ''Miss or Mrs.''

(b) *Sex.* A recipient may ask an applicant for employment to self-identify their sex, but only if this question is asked of all applicants and if the response is not used as a basis for discrimination prohibited by Title IX or this part.

■ 26. Section 106.71 is revised to read as follows:

§ 106.71 Retaliation.

A recipient must prohibit retaliation, including peer retaliation, in its education program or activity. When a recipient has information about conduct that reasonably may constitute retaliation under Title IX or this part, the recipient is obligated to comply with § 106.44. Upon receiving a complaint alleging retaliation, a recipient must initiate its grievance procedures under § 106.45, or, as appropriate, an informal resolution process under § 106.44(k). As set out in § 106.45(e), if the complaint is consolidated with a complaint of sex-based harassment involving a student complainant or student respondent at a postsecondary institution, the grievance procedures initiated by the consolidated complaint must comply with the requirements of both §§ 106.45 and 106.46.

■ 27. Section 106.81 is revised to read as follows:

§ 106.81 Procedures.

The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein. These procedures may be found at 34 CFR 100.6 through 100.11 and 34 CFR part 101.

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Part III

Department of Labor

Employment and Training Administration
Wage and Hour Division

20 CFR Parts 651, 653, 655, et al.
29 CFR Part 501
Improving Protections for Workers in Temporary Agricultural Employment in the United States; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 651, 653, 655, and 658

Wage and Hour Division

29 CFR Part 501

[DOL Docket No. ETA–2023–0003]

RIN 1205–AC12

Improving Protections for Workers in Temporary Agricultural Employment in the United States

AGENCY: Employment and Training Administration and Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (Department or DOL) is amending its regulations governing the certification of temporary employment of nonimmigrant workers employed in temporary or seasonal agricultural employment and the enforcement of the contractual obligations applicable to employers of these nonimmigrant workers. The revisions in this final rule focus on strengthening protections for temporary agricultural workers and enhancing the Department's capabilities to monitor program compliance and take necessary enforcement actions against program violators.

DATES: This final rule is effective June 28, 2024.

FOR FURTHER INFORMATION CONTACT: For further information regarding 20 CFR parts 651, 653, and 658, contact Kimberly Vitelli, Administrator, Office of Workforce Investment, Employment and Training Administration, Department of Labor, Room C–4526, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693–3980 (this is not a toll-free number). For further information regarding 20 CFR part 655, contact Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Avenue NW, Room N–5311, Washington, DC 20210, telephone: (202) 693–8200 (this is not a toll-free number). For further information regarding 29 CFR part 501, contact Daniel Navarrete, Acting Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, Department of Labor, Room S–3018, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693–0406 (this is not a toll-free number). For persons with a hearing or speech disability who need assistance to use the telephone system, please dial 711 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION:

Preamble Table of Contents

I. Acronyms and Abbreviations

ADA Americans with Disabilities Act
AEWR Adverse effect wage rate
AIE Area(s) of intended employment
ALJ Administrative Law Judge
ALRA California Agricultural Labor Relations Act
ALRB California Agricultural Labor Relations Board
ARB Administrative Review Board
ARIMA Autoregressive integrated moving average
ARS Agricultural Recruitment System
ATV All-terrain vehicle
BALCA Board of Alien Labor Certification Appeals
BLS Bureau of Labor Statistics
CAGR Compound annual growth rate
CBA Collective bargaining agreement
CFR Code of Federal Regulations
CO Certifying Officer
CRA Congressional Review Act
CY Calendar year
DBA Doing business as
DHS Department of Homeland Security
DOJ Department of Justice
DOL Department of Labor
EEOC Equal Employment Opportunity Commission
E.O. Executive Order
ES Employment Service
ES system Employment Service system
ETA Employment and Training Administration
FDA Food and Drug Administration
FEIN Federal Employer Identification Number
FLAG Foreign Labor Application Gateway
FLS Farm Labor Survey
FLSA Fair Labor Standards Act
FMVSS Federal Motor Vehicle Safety Standards
FOIA Freedom of Information Act
FR Federal Register
FRN Federal Register notice
FY Fiscal year
GAO Government Accountability Office
GVWR Gross Vehicle Weight Rating
H–2ALC H–2A labor contractor
HR Human resources
ICR Information Collection Request
IFR Interim final rule
INA Immigration and Nationality Act
MSFW Migrant or seasonal farmworker
MSPA Migrant and Seasonal Agricultural Worker Protection Act
NAICS North American Industry Classification System
NARA National Archives and Records Administration
NHTSA National Highway Traffic Safety Administration
NIOSH National Institute for Occupational Safety and Health
NLRA National Labor Relations Act
NLRB National Labor Relations Board
NOD Notice of Deficiency
NPC National Processing Center
NPRM Notice of proposed rulemaking
NPWC National Prevailing Wage Center
OALJ Office of Administrative Law Judges
OEWS Occupational Employment and Wage Statistics
OFLC Office of Foreign Labor Certification
OHV Off-highway vehicle
OIG Office of Inspector General
OIRA Office of Information and Regulatory Affairs
OMB Office of Management and Budget
OSHA Occupational Safety and Health Administration

OWI Office of Workforce Investment
PII Personally identifiable information
PRA Paperwork Reduction Act
Pub.L. Public Law
RFA Regulatory Flexibility Act
RIN Regulation Identifier Number
ROPS Roll-Over Protective Structure
SBA Small Business Administration
SBREFA Small Business Regulatory Enforcement Fairness Act of 1996
Sec. Section of a Public Law
Secretary Secretary of Labor
SOC Standard Occupational Classification
SORN System of Records Notice
Stat. U.S. Statutes at Large
SUSB Statistics of U.S. Businesses
SWA State workforce agency
TVPA Victims of Trafficking and Violence Protection Act of 2000
UMRA Unfunded Mandates Reform Act of 1995
U.S.C. United States Code
USCIS U.S. Citizenship and Immigration Services
USDA U.S. Department of Agriculture
U.S.DOT U.S. Department of Transportation
VSL Value of a statistical life
WHD Wage and Hour Division

II. Background

A. Legal Authority

1. Immigration and Nationality Act

The Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986, establishes an ''H–2A'' nonimmigrant visa classification for a worker ''having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature.'' 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. 1184(c)(1) and 1188.[1] Permanent, year-round job opportunities cannot be classified as temporary or seasonal. 87 FR 61660, 61684 (Oct. 12, 2022);[2] *see also* 8 U.S.C. 1101(a)(15)(H)(ii)(a) (the INA permits only ''agricultural labor or services . . . of a temporary or seasonal nature'' to be performed under the H–2A visa category).

The H–2A nonimmigrant worker visa program enables U.S. agricultural employers to employ foreign workers on a temporary basis to perform temporary or seasonal agricultural labor or services only where the Secretary of Labor (Secretary) certifies that: (1) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition; and (2) the employment of the foreign worker in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. 1188(a)(1).[3] The INA prohibits the Secretary from issuing this certification—known as a ''temporary agricultural labor certification''—unless both of the above-referenced conditions are met. The INA further prohibits the Secretary from issuing a temporary agricultural labor certification if any of the conditions in 8 U.S.C. 1188(b) apply concerning strikes or lock-outs, labor certification program debarments, workers' compensation assurances, and positive recruitment.

The Secretary has delegated the authority to issue temporary agricultural labor certifications to the Assistant Secretary for Employment and Training, who in turn has delegated that authority to the Employment and Training Administration's (ETA) OFLC. *See* Secretary's Order 06–2010 (Oct. 20, 2010), 75 FR 66268 (Oct. 27, 2010). In addition, the Secretary has delegated to WHD the responsibility under 8 U.S.C. 1188(g)(2) to assure employer compliance with the terms and conditions of employment under the H–2A program. *See* Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014). Pursuant to the INA and implementing regulations promulgated by DOL and the Department of Homeland Security (DHS), DOL evaluates an employer's need for agricultural labor or services to determine whether it is seasonal or temporary during the review of an H–2A Application. 20 CFR 655.161(a); 8 CFR 214.2(h)(5)(i)(A) and (h)(5)(iv).

2. Wagner-Peyser Act

The Wagner-Peyser Act of 1933 established the United States Employment Service (ES), a nationwide system to improve the functioning of the nation's labor markets by bringing together individuals seeking employment with employers seeking workers. 29 U.S.C. 49 *et seq.* Section 3(a) of the Act sets forth the basic responsibilities of the Department in the ES, which include assisting in coordinating the State public employment service offices throughout the country and in increasing their usefulness by prescribing standards for efficiency, promoting uniformity in procedures, and maintaining a system of clearing labor between the States. 29 U.S.C. 49b. The Act further authorizes the Department ''to make such rules and regulations as may be necessary to carry out [its] provisions.'' 29 U.S.C. 49k.

Consistent with the aims of sec. 3(a), the ES system provides labor exchange services to its participants and has undergone numerous changes to align its activities with broader national workforce development policies and statutory requirements. The Workforce Innovation and Opportunity Act (Pub. L. 113–128), passed in 2014, expanded upon the previous workforce reforms in the Workforce Investment Act of 1998 and, among other things, identified the ES system as a core program in the One-Stop local delivery system, also called the American Job Center network.

In 1974, the case *National Ass'n for the Advancement of Colored People (NAACP), Western Region, et al.* v. *Brennan et al.,* No. 2010–72, 1974 WL 229 (D.D.C. Aug. 13, 1974), resulted in a detailed court order mandating various Federal and State actions consistent with applicable law (Richey Order). The Richey Order required the Department to implement and maintain a Federal and State monitoring and advocacy system and set forth requirements to ensure the delivery of ES services, benefits, and protections to migrant or seasonal farmworkers (MSFWs) on a non-discriminatory basis, and to provide such services in a manner that is qualitatively equivalent and quantitatively proportionate to those provided to non-farmworkers. In 1977 and 1980, consistent with its authority under the Wagner-Peyser Act, the Department published regulations at 20 CFR parts 651, 653, and 658 to implement the requirements of the Richey Order. Part 653 sets forth standards and procedures for providing services to MSFWs and provides regulations governing the Agricultural Recruitment System (ARS), a system for interstate and intrastate agricultural job recruitment. Part 658 sets forth standards and procedures for the administrative handling of complaints alleging violations of ES regulations and of employment-related laws, the discontinuation of services provided by the ES system to employers, the review and assessment of State agency compliance with ES regulations, and the process the Department must follow if

[1] For ease of reference, sections of the INA are referred to by their corresponding section in the United States Code.

[2] Final Rule, *Temporary Agricultural Employment of H–2A Nonimmigrants in the United States,* 87 FR 61660 (Oct. 12, 2022) (2022 H–2A Final Rule).

[3] Following certification by DOL, the employer must file an H–2A petition (defined at 20 CFR 655.103(b) as the U.S. Citizenship and Immigration Services (USCIS) Form I–129, Petition for a Nonimmigrant Worker, with H Supplement or successor form and/or supplement, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H–2A nonimmigrant workers) with USCIS, requesting one or more workers not to exceed the total listed on the temporary agricultural labor certification. Generally, USCIS must approve this petition before the worker(s) can be considered eligible for an H–2A visa or for H–2A nonimmigrant status. The limited exceptions from this requirement may be found at 8 CFR 274a.12(b)(20) and (21).

State agencies are not complying with the ES regulations.

B. Current Regulatory Framework

Since 1987, the Department has operated the H–2A temporary agricultural labor certification program under regulations promulgated pursuant to the INA. The standards and procedures applicable to the certification and employment of workers under the H–2A program are found in 20 CFR part 655, subpart B, and 29 CFR part 501. The majority of the Department's current regulations governing the H–2A program were published in 2010 and many were strengthened in a final rule the Department published in October 2022.[4] The Department incorporated the provisions for employment of workers in the herding and production of livestock on the range into the H–2A regulations, with modifications, in 2015.[5] The provisions governing the employment of workers in the herding and production of livestock on the range are codified at 20 CFR 655.200 through 655.235.[6] Relatedly, the regulations implementing the Wagner-Peyser Act at 20 CFR parts 651, 653, and 658 establish the ARS, through which employers can recruit U.S. workers for agricultural employment opportunities, and which prospective H–2A employers must use to recruit U.S. workers as a condition of receiving a temporary agricultural labor certification.

C. Need for Rulemaking

This final rule aims to address some concerns expressed by various stakeholders during rulemaking. It also responds to recent court decisions and program experience indicating a need to enhance the Department's ability to enforce regulations related to foreign labor recruitment, to improve accountability for successors in interest and employers who use various methods to attempt to evade the law and regulatory requirements, and to enhance worker protections, as explained further in the sections that follow.

In particular and as noted above, the Department recently published the 2022 H–2A Final Rule, which strengthened worker protections in the H–2A program, clarified the obligations of joint employers and the existing prohibitions on fees related to foreign labor recruitment, authorized debarment of agents and attorneys for their own misconduct, enhanced surety bond obligations and related enforcement authorization, modernized the prevailing wage determination process, enhanced regulation of H–2A labor contractors (H–2ALCs), and provided additional safeguards related to employer-provided housing and wage obligations. *See* 87 FR 61660. In response to the notice of proposed rulemaking (NPRM) published prior to the 2022 H–2A Final Rule, the Department received many comments suggesting changes that were beyond the scope of that rulemaking, such as suggestions relating to increased enforcement and transparency regarding the foreign labor recruitment process, increased worker protections, revisions to the definition of employer, stronger integrity provisions to account for complex business organizations and for methods used to circumvent the regulations, strengthening provisions related to piece rate pay, and suggestions to revise the Wagner-Peyser Act regulations to ensure stronger protections for workers in the event of harmful last-minute start date delays.

After careful consideration of comments from the public, the Department is adopting important provisions in this final rule that will further strengthen protections for agricultural workers and enhance the Department's enforcement capabilities, thereby permitting more effective enforcement against fraud and program violations. These revisions will help prevent exploitation and abuse of agricultural workers and ensure that unscrupulous employers do not financially gain from their violations or contribute to economic and workforce instability by circumventing the law, both of which would adversely affect the wages and working conditions of workers in the United States similarly employed, and undermine the Department's ability to determine whether there are, in fact, insufficient U.S. workers for proposed H–2A jobs. It is the Department's policy to maintain robust protections for workers and vigorously enforce all laws within its jurisdiction governing the administration and enforcement of nonimmigrant visa programs. This includes the coordination of the administration and enforcement activities of ETA, WHD, and the Department's Office of the Solicitor in the promotion of the hiring of U.S. workers and the safeguarding of wages and working conditions for workers in the United States. In addition, these agencies make criminal referrals to the Department's Office of Inspector General (OIG) in appropriate circumstances, such as when the agencies encounter visa-related fraud. The Department has determined through program experience, recent litigation, challenges in enforcement, comments on this rulemaking as well as on prior rulemakings, and reports from various stakeholders that it is necessary to adopt stronger protections for agricultural workers to better ensure that employers, agents, attorneys, and labor recruiters comply with the law, and to enhance program integrity by improving the Department's ability to monitor compliance and investigate and pursue remedies from program violators. The recent surge in use of the H–2A program amplifies these needs.[7]

III. General Comments on the Proposed Rule

On September 15, 2023, the Department published an NPRM requesting public comments on proposals intended to improve protections for workers in temporary agricultural employment in the United States. *See* 88 FR 63750 (Sept. 15, 2023).[8] The proposed revisions focused on strengthening protections for temporary agricultural workers and enhancing the Department's capabilities to monitor program compliance and take necessary enforcement actions against program violators. The NPRM invited written comments from the public on all aspects of the proposed amendments to the regulations. A 60-day comment period allowed for the public to inspect the proposed rule and provide comments through November 14, 2023.

The Department received a total of 12,928 public comments in response to the NPRM before the end of the comment period. Included in these comments were multiple form letter campaigns, which were received as bundled submissions to the

[4] Final Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States,* 75 FR 6884 (Feb. 12, 2010) (2010 H–2A Final Rule); Final Rule, *Temporary Agricultural Employment of H–2A Nonimmigrants in the United States,* 87 FR 61660 (Oct. 12, 2022) (2022 H–2A Final Rule).

[5] Final Rule, *Temporary Agricultural Employment of H–2A Foreign Workers in the Herding or Production of Livestock on the Range in the United States,* 80 FR 62958 (Oct. 16, 2015) (2015 H–2A Herder Final Rule).

[6] Consistent with a court-approved settlement agreement in *Hispanic Affairs Project, et al.* v. *Scalia, et al.,* No. 15–cv–1562 (D.D.C.), the Department recently rescinded 20 CFR 655.215(b)(2). *See* Final Rule, *Adjudication of Temporary and Seasonal Need for Herding and Production of Livestock on the Range Applications Under the H–2A Program,* 86 FR 71373 (Dec. 16, 2021) (2021 H–2A Herder Final Rule).

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[7] *See, e.g.,* OFLC, Performance Data, *https://www.dol.gov/agencies/eta/foreign-labor/performance* (last accessed Feb. 8, 2024) (providing disclosure data for the H–2A labor certification program since Fiscal Year (FY) 2008).

[8] NPRM, *Improving Protections for Workers in Temporary Agricultural Employment in the United States,* 88 FR 63750 (Sept. 15, 2023) (2023 NPRM).

Regulations.gov website. After accounting for duplicate submissions, the Department received comments from 8,725 unique commenters. Comments can be viewed online at *https://www.regulations.gov/docket/ETA-2023-0003.* The commenters represented a wide range of stakeholders from the public, private, and not-for-profit sectors. The Department received comments from a geographically diverse cross-section of stakeholders within the agricultural sector, including farmworkers, workers' rights advocacy organizations, farm owners, farm labor contractors, trade associations for agricultural products and services, not-for-profit organizations representing agricultural issues, and other organizations with an interest in agricultural activities. Public sector commenters included Federal elected officials, State officials, and agencies representing State governments. Private sector commenters included business owners, recruiting companies, and law firms. Not-for-profit sector commenters included both industry organizations (*e.g.,* professional associations) and worker advocacy organizations.

The Department recognizes and appreciates the value of comments, ideas, and suggestions from all those who commented on the proposal, and this final rule was developed after review and consideration of all public comments timely received in response to the NPRM. Some comments provided general opinions on the proposed rule, or on agricultural labor generally, and the Department thanks the commenters for their time to submit their feedback. Where public comments provided substantive feedback on specific proposals in the NPRM, they have been responded to in the sections that follow. When the Department has made changes from the NPRM as a result of public comment, those changes are identified in the sections below.

IV. Overview of This Final Rule

A. Summary of Major Provisions of This Final Rule

1. Protections for Worker Voice and Empowerment

In this final rule, the Department is adopting several revisions to § 655.135 that will provide stronger protections for workers protected by the H–2A program to advocate on behalf of themselves and their coworkers regarding their working conditions and prevent employers from suppressing this activity. As detailed in Section VI, the Department believes that these protections are important to prevent adverse effect on the working conditions of workers in the United States similarly employed. 8 U.S.C. 1188(a)(1). Specifically, the Department is broadening § 655.135(h), which prohibits unfair treatment by employers, by expanding and explicitly protecting certain activities all workers must be able to engage in without fear of intimidation, threats, and other forms of retaliation. For those workers engaged in agriculture as defined and applied in 29 U.S.C. 203(f) of the Fair Labor Standards Act (FLSA) (''FLSA agriculture''), who are exempt from the protections of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.,* the Department also revises § 655.135(h) to include some new protections to safeguard collective action and concerted activity for mutual aid and protection, and, in a change responsive to comments, to allow those workers to decline to attend or listen to employer speech regarding protected activities without fear of retaliation.[9]

The Department also finalizes one of the provisions initially proposed at § 655.135(m) to require employers to permit workers engaged in FLSA agriculture to designate a representative of their choosing in certain interviews, with minor changes in response to comments, and adopts a new provision at § 655.135(n) to permit workers to invite or accept guests to worker housing (which has been substantially revised in response to comments received). New § 655.135(m) and (n) are intended, like the revisions and additions to § 655.135(h), to strengthen the ability of workers to advocate on behalf of themselves and their coworkers regarding their required terms and conditions of employment, to better protect against adverse effect on similarly employed workers in the United States.

The final rule does not require H–2A employers to recognize labor organizations or to engage in any collective bargaining activities such as those that may be required by the NLRA itself or by a State law such as the California Agricultural Labor Relations Act (ALRA), Cal. Lab. Code § 1140 *et seq.,* nor does it create any independent rights or obligations for labor organizations. Instead, this final rule requires employers to provide assurances that they will not intimidate, threaten, or otherwise discriminate against certain workers or others for engaging in ''activities related to self-organization,'' including ''concerted activities for the purpose of mutual aid or protection relating to wages or working conditions,'' or refusing to engage in such activities. 20 CFR 655.135(h)(2). Such activities may include seeking to form, join, or assist a labor organization, but also encompasses numerous other ways that workers can engage, individually or collectively, to enforce their rights, as further discussed below.

2. Clarification of Termination for Cause

In this final rule, the Department adopts with modifications the NPRM definition of ''termination for cause'' at § 655.122(n) by adopting five criteria that must be satisfied to ensure that disciplinary and termination processes are justified and reasonable, which are intended to promote the integrity and regularity of any such processes. These changes will help to ensure employers do not arbitrarily and unjustly terminate workers, thereby stripping them of essential rights to which they would otherwise be entitled under the H–2A program. Moreover, these changes will assist the Department in determining whether an individual worker was terminated without cause where the employer gives pretextual reasons for a termination, and will provide regulatory certainty to employers by providing clear guidelines. In response to comments, the Department adopts minor modifications from the NPRM in this final rule to clarify the definition of termination for cause, the criteria that an employer must meet to terminate a worker for cause, and the types of terminations that are not ''for cause.''

3. Immediate Effective Date for Updated AEWR

The Department adopts the proposed revisions to § 655.120(b)(2) to designate the effective date of each updated adverse effect wage rate (AEWR) as its date of publication in the **Federal**

[9] As discussed further in Section VI.C.2.b below, the NLRA excludes from its protections workers who are engaged in FLSA agriculture. See definition of ''employee'' at 29 U.S.C. 152(3) (excluding ''any individual employed as an agricultural laborer''). Congress has provided that the definition of ''agricultural'' in sec. 3(f) of the FLSA also applies to the NLRA. *See, e.g., Holly Farms Corp. et al.* v. *NLRB,* 517 U.S. 392, 397–98 (1996). The H–2A statute and the Department, however, define ''agricultural labor or services'' under the H–2A program more broadly to include FLSA agriculture as well as other activities. *See* 8 U.S.C. 1101(a)(15)(H)(ii)(a); 20 CFR 655.103(c). Certain provisions of this final rule apply only to workers or persons engaged in FLSA agriculture (who are excluded from the NLRA's protections). Therefore, workers who are not engaged in FLSA agriculture (*e.g.,* those in logging occupations) will not be covered by the provisions of this final rule that are limited to workers or persons engaged in FLSA agriculture. However, the vast majority of such workers are already covered by the NLRA as ''employees'' under 29 U.S.C. 152(3). Nothing in this final rule alters or circumscribes the rights of workers who are already protected by the NLRA to engage in conduct and exercise rights afforded under that law.

Register, and revises paragraph (b)(3) to state that the employer will be obligated to pay the updated AEWR immediately upon publication of the new AEWR in the **Federal Register**. If the update falls in the middle of a pay period, the employer may pay the updated AEWR at the end of the following pay period, but the employer must provide retroactive pay for all hours worked during the period in which the AEWR was updated, beginning immediately on the date the Department publishes the notice in the **Federal Register**. This change is intended to help ensure workers are paid at least the updated AEWR, as soon as it is published, for all work they perform, and thereby help to ensure that the employment of H–2A workers does not adversely affect the wages and working conditions of workers in the United States similarly employed.

4. Enhanced Transparency for Job Opportunity and Foreign Labor Recruitment

The Department is adopting the proposed changes for new disclosure requirements to enhance transparency in the foreign worker recruitment chain and bolster the Department's capacity to protect vulnerable agricultural workers from exploitation and abuse, as explained more fully below. This final rule includes a new § 655.137, *Disclosure of foreign worker recruitment,* and a new § 655.135(p), *Foreign worker recruitment,* which are similar to the regulations governing disclosure of foreign worker recruitment in the H–2B program. The provisions require an employer and its attorney or agent, as applicable, to provide a copy of all agreements with any agent or recruiter that the employer engages or plans to engage in the recruitment of prospective H–2A workers, regardless of whether the agent or recruiter is located in the United States or abroad. The provisions also require the employer to disclose the identity (*i.e.,* name and, if applicable, identification/registration number) and geographic location of persons and entities hired by or working for the foreign labor recruiter and any of the agents or employees of those persons and entities who will recruit or solicit prospective H–2A workers. As explained more fully below, the Department will gather the additional recruitment chain information when the employer files its H–2A Application and will require the employer to submit a Form ETA–9142A, *Appendix D,* which mirrors the Form ETA–9142B, *Appendix C.* Consistent with current practice in the H–2B program, § 655.137(d) provides for the Department's public disclosure of the names of the agents and foreign labor recruiters used by employers. These additional disclosures of information about the recruitment chain are necessary for the Department to carry out its enforcement obligations, protect vulnerable agricultural workers and program integrity, and ensure equitable administration of the H–2A program for law abiding employers.

The Department also is adopting, with minor changes, the proposal to require the employer to provide the full name, date of birth, address, telephone number, and email address of all owner(s) of the employer(s), any person or entity who is an operator of the place(s) of employment (including the fixed-site agricultural business that contracts with the H–2ALC), and any person who manages or supervises the H–2A workers and workers in corresponding employment under the H–2A Application. The Department has revised the Form ETA–9142A to require, where applicable, additional information about prior trade or doing business as (DBA) names the employer has used in the most recent 3-year period preceding its filing of the H–2A Application. Sections 655.130 and 655.167 clarify that the employer must continue to update the information required by the above paragraphs until the end of the work contract period, including extensions thereto, and retain this information for a period of 3 years from the date of certification and produce it upon request by the Department. These disclosure requirements will help prevent adverse effects on the working conditions of workers in the United States similarly employed by increasing transparency in the international recruitment chain, aiding the Department in assessing the nature of the job opportunity and the employer's need, enhancing the Department's ability to enforce the prohibition against recruitment-related fees and to pursue remedies from program violators, assisting the Department in identifying potential successors in interest to debarred employers, and better protecting agricultural workers from abuse and exploitation in the United States and abroad.

5. Enhanced Transparency and Protections for Agricultural Workers

a. Disclosure of Minimum Productivity Standards, Applicable Wage Rates, and Overtime Opportunities

In this final rule, the Department adopts the proposal to revise § 655.122(l) to require employers to disclose any minimum productivity standards they will impose as a condition of job retention, regardless of whether the employer pays on a piece rate or hourly basis. This is intended to help ensure that agricultural workers are fully apprised of the material terms and conditions of employment, including any productivity standards that may serve as a basis for termination for cause. An existing regulatory provision, § 655.122(b), would require that any such minimum productivity standard be bona fide and normal and accepted among non-H–2A employers in the same or comparable occupations and crops. This revision is intended to ensure that workers are aware of productivity standards that are a condition of job retention before accepting the job, and that an employer cannot raise productivity standards mid-contract with the goal of terminating workers.

The Department also adopts revisions at §§ 655.120(a) and 655.122(l), with minor changes responsive to comments, to require employers to offer and advertise on the job order any applicable prevailing piece rate, the highest applicable hourly wage rate, and any other rate the employer intends to pay, and to pay workers the highest of these wage rates, as calculated at the time work is performed. The Department also adopts proposed new provisions, at § 655.122(l)(4) and § 655.210(g)(3) of this final rule, that explicitly require the employer to specify in the job order any applicable overtime premium wage rate(s) for overtime hours worked and the circumstances under which the wage rate(s) for such overtime hours will be paid. These revisions are intended to help ensure that agricultural workers are fully apprised of the material terms and conditions of employment, and to aid the Department in its administration and enforcement of the H–2A program.

b. Enhanced Protections for Workers Through the ES System

The Department adopts revisions to the Wagner-Peyser Act implementing regulations at 20 CFR 653.501 to clarify an employer's obligations in the event of a delayed start date and to make conforming revisions to the H–2A regulations at 20 CFR 655.145 and a new § 655.175 to clarify pre-certification H–2A Application amendments and employer obligations in the event of post-certification changes to the start date. As noted above, the previous regulations require an employer to provide notice to the ES Office holding the job order of delayed start dates and impose obligations on employers that

fail to provide the requisite notice, but do not require employers to notify workers directly of any such delay.

The Department adopts revisions to part 658, subpart F, and related definitions at § 651.10, regarding the discontinuation of Wagner-Peyser Act ES services to employers. The Department clarifies and expands the scope of entities whose ES services can be discontinued to also include agents, farm labor contractors, joint employers, and successors in interest. The Department also adopts revisions to clarify the bases for discontinuation at § 658.501, and to clarify and streamline the discontinuation procedures at §§ 658.502 through 658.504, including the notice requirements for SWAs, evidentiary requirements for employers, when and how employers may request a hearing, and procedures for requesting reinstatement. These changes are designed to increase the reach and utility of the discontinuation of services regulations, which, as discussed in the NPRM, SWAs have infrequently used relative to the number of complaints and apparent violations that SWAs processed in recent years. *See* 88 FR 63761. These changes are described in more detail below.

c. Enhanced Transportation Safety Requirements

The Department adopts the proposal, with minor modifications, to revise § 655.122(h)(4) to require the provision, maintenance, and wearing of seat belts in most employer-provided transportation, which would reduce the hazards associated with agricultural worker transportation. Specifically, as explained in detail below, the Department revises § 655.122(h)(4) to prohibit an employer from operating any employer-provided transportation unless all passengers and the driver are properly restrained by seat belts meeting standards established by the U.S. Department of Transportation (U.S. DOT), as long as the transportation was manufactured with seat belts pursuant to U.S. DOT's Federal Motor Vehicle Safety Standards (FMVSS). Essentially, if the vehicle is manufactured with seat belts, this final rule would require the employer to retain and maintain those seat belts in good working order and ensure that each worker is wearing a seat belt before the vehicle is operated. In response to public comment, the Department clarifies in this final rule that an employer must not allow any other person, in addition to the employer, to operate employer-provided transportation unless seat belts are provided, maintained, and worn.

d. Protection Against Passport and Other Immigration Document Withholding

The Department adopts the proposal to create a new § 655.135(o) that will directly prohibit an employer from holding or confiscating a worker's passport, visa, or other immigration or government identification documents. This prohibition is independent of whether the employer is otherwise in compliance with the Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Public Law 106–386 (2000), 18 U.S.C. 1592(a), as required under the current H–2A regulations. This change is intended to better protect workers from potential labor trafficking.

e. Protections in the Event of a Minor Delay in the Start of Work

The Department adopts the proposal to create a new § 655.175 that addresses post-certification changes currently addressed at § 655.145(b) and creates new obligations and procedures in the event an employer must briefly delay the start of work due to unforeseen circumstances that jeopardize crops or commodities prior to the expiration of an additional recruitment period. Section 655.175 limits minor delays to 14 calendar days or less and requires the employer to notify each worker and the SWA of any minor delay in the start of work. Consistent with § 653.501(c), § 655.175 includes new compensation obligations that require the employer to pay workers the applicable wage rate for each day work is delayed, for a period of up to 14 calendar days, starting with the certified start date, if the employer fails to provide 10 business days' notice of the delay.

6. Enhanced Integrity and Enforcement Capabilities

a. Enhancements to the Department's Ability To Apply Orders of Debarment Against Successors in Interest

The Department adopts a new § 655.104 regarding successors in interest, revised from the NPRM based on comments received, which clarifies the liability of successors in interest for debarment purposes and streamlines the Department's procedures to deny temporary agricultural labor certifications filed by or on behalf of successors in interest to debarred employers, agents, and attorneys. The Department adopts conforming revisions to §§ 655.103(b), 655.181, and 655.182 and 29 CFR 501.20. These revisions are intended to better reflect the liability of successors in interest under the well-established successorship doctrine, and to better ensure that debarred entities do not circumvent the effects of debarment.

b. Defining the Single Employer Test for Assessing Temporary Need, or for Enforcement of Contractual Obligations

The Department adopts the proposal to define the term *single employer* at a new § 655.103(e) and adopts factors to determine if multiple nominally separate employers are acting as one. Defining the term would codify the Department's long-standing practice of using the single employer test (sometimes referred to as an ''integrated employer'' test), or similar analysis, to determine if separate employers are a single employer for purposes of assessing seasonal or temporary need, or for enforcement of contractual obligations. In relation to seasonal or temporary need, the Department has received applications for temporary agricultural labor certification that purport to be for job opportunities with different employers when, in reality, the workers hired under these certifications are employed by companies so intertwined that they are operating as a de facto single employer in one area of intended employment (AIE) for a period of need that is not truly temporary or seasonal. In its enforcement experience, the Department has increasingly encountered H–2A employers that purport to employ H–2A workers under one corporate entity and non-H–2A workers under another, creating the appearance that the H–2A employer has no workers in corresponding employment when actually, the corporate entities are so intertwined that all of the workers are employed by a single H–2A employer. Some employers have attempted to use these arrangements to avoid the obligation to provide certain H–2A program requirements to workers in corresponding employment, including the required wage rate. Codifying the definition of single employer will prevent employers from using their corporate structures to circumvent statutory and regulatory requirements.

B. Section-by-Section Analyses

Sections V through VII of the preamble provide the Department's responses to public comments received on the NPRM and rationale for the amendments adopted to 20 CFR parts 651, 653, 658, and 655, and 29 CFR part 501, section by section, and generally follow the outline of the regulations. Within each section of the preamble, the Department has noted and responded to those public comments that are addressed to that particular section of this final rule. If a proposed change is

not addressed in the discussion below, it is because the public comments did not substantively address that specific provision and no changes have been made to the proposed regulatory text. The Department received some comments on the NPRM that were outside the scope of the proposed regulations, and the Department offers no substantive response to such comments. The Department has also made some non-substantive changes to improve readability and conform the document stylistically.

C. Transition Procedures

The Department is providing a short transition period for receiving and processing criteria clearance orders and *Applications for Temporary Employment Certification* in order to promote an orderly and seamless implementation of the changes required by this final rule. This transition period will provide the Department with the necessary time to implement changes to Office of Management and Budget (OMB)-approved application forms within the Foreign Labor Application Gateway (FLAG) System and to its standard operating procedures and policies, and to provide training and technical assistance to the Office of Foreign Labor Certification (OFLC), Wage and Hour Division (WHD), State workforce agencies (SWAs), employers, and other stakeholders in order to familiarize them with changes required by this final rule.

The Department's regulations require that an employer submit a completed job order on Form ETA–790/790A (including all required addenda), an *Application for Temporary Employment Certification* on Form ETA–9142A (including all required addenda), and all required supporting documentation with the National Processing Center (NPC), using the electronic method(s) designated by the OFLC Administrator. Except where the employer has received prior approval from the OFLC Administrator to submit by mail as set forth in § 655.130(c)(2) or has been granted a reasonable accommodation as set forth in § 655.130(c)(3), the NPC will return without review any job order or *Application for Temporary Employment Certification* submitted using a method other than the designated electronic method(s).

In order to promote an orderly and seamless transition to this final rule, the NPC will process all H–2A applications submitted on or after 12:00 a.m. Eastern Daylight Time, August 29, 2024, in accordance with 20 CFR part 655, subpart B. in effect as of June 28, 2024.

The NPC will continue to process all H–2A applications submitted before 7:00 p.m. Eastern Daylight Time on or before August 28, 2024, in accordance with 20 CFR part 655, subpart B in effect as of the calendar day before the effective date as stated in this rule. The Department will use the 5 hours between 7:00 p.m. Eastern Daylight Time on August 28, 2024, and 12:00 a.m. Eastern Daylight Time on August 29, 2024, to initiate procedures to deploy and test changes to the FLAG System in order to effectively implement the new changes. No job orders or applications can be filed during this timeframe. All initiated, but unsubmitted, H–2A applications in FLAG as of 7:00 p.m. Eastern Daylight Time on August 28, 2024, will be deleted as of that time.

The Department believes this short transition period will provide employers, or their authorized agents or attorneys, with adequate time to plan and prepare their job orders and *Applications for Temporary Employment Certification* for submission under this final rule and to collect all necessary information that must be filed or retained in support of an H–2A application.

After the transition period, FLAG will not permit an employer to file prior versions of forms.

V. Discussion of Revisions to Employment Service Regulations

A. Introduction

In this final rule, the Department revises the ES regulations (20 CFR parts 651 through 654 and 658) that implement the Wagner-Peyser Act of 1933. These regulations include the provision of ES services with a particular emphasis on MSFWs, as well as provisions governing the discontinuation of ES services to employers. This final rule updates the language and content of the regulations to, among other things, improve and strengthen the regulations governing discontinuation of ES services to employers, including the applicable bases and procedures. In some areas, this final rule establishes entirely new responsibilities and procedures; in other areas, this final rule clarifies and updates pre-existing requirements. The revisions make important changes to the following components of the ES system: definitions, requirements for processing clearance orders, and the discontinuation of ES services provided to employers.

Within the revisions to the ES regulations, the Department is adopting the following modifications to the proposed regulatory amendments in the NPRM as a result of public comments received: (1) revising the new *successor in interest* definition in § 651.10 to omit unnecessary and potentially contradictory language; (2) revising provisions on the discontinuation of services list in new § 653.501(b)(4) to allow employers to submit requests for determinations to the Administrator of ETA's Office of Workforce Investment (OWI); (3) clarifying the requirements in § 653.501(c)(1)(iv)(E) for disclosure of wages on the clearance order; (4) revising the provisions in § 653.501(c) on delays in the start of work to clarify the applicability of the housing requirement to migrant workers, replace the proposed subsistence requirement with a requirement that the employer provide or pay all benefits and expenses listed on the clearance order, and incorporate requirements on method of delivery and language access for notifications to workers; and (5) providing that the SWA must consider whether there is a basis to discontinue services in cases of alleged misrepresentation or noncompliance in connection with a current or prior temporary labor certification, if the circumstances occurred within the previous 3 years. Additionally, the Department is adopting the following modifications to proposed amendments in the NPRM for clarity and consistency: (1) revising the *employment-related laws* definition in § 651.10 to clarify that it includes ''rules'' and ''standards''; (2) relocating language on liability of successors from the new *successor in interest* definition in § 651.10 to § 658.500; (3) making minor conforming changes to the assurances and delayed start requirements in § 653.501(c)(3)(i) and (iv) and § 653.501(c)(5); and (4) incorporating into § 658.501(b) existing obligations on SWAs under part 655, subpart B, and 29 CFR parts 501 and 503 to notify OFLC and WHD in cases of alleged misrepresentation or noncompliance with temporary labor certification requirements.

Note that on November 24, 2023, the Department issued a final rule regarding Wagner-Peyser Act staffing (Staffing Final Rule). 88 FR 82658 (Nov. 24, 2023). In the NPRM to the Staffing Final Rule (Staffing NPRM), 87 FR 23700 (Apr. 20, 2022), the Department proposed changes to several sections in 20 CFR parts 653 and 658 that govern the provision of ES services to MSFWs. As relevant here, in the Staffing NPRM, the Department proposed changes to 20 CFR 653.501(b)(4) and (c)(3) (ES office and SWA requirements for processing clearance orders); § 658.501(a)(4), (b),

and (c) (bases for discontinuation of ES services); § 658.502(a) and (b) (notification requirements for discontinuation of ES services); and § 658.504(a) and (b) (procedures for reinstatement of ES services). 87 FR at 23717, 23722, 23736, 23740–23741.

In the NPRM to this final rule, which the Department published on September 15, 2023, the Department proposed further changes to the above-named provisions. In some instances, these changes conflicted with changes proposed in the Staffing NPRM. Because the Department had not yet issued the Staffing Final Rule when the NPRM to this rule was published, the Department recognized that the proposed changes in this rulemaking might generate questions within the regulated community about how the Department ultimately proposed to revise these provisions, including how the proposed changes in this rulemaking would affect the proposed changes in the Staffing NPRM, and what the Department might do in finalizing the changes proposed in the Staffing NPRM. As discussed in the NPRM to this final rule, where the proposed changes in this rulemaking conflicted or intersected with changes proposed in the Staffing NPRM, the Department is using this rulemaking as the operative proceeding to provide notice and an opportunity to comment on the proposed changes to the provisions referenced above. Accordingly, the Department did not finalize changes to the above referenced provisions in the Staffing Final Rule. The Staffing Final Rule notified the public that changes to the above referenced provisions would be made through this rulemaking. 88 FR at 82708–82709, 82710. The Department has concluded that the proposed changes to these provisions are better suited for this rulemaking because they are meant to strengthen protections for agricultural workers and, therefore, better align with the overall purpose of this rulemaking. Further, the Department has concluded that this is the most transparent approach to address the overlap and is the approach that best minimizes confusion within the regulated community while ensuring the public the full opportunity to receive notice and provide comments on the proposed changes.

B. 20 CFR Part 651—General Provisions Governing the Wagner-Peyser Act Employment Service

Part 651 (§ 651.10) sets forth definitions for parts 652, 653, 654, and 658. In the NPRM, the Department proposed to add or revise the following definitions primarily to clarify aspects of its discontinuation of Wagner-Peyser Act ES services regulation at 20 CFR part 658, subpart F, including new provisions added in this rulemaking that expand the scope of entities whose services can be discontinued. Where appropriate, as discussed below, the Department has sought to align these new definitions with the same or similar definitions at 20 CFR 655.103. The Department received comments on each of the proposed additions and revisions, and it notes that many commenters did not raise objections to the proposed changes. After carefully considering these comments, the Department adopts most of the additions and revisions as proposed, with exceptions, as discussed in detail below.

1. Agent

The Department proposed to add a definition to § 651.10 for *agent* to establish that an agent is a legal entity or person, such as an association of employers, or an attorney for an association, that is authorized to act on behalf of the employer for purposes of recruitment of workers through the clearance system and is not itself an employer or joint employer, as defined in this section, with respect to a specific job order. The Department has observed that individuals and entities meeting the proposed definition of *agent* often engage the ES clearance system by submitting clearance orders on behalf of *employers,* as defined in part 651, and control many aspects of *employers'* recruitment activities relating to clearance orders. Adding this proposed definition clarifies that *agents* (which include attorneys) are among the entities subject to discontinuation of services as a result of the proposed changes to part 658. Additionally, because an employer's agent for purposes of the ES clearance system is often the same agent that an employer uses for purposes of the H–2A labor certification process, the Department proposed a definition of *agent* at § 651.10 that aligns with the definition of agent in § 655.103.

Farmworker Justice, in comments joined by 40 signatories, including advocacy organizations and legal services providers, supported inclusion of the proposed definition, stating that to the greatest extent feasible, the § 651.10 definition should be consistent with that used in the H–2A regulations at § 655.103(b). Farmworker Justice suggested that the Department clarify that agents who assist in the preparation and submission of criteria clearance orders (clearance orders placed in connection with H–2A applications) on behalf of their principals must obtain certificates of registration as farm labor contractors under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). They stated that criteria clearance orders, currently submitted using Form ETA–790/790A, are used to recruit U.S. workers for the positions for which H–2A workers are requested. In such situations, Farmworker Justice said, the agent is being paid by the employer for recruiting MSFWs, thereby falling squarely within the definition of farm labor contractor under MSPA.

Relatedly, Mid-Atlantic Solutions, LLC d/b/a másLabor and AgWorks H2, LLC (másLabor) and McCorkle Nurseries, Inc. suggested that the Department remove the reference to recruitment from the definition to avoid potential implications under the MSPA. MásLabor stated that the qualifier, for purposes of recruitment of workers through the clearance system, was likely intended to refer to the employer's purposes in placing the job order, rather than the agent's—*i.e.,* the employer is placing a job order for purposes of recruitment and the agent is acting on the employer's behalf in the placement of the job order)—and that such language may inadvertently imply that an agent acting on behalf of an employer for the submission of a job order is itself, as the agent, engaged in the recruitment or solicitation or both of U.S. farmworkers. MásLabor stated that because the Department considers recruitment and solicitation activities to be farm labor contracting activities under MSPA, an interpretation to this effect would mean that agents using the ES, in all cases, would be obligated to obtain a Farm Labor Contractor Certificate of Registration under MSPA.

MásLabor further stated that not all agents are engaged in activities that would traditionally be construed as recruitment or solicitation of workers. Some agents play no representative role throughout the recruitment process, and they instead engage purely in document preparation services by recording the employer's intent on the relevant government forms. Others offer services in both document preparation and written or verbal communication with the applicable government agencies for processing purposes but stop short of any direct assistance with recruitment. Others, like másLabor, offer comprehensive services wherein the agent is also authorized to conduct interviews with potential applicants and document hiring dispositions. MásLabor stated that only the latter (*i.e.,* comprehensive) service can be construed as recruitment or solicitation or both and therefore only agents offering this range of services ought to

be carefully considered within MSPA's jurisdiction. MásLabor suggested that the Department revise the proposed definition to state that an agent is a legal person or entity that is authorized to act on behalf of the employer for any purpose related to the employer's use of the clearance system, and is not itself an employer or joint employer, as defined in this section, with respect to a specific job order. Additionally, másLabor suggested modifying the definition to more clearly delineate between recruitment conducted by an employer and recruitment conducted by the agent or attorney directly, by defining agent to mean a legal person or entity authorized to act on behalf of the employer for purposes of the employer's recruitment of workers. MásLabor emphasized recruitment by ''the employer'' as distinct from recruitment by the agent, arguing the ES definition of agent should not imply that agents acting as recruiters on behalf of employers in the submission of job orders are acting as recruiters for MSPA purposes, and therefore subject to MSPA requirements, in all cases.

An agent and a law firm, USA Farm Labor, Inc. (USAFL) and the Hall Law Office, PLLC (Hall Global) (together, USAFL and Hall Global), agreed with másLabor and further stated the proposed definition conflates the role of attorney and agent. They stated that an agent in the context of the H–2A Program refers to a company that provides specialized services focused on preparing, managing, and filing H–2A-related paperwork. While attorneys can be said to be agents because they are hired by a principal to act on the principal's behalf, attorney conduct is normally regulated by the highest court in various jurisdictions, and regulatory concerns with respect to agents and attorneys are different. The primary issue for attorneys is protecting the sanctity of the attorney-client relationship as well as the distinction between lawyer and client. Clients are entitled to zealous representation within the bounds of the law, which includes making arguments seeking the modification or reversal of existing law. By conflating attorney with agent, the commenters argued, the Department creates ambiguity as to whether it intends to respect, as required by law, 5 U.S.C. 500, that nothing in this definition nor elsewhere in the regulations supplants an attorney's duties under State law or their ability to zealously represent their client within the bounds of the law.

The Department acknowledges commenters' suggestions and concerns regarding potential MSPA implications raised by the proposed *agent* definition. The Department notes that the definitions set forth in § 651.10 govern the Wagner-Peyser ES and do not govern any obligations under the MSPA. Whether an agent meets the definition of a farm labor contractor under the MSPA is a fact-specific inquiry governed by the MSPA and its implementing regulations.

Relatedly, regarding opposition from másLabor, McCorkle Nurseries, Inc., and USAFL and Hall Global regarding use of the word recruitment in the proposed agent definition, the Department declines to remove it. The Department acknowledges commenters' concerns but reiterates that these definitions are specific to 20 CFR part 651 and do not confer any obligations under MSPA. As discussed in the NPRM, the proposed definition of *agent* is meant to encompass those entities that act on behalf of employers that utilize the ES clearance system, including, for example, by controlling aspects of employers' recruitment activities relating to clearance orders. The inquiry of whether an entity is engaged in activities that bring them within the definition of farm labor contractor under the MSPA is fact-specific and must be addressed on a case-by-case basis under that law and its implementing regulations.

Finally, the Department disagrees with USAFL and Hall Global's concern that the proposed definition conflates the roles of attorneys and agents and may impede on an attorney's duty to provide zealous representation to their clients. An attorney who engages the ES system on behalf of an employer must do so in conformance with the requirements of the ES regulations and must advise their employer-client to use the ES system in conformance with the regulations. Zealous representation within the bounds of law is a fundamental component of the attorney-client relationship, which the Department presumes includes advising clients on compliance with all applicable laws and regulations. By including agents here, the Department does not intend to hold agents, including attorneys, accountable for the acts of the employers they represent. Rather, the inclusion of the definition of agent, and the inclusion of attorneys in that definition, recognizes that attorneys can and do serve as agents in interactions with the ES system, and is meant to hold them accountable for compliance and their own misconduct that meets the bases described at § 658.501, independent of any violation by the employers they represent (87 FR 61660, 61662 (Nov. 14, 2022)). The Department reiterates that agents who engage the ES clearance system should be subject to discontinuation, if appropriate, and that inclusion of attorneys is necessary to align the definition of agent here with the definition of agent in § 655.103. For these reasons and the reasons set forth in the NPRM, the Department adopts the definition for *agent,* as proposed.

2. Criteria and Non-Criteria Clearance Orders

The Department proposed to add definitions to § 651.10 for *criteria clearance order* and *non-criteria clearance order* because they are terms that are used in the ES regulations but were previously undefined. The Department proposed that the term *criteria clearance order* means a clearance order that is attached to an application for foreign temporary agricultural workers pursuant to part 655, subpart B, of this chapter; and the term *non-criteria clearance order* means a clearance order that is not attached to an application for foreign temporary agricultural workers pursuant to part 655, subpart B, of this chapter. By defining these terms, it will be clearer which orders must comply with both the requirements at part 653, subpart F, and part 655, subpart B, and which orders do not have to comply with the requirements at part 655, subpart B.

The Department received a comment from Farmworker Justice in support of the proposed definitions. Farmworker Justice agreed that clarification is needed regarding which provisions in part 653, subpart F, and part 655, subpart B, apply to the various agricultural clearance orders filed with the Department and with the SWAs. They suggested that the Department use this rulemaking to further clarify and unequivocally state that the normal and accepted standard articulated in § 655.122(b) applies only to job qualifications in criteria clearance orders, and that all other working conditions be assessed under prevailing practices as articulated in § 653.501(c)(2)(i). Farmworker Justice stated that U.S. workers have seen their working conditions consistently eroded in recent years because SWAs have evaluated the working conditions set out in criteria clearance orders under the normal and accepted standard in § 655.122(b) rather than the more rigorous prevailing practice standard required under § 653.501(c)(2)(i). Additionally, másLabor stated that it had no substantive objections to the proposed definitions.

The Department appreciates these comments. The Department believes the

definition for *criteria clearance order* makes clear that such orders must comply with the requirements at part 655, subpart B (which in § 655.121 include the requirements at part 653, subpart F and at § 655.122). Moreover, the definition for *non-criteria clearance order* makes clear that such orders do not have to comply with the requirements at part 655, subpart B. The Department believes these definitions sufficiently distinguish between criteria and non-criteria clearance orders. For these reasons and the reasons set forth in the NPRM, the Department adopts the definitions, as proposed.

As to the request for clarification regarding application of the normal and accepted standard in § 655.122(b) and the prevailing practices standard in § 653.501(c)(2)(i) to criteria clearance orders, this request is beyond the scope of these changes, which are merely to adopt definitions for terms currently in use in the ES regulations, found at parts 651, 652, 653, 654, and 658. For information on the normal and accepted standard and the prevailing practices standard as they apply to criteria clearance orders, see, for example, §§ 655.103 and 655.122, the discussion of § 655.122(l)(3) below, and *Segura Portugal* v. *Louisiana Workforce Commission,* OALJ No. 2022–WPA–00001 (OALJ Dec. 5, 2023) (holding that work rules in employer's criteria clearance order were not included within the meaning of prevailing working conditions under § 653.501(c)(2)(i)); see also ETA Handbook 398 (53 FR 22076, 22095–22097 (June 13, 1988)).

3. Discontinuation of Services

The Department proposed to add to § 651.10 a definition for *discontinuation of services* because it is referenced throughout the ES regulations and is the subject of part 658, subpart F, but was previously undefined. Under the proposed *discontinuation of services* definition, the scope of services to which discontinuation applies includes any Wagner-Peyser Act ES service provided by the ES to employers pursuant to parts 652 and 653, and the scope of individuals and entities to whom discontinuation applies includes *employers,* as defined in part 651, and *agents, farm labor contractors, joint employers,* and *successors in interest,* as proposed to be defined in part 651.

The Department received supportive and opposing comments to the proposed definition. Farmworker Justice supported the proposed definition, stating that it would provide clarity to both SWAs and employers regarding which services are discontinued, and which entities may be subject to the discontinuation of services described in 658, subpart F. Specifically, Farmworker Justice stated that the definition is broad in scope, which is crucial for SWAs to take meaningful enforcement action against entities that act or have acted on behalf of problem employers, or are simply a reconstitution of a prior bad actor under a new name. Farmworker Justice also stated that the proposed definition would clarify that discontinuation of services impacts all ES services in parts 652 and 653, including ES services in another State, thereby preventing bad actors from continuing to receive services, absent reinstatement, elsewhere or for non-criteria orders. Farmworker Justice recommended that the Department consider adding language to the definition to clarify that SWAs cannot process H–2A applications for employers whose services are discontinued.

MásLabor stated they had no substantive objection to the proposed definition of discontinuation of services. However, USAFL and Hall Global stated that discontinuation of services should only apply to services not necessary for participation in the H–2A program. Wafla, an agricultural employer membership organization, expressed concerns that the proposed definition would include entities other than the employer. The organization contended that attorneys, agents, associations, joint employers, farm labor contractors, and any other entity that is not the principal employer to H–2A workers and that was not involved with a potential rule violation should not be subject to discontinuation of services. Wafla was also concerned that discontinuation of services to an agent would negatively affect the agent's other employer-clients, stating that if a SWA or DOL finds a problem with an agent, all of that agent's H–2 clients may be debarred from the program. Separately, the National Cotton Ginners Association and Texas Cotton Ginners' Association commented that though an employer may use an agent for recruitment services with the contracted stipulations that the agent/recruiter must follow all applicable labor rules, the employer has no ability to verify actions taken by these agents. They stated that the proposed rule allows SWAs to discontinue services to an employer due to potential violations that may be outside of the employer's control.

The Department agrees that broadening the scope of entities subject to discontinuation is crucial to ensuring meaningful application of the discontinuation of services provisions at part 658, subpart F. However, the Department clarifies that the proposed changes are meant to hold agents, farm labor contractors, joint employers, and successors in interest accountable for their own compliance with ES regulations. They are not meant to hold entities such as agents, attorneys, or farm labor contractors accountable for the independent actions of the employers they represent. SWAs should not initiate a discontinuation action against an entity that has not met one or more of the bases for discontinuation under § 658.501(a). For example, if an employer is subject to discontinuation of services because it refused to cooperate in field checks conducted pursuant to § 653.503, as described at § 658.501(a)(7), but the employer's agent was not involved in the refusal, the SWA may not initiate or apply discontinuation of services to the agent. Conversely, if an agent is subject to discontinuation of services because it was found by a final determination by an appropriate enforcement agency to have violated an employment-related law and notification of this final determination has been provided to the Department or the SWA by that enforcement agency, as described at § 658.501(a)(4), but the enforcement agency did not also find that the employer engaged in violations, then the SWA would not have a basis to discontinue services to the employer under § 658.501(a)(4). However, it is possible that there may be cases where it is appropriate and necessary to discontinue services to an employer and its agent. For example, if an agent and employer both knowingly misrepresent the number of workers needed for a clearance order or both knowingly cause workers to work at locations or to complete duties that are not described on the approved clearance order, it would be appropriate to initiate discontinuation against the employer as well as the agent. The proposed definition allows SWAs to take appropriate action against noncompliant entities while allowing those entities who are not responsible for the action or behavior giving rise to the discontinuation action to continue receiving ES services; and the ability of the SWAs to pursue discontinuation against multiple types of entities aligns with the scope of entities subject to the debarment procedures in part 655, subpart B. The Department also notes that there may be cases where it is appropriate and necessary to discontinue services to more than one entity regarding the same or similar violation (for example, to the employer,

agent, farm labor contractor, joint employer, or successor in interest). Finally, the Department notes that a SWA's initiation of the discontinuation procedures against entities such as agents/attorneys would not necessarily impact the processing and clearance of an employer's pending job order, as in most cases the SWA will continue to provide services until the discontinuation action becomes final, including the disposition of any appeals filed by such agents/attorneys.

As to the commenter recommendation that discontinuation of services should only apply to services not necessary for participation in the H–2A program, the Department disagrees. Discontinuation has historically applied to ES services available under part 653, which includes access to the ARS. Prospective H–2A employers must use the ARS to recruit U.S. workers as a condition of receiving a temporary agricultural labor certification, and the H–2A regulations provide that employers and entities who file applications for temporary agricultural labor certification under 20 CFR part 655, subpart B must comply with the ARS requirements at part 653, subpart F. *See, e.g.,* § 655.121 and §§ 655.131–132. The Department, therefore, declines to adopt the recommendation.

Relatedly, the Department has considered the recommendation to add clarifying language that SWAs cannot process H–2A applications for employers with discontinued services. The Department declines to do so because it believes that the definition already includes effective language explaining that entities with discontinued services cannot participate in or receive any Wagner-Peyser Act ES services provided by the ES to employers pursuant to parts 652 and 653. Therefore, SWAs must reject both criteria and non-criteria job orders submitted by employers with discontinued services for either local recruitment or intrastate clearance, which would therefore preclude such employers from participating in the H–2A program.

The Department believes that the proposed changes will allow SWAs to better protect workers and that the regulations are sufficiently clear that discontinuation of services must only be applied to entities that meet the bases described at part 658, subpart F. Therefore, the Department adopts the definition for *discontinuation of services,* as proposed.

4. Employment-Related Laws

The Department proposed to revise the definition of *employment-related laws* to clarify that the term means those laws and implementing regulations that relate to the employment relationship, such as those enforced by the Department's WHD, Occupational Safety and Health Administration (OSHA), or by other Federal, State, or local agencies. The pre-existing definition of this term did not include implementing regulations. Revising the definition clarifies its meaning and scope for ES staff who observe or process complaints relating to violations of employment-related laws, such as outreach workers, complaint system representatives, and those who conduct field checks.

The Department received supportive comments from the Washington State Employment Security Department and Washington State Department of Labor and Industries (Washington State) and Farmworker Justice. Washington State agreed that the new definition clarifies the meaning and scope of employment-related laws for SWA staff. Farmworker Justice stated that the proposed revision would help ES staff and characterized it as a common-sense clarification, not an actual change, to the scope of violations that require ES staff to proceed with discontinuation. Farmworker Justice further stated that a broad reading of the laws covered and agencies involved is necessary to accomplish meaningful enforcement, and that farmworker protections would be gutted if the associated implementing regulations were not also enforced.

MásLabor stated it had no substantive objection to the proposed definition of employment-related laws. USAFL and Hall Global stated that the Department should clarify that employment-related laws apply only when their jurisdictional requirements and any other substantive limitations prescribed by statute or common law have been met. They also stated that the Department should clarify that the agency with primary jurisdiction over the relevant laws and implementing regulations retains primary jurisdiction. They expressed concern that SWAs might misinterpret laws or implementing regulations and sought clarification that the agency with jurisdiction over the implementing regulations would be the authority on how to apply those regulations, not the SWA.

The Department appreciates the comments and agrees that the proposed definition provides needed clarity for SWAs and meaningfully improves worker protections. The Department notes that while SWAs may assess an entity's compliance with employment-related laws in carrying out its obligations under the ES regulations, for example by reviewing clearance orders to ensure their terms and conditions comply with employment-related laws, or by observing and referring apparent violations of employment-related laws to an appropriate enforcement agency, SWAs are not enforcement agents for employment-related laws (unless otherwise authorized). *See* 81 FR 56072, 56282 (Aug. 19, 2016). If the employment-related law at issue is not clear or otherwise does not allow the SWA to determine if there is a violation of the law, the SWA must consult with the relevant enforcement agency to ensure a consistent interpretation. The Department, therefore, agrees that the agency with jurisdiction over the applicable laws and implementing regulations would retain jurisdiction and be the final authority on how to apply those regulations, not the SWA. Regarding commenter concern that SWAs might misinterpret laws or implementing regulations, the Department notes that the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, at 2 CFR 200.303(a) and (b), broadly require SWAs to comply with Federal statutes, regulations, and the terms and conditions of their Federal award, and require that each SWA establish and maintain effective internal controls over its ES program, including controls that provide reasonable assurance that the SWA is managing the ES program in compliance with Federal statutes, regulations, and the terms and conditions of the applicable Federal award. Therefore, SWAs must have internal controls (for example policies and procedures) to ensure that their assessments and determinations regarding an entity's compliance with employment-related laws are correct, and if not the Department can take corrective action. For these reasons, the Department finalizes the definition of *employment-related laws* with the two changes discussed below.

Finally, to provide increased clarity, the Department is including in the final definition the terms ''rules'' and ''standards'' to make clear that employment-related laws include not only ''regulations,'' but also any other administrative requirement carrying the force of law, that relates to the employment relationship. For example, the Occupational Safety and Health Act of 1970 authorizes OSHA to promulgate occupational safety and health standards pursuant to the requirements of sec. 6 of the Act, 29 U.S.C. 655. These standards, which relate to the

employment relationship and are enforced by OSHA, are properly within the scope of employment-related laws. The Department is including this additional language in the definition to minimize any risk of confusion that could be caused by the use of ''regulations'' alone and to clarify rather than expand the scope of this definition.

5. Farm Labor Contractor

The Department proposed to add to § 651.10 a definition for *farm labor contractor* as any person or entity, excluding agricultural employers, agricultural associations, or employees of agricultural employers or agricultural associations, who, for any money or other valuable consideration paid or promised to be paid, recruits, solicits, hires, employs, furnishes, or transports any MSFW. The Department proposed to add this definition because the term is used throughout the ES regulations, most notably in part 653, subpart F, which recognizes that farm labor contractors use the ES clearance system, but it has never been defined. Adding this proposed definition also clarifies the entities subject to discontinuation of services as a result of the proposed changes to part 658, subpart F. As with the term *agent,* because many farm labor contractors that use the ES clearance system also seek temporary agricultural labor certifications from OFLC as H–2ALCs under part 655, subpart B, the Department proposed a definition of *farm labor contractor* that both aligns with the definition of *H–2A labor contractor* at 20 CFR 655.103 and with the definitions under MSPA of *farm labor contractor* and *farm labor contracting activity* at 29 U.S.C. 1802 and 29 CFR 500.20 to maintain consistency between Departmental program areas.

MásLabor stated that it had no substantive objections to the proposed definition. Farmworker Justice expressed concern that because the proposed definition is drawn from the definitions of *farm labor contractor* and *farm labor contracting activity* under MSPA, and MSPA does not include H–2A workers in its definition for *MSFWs* at 29 U.S.C. 1802(7), ES staff may mistakenly assume that H–2A workers would be excluded from the NPRM's definition of farm labor contractor due to its reference to MSFWs. Farmworker Justice stated that this is problematic because farm labor contractors who employ or furnish exclusively H–2A workers should also be subject to discontinuation under part 658 in appropriate circumstances. Farmworker Justice suggested that the Department clarify that the *MSFW* definition at § 651.10, which does not specifically exclude H–2A workers, is the applicable reference in the new *farm labor contractor* definition. Farmworker Justice stated that this would be consistent with longstanding Departmental interpretation that has included foreign workers legally authorized to work in the United States in the Wagner-Peyser Act definition of migrant farmworkers.

The Department clarifies that the reference to MSFWs in its proposed definition means *MSFW* as defined in § 651.10, and that definition does not exclude H–2A workers. Under § 651.10, the term *farmworker,* as it appears in the term *MSFW* (migrant or seasonal farmworker), means an individual employed in *farmwork;* and under § 651.10, the term *farmwork* is defined to also include any service or activity covered under the definition of *agricultural labor or services* at § 655.103(c).The Department notes that it added the terms *farmwork* and *farmworker* to § 651.10 in 2016 to align them with OFLC and WHD definitions and to clarify and expand the types of work covered. *See* 80 FR 20690, 20800 (Apr. 16, 2015). The term *farmworker at* § 651.10 replaced the prior term *agricultural worker,* which the Department defined in 1980 to include certain farmworkers, whether citizens or not, who were legally allowed to work in the United States. *See* 45 FR 39454, 39457 (June 10, 1980). The Department did not include this work authorization language in its 2016 *farmworker* definition—not to make any substantive change—but to align the definition with other programs, and because it determined it unnecessary to mention immigration status for only a subset of programs. *See* 81 FR 56072, 56256 (Aug. 19, 2016). Accordingly, given the Department's longstanding interpretation, the term *MSFW* under § 651.10 does not exclude H–2A workers, and the proposed *farm labor contractor* definition here encompasses those contractors who interact with the ES clearance system for purposes of the H–2A program. The Department further notes that even where farm labor contractors only employ or furnish H–2A workers, they must first engage the ARS for recruitment of U.S. workers as a condition of receiving a temporary agricultural labor certification. Because entities who engage the ES system for temporary agricultural labor certification purposes are subject to ARS requirements (*see* § 655.121), the Department believes they should be subject to discontinuation of ES services (including the ARS), if applicable. For these reasons, the Department adopts the definition for *farm labor contractor,* as proposed.

6. Joint Employer

The Department recognizes that joint employment relationships are common in agriculture, and that joint employers who submit clearance orders to the ARS are required to comply with the requirements in part 653, subpart F, including when filing a joint application for temporary agricultural labor certification under 20 CFR part 655, subpart B. *See* § 655.131. The Department, therefore, proposed to add a definition for *joint employer* to § 651.10 to clarify how the concept will be applied in the ES system and to clarify the entities subject to discontinuation of services as a result of the proposed changes to part 658, subpart F. The proposed definition is also intended to ensure consistency with recent changes to the Department's H–2A regulation, *see* 87 FR at 61793–61794, and as with the definitions of *agent* and *farm labor contractor,* the proposed definition is modeled on the definition of joint employment at § 655.103 because of the connection between the ES system and H–2A labor certification program.

Farmworker Justice supported inclusion of the joint employer definition, stating that the proposed definition makes clear that, when a fixed-site employer or H–2ALC unlawfully permits another, non-petitioning employer not listed on the clearance order to employ an H–2A worker, or otherwise permits an H–2A worker to provide services to such a non-petitioning employer, both the petitioning employer and the non-petitioning employer jointly employ the worker. MásLabor also stated that it had no substantive objections to the proposed definition.

The Department appreciates commenter support and adopts the definition for *joint employer,* as proposed.

7. Successor in Interest

The Department proposed to add to § 651.10 a definition for *successor in interest* that describes the inexhaustive factors that SWAs should use to determine if an entity is a successor in interest to another entity, and described successors in interest as any entity that is controlling and carrying on the business of a previous employer, agent, or farm labor contractor, regardless of whether such successor in interest has succeeded to all the rights and liabilities of the predecessor entity. The proposed definition allows SWAs and

stakeholders to better understand which entities may be subject to discontinuation as a result of the proposed changes to part 658, subpart F. To maintain consistency between the regulations governing the ES system and the regulations governing the H–2A labor certification program, the Department proposed to adapt the definition of successor in interest as proposed in § 655.104.

Washington State supported the proposed definition, stating that it will better position the SWA to identify such entities and determine if an entity so identified is subject to prior debarment orders when evaluating criteria clearance orders (Form ETA–790/790A). Farmworker Justice also agreed with inclusion of the definition and suggested that the Department devote resources to training SWAs on how to analyze the successor in interest factors to ensure that employers who have had services discontinued are not evading sanction with a simple rebrand. The Farm Labor Organizing Committee of the AFL–CIO (FLOC) endorsed the definition, stating that the proposed changes in § 651.10 and § 655.104 clarify the consequences to H–2A employers and labor contractors who try to avoid their responsibilities for violations of the law by transferring their operations to a new person or entity (usually an associate or family member), while all the time retaining control. In instances where farm labor contractors propose to furnish H–2A labor to farms as a replacement for farm labor contractors that have since been sanctioned or debarred or both, FLOC suggested that there be a presumption that the new farm labor contractor is a successor in interest of the discontinued predecessor; and the prospective new farm labor contractor should be required to prove that they are simply using the equipment and machinery of the previous labor contractor.

MásLabor, McCorkle Nurseries, Inc., and an individual asked that the Department reconsider the scope of the definition, particularly the language that allows for construing entities as successors in interest regardless of whether they have succeeded to all the rights and liabilities of the predecessor entity. MásLabor further explained that this language may prove problematic as it relates to asset purchase arrangements. Specifically, because an acquiring entity may be construed as a successor in interest regardless of whether it has succeeded to the rights and liabilities of the predecessor, and because the factors used to determine successorship include factors relating to the physical assets or core operations of the business itself (for example, use of the same facilities, similarity in machinery, equipment, and production methods, and similarity of products and services), másLabor stated that the proposed definition opens the door for asset purchases alone to trigger successor in interest obligations and liability. MásLabor provided an example, where Farm A is debarred from the H–2A program and subsequently sells its farming property and all the fixtures, buildings, and equipment on its premises to Farm B. MásLabor said it is conceivable that Farm B will be considered a successor in interest to Farm A simply by virtue of taking over the farming operation at the acquired property, and that this would be the case even if Farm B is a model employer that had nothing to do with Farm A's violations. MásLabor stated this possibility would discourage potential acquisitions by good, compliant employers.

The Department appreciates commenter support for the *successor in interest* definition. The Department agrees that the new definition will help SWAs identify entities that reincorporate themselves into another entity with the same interests or operations so as to avoid discontinuation of ES services. Additionally, the Department agrees with providing SWAs training on how to analyze the successor in interest factors so as to avoid a scenario where the sale of property, fixtures, and equipment alone triggers joint employment concerns. The Department will issue further guidance on application of the new *successor in interest* definition. The Department declines to adopt any presumption that a new farm labor contractor or entity is a successor in interest of a discontinued predecessor. Successor in interest inquiries are factor driven and case specific, and the Department believes that the factors outlined in the new definition are sufficient to guide the inquiry. The discussion of the parallel provisions on successors in interest at § 655.104 further address commenters' concerns and provides additional explanation of the Department's reasons for adopting these factors, as well as the language on successor liability addressed below.

The Department has decided to relocate some of the proposed language in the definition describing the scope of liability of successors in interest for ES violations of predecessor entities, from § 651.10 to § 658.500. Relocating this language places the focus of the definition squarely on the factors that SWAs will consider in order to determine whether an entity constitutes a successor in interest. The Department believes that the language on the liability of successors is more appropriate to include in part 658, subpart F, which similarly describes the situations in which entities are subject to discontinuation actions by SWAs. The discussion of § 658.500 below addresses the comments received on this language, as well as the Department's decision not to finalize the proposed introductory language of the *successor in interest* definition (''A successor in interest includes any entity that is controlling and carrying on the business of a previous employer, agent, or farm labor contractor . . .''). The Department adopts the remaining language in the *successor in interest* definition, as proposed.

8. Week

The Department proposed to add to § 651.10 a definition for *week* to clarify that a week, as used in parts 652, 653, 654, and 658, means 7 consecutive calendar days. The proposed definition allows for SWAs and employers to calculate time periods used in the ES regulations uniformly, including for wage calculations and other time-related procedures.

MásLabor commented that they had no substantive objections to the proposed definition. The Department did not receive any other comments on this proposed change.

The Department appreciates the comment indicating that the H–2A employer agent organization did not object to the proposed definition. The Department adopts the definition of *week,* as proposed.

C. 20 CFR Part 653—Services of the Wagner-Peyser Act Employment Service System

Part 653 sets forth the principal regulations of the ES concerning the provision of services for MSFWs consistent with the requirement that all services of the workforce development system be available to all job seekers in an equitable fashion and in a way ''that meets their unique needs.'' 20 CFR 653.100(a). Part 653 also describes requirements for participation in the ARS. Subpart F provides the requirements that SWAs and employers must follow when employers seek access to the ARS by submitting clearance orders for temporary or seasonal farmwork. Section 653.501 provides the responsibilities of ES Offices and SWAs when they review clearance orders submitted by employers, and the process by which

they place approved clearance orders into intra- and interstate clearance.

1. Section 653.501(b), ES Office Responsibilities

The Department proposed to add a fourth paragraph to § 653.501(b), at § 653.501(b)(4), which would require ES staff to consult the OFLC and WHD H–2A and H–2B debarment lists, and an OWI discontinuation of services list, before placing a job order into intrastate or interstate clearance. The Department further proposed a new paragraph (b)(4)(i), which states that SWAs must initiate discontinuation of ES services if the employer seeking placement of a clearance order is on a debarment list, and new paragraph (b)(4)(ii), which states that SWAs must not approve clearance orders from employers whose ES services have been discontinued by any State. Finally, the Department proposed a new paragraph (b)(4)(iii) to make clear that the provisions in paragraph (b)(4) apply to all entities subject to discontinuation under part 658, subpart F, and not just to *employers* as defined in § 651.10. The Department's response to public comments received on § 653.501(b) is set forth below. For the reasons discussed in the NPRM and below, the Department adopts § 653.501(b), with edits.

Several organizations, including United Farm Workers (UFW) (joined by 59 signatories, including advocacy organizations and legal services providers), the UFW Foundation and UFW (hereinafter, the UFW Foundation), the North Carolina Justice Center, United Migrant Opportunity Service (UMOS), Pineros y Campesinos Unidos del Noroeste (PCUN), Central Coast Alliance United for a Sustainable Economy (CAUSE), and Green America expressed uniform support for requiring initiation of discontinuation procedures where an employer is on an H–2A or H–2B debarment list and for prohibiting clearance orders from employers who have been discontinued in another State. In contrast, several trade associations, including the Western Growers Trade Association, wafla, AmericanHort, Michigan Farm Bureau, Florida Strawberry Growers Association (FSGA), National Council of Farmer Cooperatives (NCFC), and the U.S. Apple Association (USApple), along with Willoway Plant Nursery, opposed or expressed concerns regarding the proposed changes, stating that they do not provide sufficient safeguards or an appeal process, particularly where a SWA mistakes one employer for another when consulting the debarment and discontinuation lists. These commenters cautioned that even minor delays in processing a clearance order could result in irreparable harm to an employer, such as diminished crop yield and monetary loss. In circumstances where a SWA does not process a clearance order for an employer because that employer has the same or similar business name as another employer on the debarment or discontinuation lists, commenters stated that the Department must have safeguards in place for employers to demonstrate that they are not, in fact, the employer named on the lists.

Relatedly, Washington State requested that the Department ensure that the debarment and discontinuation lists are accurate, updated, and easily accessible. Washington State suggested that OFLC add an eligibility checker tool to its Foreign Labor Application Gateway system where employer names are searchable, the debarment and discontinuation lists are updated automatically, and the system alerts SWAs if employers are potentially ineligible due to debarment. They further suggested that the Department create a standard letter notifying applicants of the impact of debarment and making clear that SWAs are bound to deny clearance orders on this basis.

Finally, wafla opposed proposed new paragraph (b)(4)(iii), which clarifies that proposed § 653.501(b) applies to all entities subject to discontinuation, including agents, farm labor contractors, joint employers, and successors in interest as adopted in § 651.10 and § 658.500(b), and not just employers. Wafla stated that only principals should be subject to discontinuation, that moving beyond the employer-employee relationship penalizes third parties that may have had no fault in causing discontinuation, and that unrelated clients of third parties may unjustifiably experience the effects of discontinuation as a result.

The Department appreciates the views and recommendations of commenters that supported, opposed, and raised concerns with the proposed changes to § 653.501(b). Regarding commenter requests for adequate safeguards to ensure against SWAs mistaking one employer for another when consulting the debarment and discontinuation lists, the Department will issue guidance on SWA consultation of the lists, including guidance on identifying employers/entities and *successors in interest* to employers/entities who are on the lists. Regarding the due process concerns raised by commenters, as discussed below, the Department believes that the clearance order review processes at § 653.501 and § 655.121, the discontinuation of services procedures at part 658, subpart F, and the procedures for filing a complaint at part 658, subpart E, provide adequate process and safeguard against unwarranted or harmful delays in processing clearance orders.

First, under proposed paragraph (b)(4)(i), a SWA must initiate discontinuation of ES services pursuant to § 658.501(a)(4) if an employer seeking placement of a clearance order in the ARS is on the H–2A or H–2B debarment list. The employer may contest the SWA's notification of intent to discontinue services in accordance with proposed § 658.502(a)(4). In the specific circumstance raised by some commenters (*e.g.,* Michigan Farm Bureau, FSGA, AmericanHort), where an employer with the same or similar name incorrectly appears on a debarment list, the employer may contest the proposed discontinuation by submitting evidence that they are not, in fact, the employer listed on the applicable debarment list. During this time, the SWA must continue to process the employer's clearance orders, without delay, as no final determination on discontinuation has yet been issued and taken effect. Where the SWA ultimately issues a final determination to discontinue services under proposed § 658.503(a), if an employer appeals by timely requesting a hearing, the request stays the discontinuation pending the outcome of the hearing. The SWA must continue to process the employer's clearance orders, without delay, while the matter is on appeal.

Second, under paragraph (b)(4)(ii), SWAs must not approve clearance orders from employers whose ES services have been discontinued by any State. In the specific circumstance raised by commenters, where an employer believes they have been incorrectly identified as having been placed on the discontinuation of services list, the employer and the SWA may resolve any such discrepancy in the clearance order review processes described in § 655.121 (for criteria clearance orders) and § 653.501 (for non-criteria clearance orders). For criteria clearance orders, that process includes initial review, a deficiency notice, where applicable, an opportunity for an employer to respond, a final determination from the SWA, and allowance for employers to file an emergency Application for Temporary Employment Certification where they disagree with the SWA's final determination (*see* §§ 655.160, 655.164, and 655.171). For non-criteria clearance orders, under § 653.501, SWAs must review and approve clearance orders

within 10 business days of receipt of the order. Within that timeframe, SWAs should attempt to resolve any discrepancy regarding an employer's placement on the discontinuation of services list. For example, where Employer A Corp. files a non-criteria clearance order and a similarly named employer (*e.g.,* Employer A. Inc.) is on the discontinuation of services list, the SWA should review and consider relevant information, such as Federal Employer Identification Numbers (FEINs), Employer A, Inc.'s final determination on discontinuation, or any information provided by Employer A. Corp. indicating that they are not the named employer on the list, prior to approving or denying the clearance order. Where the SWA denies a non-criteria clearance order under § 653.501 because the employer is named on the discontinuation of services list, the employer may timely appeal the discontinuation or seek reinstatement of services under § 658.504. As discussed above, the Department will issue guidance on use of the discontinuation of services list when processing clearance orders.

The OWI discontinuation of services list will be publicly available online and regularly updated with information from States so employers can check the list before they submit their clearance order. In addition, the Department will further revise § 653.501(b)(4)(ii) to specify that employers may submit requests to the OWI Administrator to determine whether they are on the OWI discontinuation of services list. If the OWI Administrator indicates that the employer is not on the discontinuation of services list, then the SWA must approve the clearance order if all other requirements have been met.

Finally, as to consultation of either the debarment lists under proposed paragraph (b)(4)(i) or the discontinuation list under proposed paragraph (b)(4)(ii), the Department notes that where an employer believes a SWA has violated proposed paragraph (b)(4) when consulting the lists, the employer may file a complaint against the SWA under part 658, subpart E. Complaints against SWAs regarding ES regulations are processed pursuant to § 658.411(d). In sum, in all instances of consultation of the debarment and discontinuation lists, the Department believes that its clearance order review processes at § 653.501 and § 655.121, and its procedures at part 658, subparts E and F, provide sufficient safeguards against unwarranted and harmful delays in processing clearance orders, even where an employer believes they have been incorrectly placed, or incorrectly identified as having been placed, on the lists.

Regarding Washington State's request that the Department ensure that debarment and discontinuation lists are accurate, updated, and easily accessible, the Department appreciates the request and suggested methods for doing so. The Department notes that it has proposed a 10-working-day requirement in § 658.503 and § 658.504 for SWAs to notify OWI of any final, effective determination to discontinue ES services, and any determination to reinstate services. As discussed in the NPRM, the Department believes that these requirements will help facilitate prompt implementation and maintenance of the discontinuation of services list, and prompt access to ES services for employers who have been reinstated. The Department will issue guidance on maintenance and use of the discontinuation list. The Department updates the debarment list promptly upon finalizing debarment of an employer from the H–2A program. An up-to-date debarment list is publicly available on the OFLC website.

The Department appreciates Washington State's suggestion that the Department create a standard letter notifying applicants of the impact of debarment and making clear that SWAs are bound to deny clearance orders on this basis. Depending on the violation at issue, debarment is undertaken by either OFLC or WHD, and the relevant debarring agency is responsible for communicating the consequences of such action to the entity it seeks to debar and will review its communication as it implements this final rule. The Department reiterates that under proposed § 501(b)(4)(ii), SWAs are not bound to deny clearance orders to employers who are debarred. Rather, SWAs are required to initiate discontinuation of services to employers who are on the Department's debarment lists. Only where the discontinuation of services has been finalized must the SWA deny an employer's clearance order.

Finally, regarding wafla's opposition to proposed new paragraph (b)(4)(iii), the Department disagrees that discontinuation should apply only to principals. As explained more fully below in Section V.D, to better protect workers, the Department believes that all entities who engage in the ES clearance system, including agents, farm labor contractors, joint employers, and successors in interest, should be subject to possible discontinuation. Moreover, in clarifying and expanding the entities subject to discontinuation, the Department is aligning the ES regulations with existing H–2A regulations at part 655, subpart B, which already permit debarment of agents, farm labor contractors, joint employers, and successors in interest. Regarding wafla's concern about the possible effects of discontinuation on third parties and their clients, the Department believes any such effects are the same or similar as the effects of debarment on the same third parties in the existing H–2A context, and the Department did not receive comments and is not otherwise aware that there have been any unjustifiable effects to these entities under the debarment process.

2. Section 653.501(c), SWA Responsibilities

Section 653.501(c)(3) lists the assurances that each clearance order must include before the SWA can place it into clearance. The Department proposed to revise § 653.501(c) to require that, in the event the employer's date of need changes from the date the employer indicated on the clearance order, the employer must notify the SWA and all workers placed on the clearance order of the change at least 10 business days before the original start date. The Department further proposed that employers that fail to comply with these notice requirements must provide housing and subsistence to all workers placed on the clearance order who are already traveling to the place of employment, without cost to the workers, until work commences, and must pay all workers placed on the clearance order the applicable wages for each day work is delayed for a period of up to 2 weeks, starting with the originally anticipated date of need. The proposed revisions are meant to improve notification requirements and wage protections for workers, as well as align with current § 655.145(b) and proposed § 655.175 protections in the H–2A program regulations. To accomplish these changes, the Department proposed several specific revisions, which are discussed in detail below.

First, the Department proposed to revise § 653.501(c)(3)(i) to remove the requirement that the SWA must make a record of the notification and attempt to inform referred workers of the change in the date of need. The current language improperly incorporates a SWA requirement into the employer assurances and, as discussed below, the Department proposed to shift these responsibilities to the employer. The Department also proposed to move language in paragraph (c)(3)(i) regarding the employer's notice to the order-holding office to § 653.501(c)(3)(iv),

which contains other instructions the employer must follow when giving notice of changed terms and conditions of employment. The Department did not receive comments on these specific changes and adopts them, as proposed, with additional changes (the substitution of ''placed'' for ''referred'' and ''14 calendar days'' for ''week'') to conform to the other provisions of § 653.501(c) discussed below.

Second, the Department proposed to remove a redundancy in the first sentence of paragraph (c)(3)(iv), which currently states that the employer must expeditiously notify the order-holding office or SWA immediately. Because immediate notice is expeditious, the use of the word expeditiously is not necessary. The Department did not receive comments on this change and adopts it, as proposed.

Third, in paragraph (c)(3)(iv), the Department proposed that the assurance on the clearance order require that when there is a change to the start date of need, the employer, rather than the order-holding office or SWA, notify the office or SWA and each worker placed on the order. The Department further proposed that notification be in writing (email and other forms of electronic written notification are acceptable) at least 10 business days prior to the original date of need, and that the employer must maintain records of the notification and the date notification was provided to the order-holding office or SWA and workers for 3 years. In paragraph (c)(5), the Department similarly proposed to specify that the employer must notify the office or SWA and each worker placed on the order, to align this paragraph with paragraph (c)(3)(iv).

Wafla, Farmworker Justice, and Washington State supported shifting the notification requirement from the SWA to the employer. Wafla stated that given the variability of crops, crop maturation, weather, work schedules, or over-recruitment in agriculture, the employer knows the conditions on the ground and is capable and should be empowered to make this decision and provide the proposed notification. Farmworker Justice described it as a common-sense change where the employer, who has been in prior contact with the workers, either directly or through agents, is much more likely than the SWA to have the most current and effective contact information; and the employer, rather than the SWA, can more quickly reach workers, when time is critical, by going directly to the workers rather than roundabout through the SWA. Both Farmworker Justice and Washington State stated that the proposed change reduces the burden on SWAs, whose resources, as Farmworker Justice stated, are reportedly already stretched thin. On the other hand, an individual who operates a family farm opposed the employer notification requirement, stating that it would be very difficult and expensive to contact workers individually within 10 days of the start date.

Several commenters raised concerns about employers providing effective notification to workers. MásLabor, whose comments USAFL and Hall Global endorsed, stated that it would be unduly burdensome to require employers to notify workers in writing of a delay at least 10 business days before the original date of need because many U.S. applicants do not provide an email address and employers would need to notify workers by mail, which may not be feasible within 10 business days. MásLabor said the notification requirement creates perverse incentives in that workers who are aware of its limitations may intentionally avoid giving an employer a means for written notice in order to guarantee payment if there is a delay. USAFL and Hall Global additionally cautioned the Department against imposing unnecessary formal notice requirements. They raised concerns with information overload and stated that workers often receive notice and ignore it. They stated that formal notice is not needed where the employer is working with the workers to get them to its workplace, and that any information conveyed in that scenario is a natural part of working together. They requested that the Department look at each formal notice that it demands to make sure it is really justified and necessary.

Farmworker Justice requested that the Department improve the notice requirements, stating that relying on employers to give notices raises concern as to whether meaningful and effective notice will actually be received. Farmworker Justice suggested that the Department require that notice be received, and that employers provide notices in languages spoken by workers. Farmworker Justice also requested employers be required to use the most reliable or speediest form of communication. For example, they suggested, if the employer has a worker's mailing address and phone number, then the employer should be required to send a text message or use a different available phone-based application that the worker may use. Farmworker Justice also noted that the Department did not propose to require employers to contact farm labor contractors or local recruiters if they are not able to contact workers directly to ensure workers get the message.

In response to the másLabor comments, the Department notes that employers may provide written notice to each worker who has been placed on the clearance order using postal mail, email, or other forms of electronic written notification, including by text message. Because employers have a variety of options available to provide the notice, and must use electronic means when the worker provides an email address or their phone number, the Department thinks that it will be a minimally burdensome requirement on employers in the event they are required to provide notice. In response to Farmworker Justice's comments, the Department considered requiring proof that workers have actually received the employer's written notification; however, the Department believes that it will not be possible or practicable for employers to be able to document proof of receipt in all cases. The Department notes that under the proposed changes, employers will be required to maintain records showing that the notification was provided. The Department believes that it is reasonable to expect that most workers will receive written notice sent through either postal mail or electronic written mail or other electronic means before they need to depart for the original date of need. Therefore, the Department is revising paragraphs (c)(3)(iv) and (c)(5) to indicate that employers must send written notification at least 10 business days before the original date of need.

The Department agrees with Farmworker Justice that it is important for employers to provide notifications in languages spoken by workers and is further revising paragraph (c)(3)(iv) to align employer notices with 29 CFR 38.9 language access requirements. The Department made similar changes more broadly to align part 653 with these obligations as part of the Wagner-Peyser Act Staffing Final Rule, 88 FR 82658 (Nov. 24, 2023), which recognized that language access is crucial for individuals with limited English proficiency. The Department reiterates the importance of these non-discrimination obligations and believes that providing notification to workers in accordance with 29 CFR 38.9 is necessary to ensure that workers receive effective notice that apprises them of delays in the start of work. Employers and SWAs may work together as necessary and appropriate to fulfill these obligations. Additionally, the Department is further revising paragraph (c)(3)(iv) to state that if a worker provides electronic contact

information, such as an email address or telephone number, the employer will send notice using one of the electronic contact methods provided. If the employer provides non-written telephonic notice, such as a phone call, voice message, or an equivalent, the employer will also send written notice using the email or postal address provided by the worker at least 10 business days prior to the original date of need.

However, the Department declines to require employers to contact farm labor contractors or local recruiters if they are not able to contact workers directly because it would be difficult to measure when an employer met its responsibilities in notifying workers. Moreover, the purpose of these changes is to streamline communication with workers by requiring direct communication between the employer and worker, and the suggestion to permit third parties to engage in the communication undermines the changes being made in this rule. The Department believes that the adopted changes will increase the likelihood that workers will receive required notices, while making the requirements achievable for employers. The Department also identified that it would help clarify that the notice requirements to which paragraph (c)(5) refers are notices assured in paragraph (c)(3)(iv) of this section.

The Department adopts the notice requirements in paragraphs (c)(3)(iv) and (c)(5) proposed in the NPRM, with further revision to clarify that the employer's written notice must be sent at least 10 business days prior to the original date of need, must be given in languages workers understand, and that the employer must provide electronic notification, if available. The Department has revised paragraph (c)(5) to refer to the assurance in paragraph (c)(3)(iv).

Fourth, in paragraphs (c)(3)(iv) and (c)(5), the Department proposed to require that notification be provided to workers placed on the order rather than eligible workers referred from the order. Relatedly, in paragraph (c)(5), the Department proposed to remove language stating that employers must pay only workers who are eligible pursuant to paragraph (d)(4).

Farmworker Justice supported the proposed change, stating that it reduces the burden on employers by clarifying that only workers who are placed on the order, rather than all workers referred, are covered by the notice requirements. Washington State similarly stated that the proposed change slightly reduces the burden on SWAs by clarifying that neither SWAs nor employers need to notify SWA referrals of delays in start dates.

The Department appreciates commenter support and adopts this change, as proposed.

Fifth, in paragraphs (c)(3)(iv) and (c)(5), the Department proposed that where an employer fails to provide adequate notice of a change to the anticipated start date of need, the employer must provide housing and subsistence to all workers placed on the clearance order who are already traveling to the place of employment, without cost to the workers, until work commences.

The Department received several supportive comments regarding the proposal to require employers to provide housing and subsistence to workers. Wafla, an employer agent organization, agreed that the employer should provide housing and subsistence to all workers already traveling to the place of employment under these conditions. Catholic Charities USA (CCUSA) and the United States Conference of Catholic Bishops (USCCB) (together, CCUSA and USCCB) also agreed, noting that the proposal was designed to ensure workers are not deprived of basic needs because of delays. CCUSA and USCCB further stated that the provision would respect the reliance interests of workers and protect against financial hardships beyond their control. The Alliance to End Human Trafficking commented that the proposed regulation would help people who are otherwise vulnerable to trafficking to obtain the necessary support when disruptions to their employment occur through no fault of their own. CCUSA and USCCB and the Alliance to End Human Trafficking each indicated that the Department should finalize the change, as proposed.

On the other hand, McCorkle Nurseries, Inc. and másLabor expressed concern regarding the housing requirement, stating that it would extend housing obligations to U.S. workers who were otherwise ineligible for employer-provided housing. Additionally, másLabor opposed the subsistence requirement. MásLabor stated that there was a contradiction in requiring subsistence to avoid financial hardship because, under the proposed rule, employers would also be required to pay workers up to 2 weeks of wages. Therefore, workers would be paid as if there were no delay to the start date and financial hardship would not exist. MásLabor stated that because paying wages in this circumstance moots the need for meal subsistence, as workers will have the income to be able to purchase food, the Department should either keep the wage guarantee or keep the subsistence requirement, but not both.

Regarding housing, the Department notes that employers would only be required to provide housing to workers who are eligible for housing under § 653.501(c)(3)(vi), which requires the availability of housing for only those workers, and when applicable, family members, who are not reasonably able to return to their residence in the same day. Because such housing is already required to be available and to meet applicable housing standards prior to the start date of work, the Department does not think that providing housing in the event of a delay in the start date will create a burden or hardship for the employer. To clarify the scope of this requirement, the Department is further revising paragraphs (c)(3)(iv) and (c)(5) to specify that employers must provide the housing *described in the clearance order* to all *migrant* workers placed on the clearance order who are already traveling to the place of employment, without cost to the workers, until work commences.

The Department has considered each comment regarding the proposed subsistence carefully. The Department recognizes the concern raised by másLabor about the burden to employers when the benefit would not be otherwise available if there had been no delay in the start date. In light of this concern, the Department has decided not to finalize the subsistence provision. However, the Department remains concerned about workers being left in a worse position than they would have been had there been no delay. Accordingly, the Department is adding to paragraphs (c)(3)(iv) and (c)(5) that employers that fail to provide the required notice must pay all placed workers for the hours listed on the clearance order *and provide or pay all other benefits and expenses described on the clearance order.* This revision will ensure that workers receive the full monetary and non-monetary benefits they would have received if work had started on time. Therefore, if, for example, the clearance order includes as a benefit some form of payment for or access to food or meals, such as employer-provided lunches, an employer-organized food truck at the property, or simply employer-provided access to a grocer, then the worker would be entitled to those benefits to ensure they are kept whole.

Sixth, in paragraphs (c)(3)(iv) and (c)(5), the Department proposed that where an employer fails to provide adequate notice of a change to the

anticipated date of need, the employer must also pay workers for each day work is delayed up to 2 weeks starting with the originally anticipated date of need or provide alternative work. In paragraph (c)(5), the Department proposed that the employer pay the specified hourly rate of pay on the clearance order, or if the pay listed on the clearance order is a piece-rate, the higher of the Federal or State minimum wage, or if applicable, any prevailing wage. For criteria clearance orders, the employer would be required to pay the rate of pay specified at 20 CFR 655.175(b)(2)(ii). These proposed edits would align the wage requirement in this paragraph with proposed wage requirements in part 655, subpart B, as applicable. The Department also proposed language clarifying that alternative work must be stated on the approved clearance order.

Several organizations submitted supportive comments regarding the proposal to require employers pay up to 2 weeks of wages, when employers do not properly notify workers. The UFW Foundation, UFW, North Carolina Justice Center, UMOS, PCUN, CAUSE, and Green America noted that employers would have to pay such wages if the job started on time and said that the rule proposed a safety net during a particularly vulnerable time, when farmworkers have little or no savings and are awaiting their first paycheck. The UFW Foundation shared stories of multiple farmworkers who experienced delayed start dates, one up to 15 days, which caused the farmworkers to go into debt because their cost of living continued, despite their income being delayed. One farmworker described repeatedly traveling back and forth to the job site each day during a delay, where they were told work was not available that day. The farmworker spent time, energy, and money for gas during the delay. The farmworker further stated that workers return each day only to find they have been replaced, leaving them with no money to pay their mortgages or to purchase groceries. The Agricultural Workers Advocacy Coalition (AWAC) also supported the wage requirement, stating that numerous workers on the Eastern Shore have experienced significant delays in receiving wages at the start of their contracts and have had to go for lengthy periods without enough money to even buy food. Farmworker Justice said the increase to 2 weeks wages was warranted given incoming travel costs and potential economic harm to workers impacted by delay. The Alliance to End Human Trafficking stated that the proposal would help people who are otherwise vulnerable to trafficking to obtain the necessary support when disruptions to their employment occur through no fault of their own. Marylanders for Food and Farmworker Protection stated the proposal promotes accountability, and CCUSA and USCCB stated that the proposed changes are designed to ensure workers are not deprived of basic needs because of delays.

USA Farmers, a national trade association that exclusively represents agricultural employers of H–2A foreign workers, opposed the 2-week wage requirement, calling it unreasonable. USA Farmers proposed that instead of requiring wage payment for up to 2 weeks, the Department instead should align the period of payment to correspond to the number of days the employer was late in providing the notice after the employer knew that start date would change. MásLabor, whose comments USAFL and Hall Global endorsed, and McCorkle Industries, Inc. contended that there are already procedural protections to prevent financial hardship, including the preexisting guarantee of the first week wages as well as existing H–2A employer obligations under the three-fourths guarantee. They described the proposal to extend wages up to 2 weeks as unduly punitive and redundant. MásLabor also stated that the requirement for wage payments to all workers placed on the clearance order extends the wage rate guarantee to H–2A workers, which it described as a drastic expansion of existing requirements. USAFL and Hall Global further stated that the Department did not disclose the reason why any change to the existing regulation was warranted and requested that the Department provide a factual basis for why one week of pay is not sufficient. MásLabor noted that an employer requesting a delay to the start date is itself experiencing hardship and said that the Department must strike an appropriate balance of the equities. MásLabor said that tipping the scales too heavily in favor of the workers by dramatically increasing the costs to employers is not equitable.

Wafla disagreed that an employer should be required to pay workers' wages when they do not meet the 10-business-day notice provision. Wafla said that some delays are due to surprise events, like an unexpected, unforeseeable weather storm or an act of God, and that such events should be considered as valid reasons to delay notification of workers after the 10 business days. The Agricultural Justice Project stated that the wage requirement was fair but noted that this level of detail will make the application process even more daunting for smaller farms while larger business have designated staff or contracted specialists to handle these matters. They stated that honest employers will be penalized here because of the work of other unscrupulous employers who will find new loopholes or workarounds to evade these provisions, particularly where the chance of enforcement is low.

Regarding alternative work, Farmworker Justice said the proposed rule makes clear that alternative work must be in the approved job order, and that this is an important clarification to deter unsafe and uncompensated work. USA Farmers commented that it is not logical to limit alternative work to work described on the clearance order. USA Farmers contended that if the employer is offering work included in the job order, then there would be no need for the employer to delay the start date of work because the alternative work would already be a part of the job order. MásLabor also commented that limiting alternative work to work described on the clearance order makes sense for H–2A workers who cannot perform duties outside the scope of the job order, but not for U.S. workers who are not subject to similar limitations. MásLabor stated that it is unclear why the employer should be restricted to work activities within the scope of the job order for U.S. workers, and why an employer may not count other alternative work if the job duties anticipated are not available. MásLabor contended that if an employer finds such alternative work, the work would also be compensable, and expressed concern that workers might receive double payment.

Regarding the methods for calculating wages, wafla expressed concern that the required wages would need to be hourly, piece rate, or any prevailing wage listed in the job order. Wafla asked how an employer can pay a piece rate to a worker when work has not yet started, and no piece rate has been established. Wafla suggested that the provision require only payment of the hourly rate listed in the job order and nothing more.

The Department agrees that expanding the wage payment requirement in the event of a delay, about which the employer failed to provide required notice, to 2 weeks is necessary for worker protection. As stated in the NPRM, the Department has made a policy decision that one week of wages is insufficient to protect workers from the financial hardships associated with a delayed starting date when such

delays were not communicated, particularly if a worker traveled for the job. Instead of adjusting the number of days wages must be paid to be equal to the number of days the employer's notice was late, as USA Farmers suggested, the Department is finalizing its proposed requirement that the number of days wages must be paid must be equal to the number of days work is delayed, up to 2 weeks. This helps ensure workers receive compensation commensurate with the amount of financial impact they experience due to the delay.

While it may add an additional cost, these requirements are not intended to be punitive to employers. Instead, the wage payment is designed to be protective for workers by ensuring that they are not disadvantaged due to circumstances beyond their control. The Department notes that in lieu of paying the 2 weeks' worth of wages, if the employer fails to comply with the notice requirements, employers can provide workers alternative work if such alternative work is listed on the approved clearance order. The Department has determined that this alternative effectively addresses the hardship concern by providing the worker a source of income, which would otherwise have been available but for the delay, while continuing to allow the employer flexibility to adjust their anticipated start date. Alternative work may be provided to help employers recover from unexpected weather events or acts of God. Finally, the requirement to pay up to 14 days of wages does not mean that workers will receive more money than they otherwise would have under the offered and agreed-upon terms of the clearance order, had the work begun on time. For example, if a delay lasts 10 days and the workers begin work on the 11th day, the employer, if having not provided adequate notice and not providing alternative work, is required to pay the worker only what they originally promised to pay.

As described in the discussion for parallel proposals in § 655.175, the Department disagrees that preexisting protections are sufficient to prevent financial hardship, including the preexisting requirements to pay one week of wages as well as existing H–2A employer obligations under the three-fourths guarantee. The requirements in § 653.501(c) ensure workers receive the first 2 weeks of wages at the beginning of the contract term and with the first scheduled paycheck. This helps avoid financial hardship workers might experience at the beginning of work, which is distinct from the three-fourths guarantee described for criteria clearance orders in part 655. The Department also notes that the requirements in § 653.501(c) apply to both criteria and non-criteria clearance orders, so this provision provides a necessary protection to workers not otherwise covered by the requirements in the Department's H–2A regulations.

The Department notes that the option for an employer to provide alternative work is preexisting and the Department did not propose to change that part of the regulation, except to clarify that the alternative work must be in the *approved* clearance order. The addition of *approved* is intended to clarify the existing regulation but not to change its meaning. Regardless, the Department believes it is important to retain the option to provide alternative work and that any alternative work must be described in the clearance order. Maintaining this option provides employers with flexibility to employ workers through other duties that are useful to the employer, though not their primary or anticipated need. For example, if an employer files a clearance order for apple pickers, the employer might include a description of alternative work that explains workers may be required to perform related work to prepare or maintain growing areas or to prepare containers and other specific support activities. In the event of a delay related to weather conditions, where the employer failed to properly notify workers, the employer could offer alternative work that would help the business be ready for work to start or to recover from the weather condition that caused the delay. Such work would be considered alternative because the primary job duties for the workers would be apple picking but, if apple picking is not possible, workers could be offered work that supports the primary work activity or business. The Department maintains that it is necessary for the alternative work to be described in the clearance order so that potential applicants have adequate notice of the duties they may be asked to perform, which are material terms and conditions. Applicants may decide to apply or not to apply based on the alternative work described in clearance orders. For these reasons, the Department declines to revise the option to provide alternative work and the specification that any alternative work must be described on the clearance order.

Additionally, though the Department did not receive comments requesting the Department to align the language of § 653.501(c)(3)(iv) and (c)(3)(5) with the parallel requirements in part 655, the Department has determined that it would be clearer to revise § 653.501(c)(3)(iv) and (c)(3)(5) so that the wage requirement is stated in days, instead of weeks, to be consistent with § 655.175. This revision does not change the proposed requirement.

The Department is finalizing the proposal to expand the period during which employers must pay the applicable wage to 2 weeks, from the current 1-week period, with one edit to describe the required 2-week period as 14 calendar days.

Finally, in paragraph (c)(5), the Department proposed new language instructing SWAs to process noncompliance with the employer's obligations in paragraph (c)(5) as an apparent violation pursuant to § 658.419. The Department did not receive comments on this change and adopts it, as proposed.

3. Section 653.501(d), Processing Clearance Orders

The Department proposed to remove paragraphs (d)(4), (7), and (8) in their entirety because, with the proposed change in paragraph (c) to have employers notify workers of any change in the start date, the requirement that the applicant holding office notify workers of any changes is no longer relevant or necessary.

Farmworker Justice supported the removal of paragraph (d)(4), stating that it eliminates an additional obstacle for U.S. workers in that previously they had to contact the ES Office to verify the original date of need to be eligible for the first week's pay. The Department did not receive any other comments.

The Department appreciates commenter support and adopts the removal of paragraphs (d)(4), (7), and (8), as proposed.

D. 20 CFR Part 658, Subpart F—Discontinuation of Services to Employers by the Wagner-Peyser Act Employment Service

This subpart sets forth the regulations governing the discontinuation of Wagner-Peyser Act ES services to employers. The Department adopts revisions throughout this subpart to clarify the bases and process for discontinuing services. The Department also reorganizes these regulations to more accurately group subjects and to more logically arrange procedural steps, including when and how employers may request a hearing. Finally, the Department clarifies what ES services would be unavailable after discontinuation and the entities subject to discontinuation.

The Department believes that revising the regulations, as described below, provides SWAs the needed additional clarity to better implement the discontinuation provisions and would allow ETA, including its regional offices, to better monitor and support SWAs to ensure they initiate discontinuation of services as required by the regulations. This will improve worker protection by preventing noncompliant employers from using the ES service to obtain workers (including H–2A workers, as employers seeking to use the H–2A visa program must first file a clearance order through the ES) which, in turn, aids the Department in ensuring a fair labor exchange system for compliant employers, and meeting its statutory obligations to maintain and increase the usefulness of the ES system. Additionally, the proposed clarifications and improvements to the discontinuation procedures provide greater certainty to employers seeking to provide information to SWAs in response to a notice of intent to discontinue, or seeking to reinstate services, and protect employers' interests by ensuring that they receive informative and timely determinations from SWAs. Specific changes are discussed below.

1. General Comments

The Department received several supporting and opposing comments on the general revisions to discontinuation of services provisions in part 658. The National Women's Law Center said that improving protections for both H–2A and corresponding workers is key to ensuring that abusive employers do not take advantage of the H–2A program to discriminate against their non-H–2A workforce and exploit the vulnerability of H–2A workers. It described the changes proposed to the discontinuation of services provisions as key improvements. Farmworker Justice said that discontinuation provides vital protections for workers who want to receive what they are owed and work under improved conditions without losing their jobs altogether. According to Farmworker Justice, unlike debarment, which is a discretionary sanction, discontinuation of services is mandatory whenever an H–2A employer is determined to have violated an employment-related law. Farmworker Justice further said that the detailed provisions for reinstatement of services can ensure farmworkers impacted by the employer's violations receive restitution, which may not routinely occur in debarment cases, and also highlighted the importance of corrective action plans described in part 658. Farmworker Justice also noted underapplication of the pre-existing discontinuation of services regulations by SWAs and said that, if properly applied, discontinuation of services would be a major deterrent to employers who might otherwise violate the law.

The U.S. Chamber of Commerce stated that it was concerned that the proposed revisions to the Wagner-Peyser ES regulations would have a significantly negative impact upon employers' ability to obtain and retain H–2A workers. The U.S. Chamber of Commerce said that the proposed revisions would incur additional processing costs, increase the likelihood of delays in obtaining workers, and create significant risks for business disruptions should employers run afoul of the new requirements in the middle of the seasons. The U.S. Chamber of Commerce stated that additional operating costs would affect American consumers in the form of higher food prices.

USA Farmers described the proposed regulations as an attempt to weaponize the Wagner-Peyser system against farmers and U.S. workers seeking agricultural employment and that the changes could block employers from utilizing the ARS for minor or unproven alleged violations of regulations and deny employers due process. USA Farmers contended that there is no rational need for the changes. USA Farmers stated that the Department already has a robust debarment program with due process rights. They argued that, as a result of this proposal, employers with violations that are not serious enough to warrant debarment by the Department will nonetheless effectively be debarred. USA Farmers also stated that the process to request a hearing and for SWAs to make decisions is flawed.

USAFL and Hall Global stated that the Department should defer adoption of the proposal and engage in detailed discussions with stakeholders. USAFL and Hall Global noted that discontinuation of services applies to the H–2A program and to non-H–2A related services and that, because the H–2A regulations mandate that a prospective H–2A employer access the interstate clearance system, discontinuation of services can amount to a permanent debarment of an employer.

The Northwest Horticultural Council (NHC) said that it is aware that many SWAs have limited resources and are often short staffed, which may contribute to the low use of discontinuation of services. NHC noted that many SWAs work closely with growers where clarification or questions may arise rather than simply discontinuing access to the services, which the commenter said it believes should be encouraged. NHC stated a concern that the proposed expansion of those subject to discontinuation of services, as well as the proposal to remove SWA discretion prior to discontinuation, will lead to delays in processing clearance orders for all employers, not just those subject to additional scrutiny. Additionally, NHC had concerns about limited employer recourse to the Department if there is ongoing conflict with the respective SWA.

The Department agrees with the comments from National Women's Law Center and Farmworker Justice, and believes that the changes are necessary to ensure worker protections, while offering adequate due process to employers. The Department notes that employers that comply with applicable laws and regulations should not experience delays or expenses related to these procedures because they will not have met the bases described at § 658.501 that mandate SWAs to initiate procedures for discontinuation of services. As described in greater detail in the following comment responses, the bases at § 658.501 in many cases describe that, to meet the basis for discontinuation, the employer must have *refused* to comply with the stated requirements. The bases that describe employer refusal to comply assume that the SWA has already attempted to resolve issues, which provided the employer with an opportunity to avoid initiation of discontinuation of services. For example, the SWA may be required to initiate discontinuation of services after the SWA attempted to informally resolve apparent violations under § 658.419 or complaints under § 658.411. The Department believes that the provisions of part 658, subpart F clearly explain that discontinuation of services is not the SWA's first response when it identifies apparent violations, or in response to complaints, except in cases where immediate discontinuation is warranted. The Department further notes that where immediate discontinuation is warranted, under § 658.502(b), the employer must also have met one of the stated bases at § 658.501(a), therefore, employers are not at risk of experiencing discontinuation of services for unsubstantiated claims, as some commenters suggested. The Department affirms that employers must comply with all applicable employment-related laws, as well as the full terms and

conditions of clearance orders, to employ workers through the ES system. The Department maintains that all ES regulations and employment-related laws are important and notes that the preexisting bases at § 658.501 similarly required SWAs to initiate discontinuation of services to employers who failed to comply with such requirements.

The Department will discuss comments specific to each of the proposed changes below but wishes to provide a response to these general comments to indicate that the interest of worker protection is compelling and supports the Department's determination to implement most of the changes, as proposed. The Department maintains that there are adequate procedural protections to protect the due process rights of employers, including several mechanisms to allow employers to respond to and resolve identified noncompliance, prior to discontinuation of services. The Department also maintains that the purpose and application of discontinuation of services is distinct from debarment actions, which more narrowly apply to certain programs. The proposed changes foster a culture of compliance between employers, workers, and SWAs, which is necessary to uphold the laws of the United States and their implementing regulations.

2. Section 658.500, Scope and Purpose of Subpart F

The Department proposed to revise § 658.500, which describes the scope and purpose of subpart F, to add language consistent with proposed revisions to § 658.503 that discontinued services include services otherwise available under parts 652 and 653. This revision clarifies the scope of services discontinued to include the labor exchange services—such as recruitment, career, and labor market information services—available to employers under part 652.

Farmworker Justice supported the proposed change, stating that it provides needed clarification that all job services in parts 652 and 653 are impacted by discontinuation. Additionally, the UFW Foundation, UFW, North Carolina Justice Center, UMOS, PCUN, CAUSE, and Green America expressed general support for inclusion of labor exchange services at part 652. On the other hand, USAFL and Hall Global stated that discontinuation of services should only apply to services *not* necessary for participation in the H–2A program, meaning discontinuation should only apply to the services available at part 652, and not part 653.

The Department appreciates commenter support for this clarification. Regarding the recommendation that discontinuation of services should only apply to services *not* necessary for participation in the H–2A program, the Department disagrees. Discontinuation has historically applied to ES services available under part 653, including access to the ARS. As explained above, prospective H–2A employers must use the ARS to recruit U.S. workers as a condition of receiving a temporary agricultural labor certification, and employers and entities who file applications for temporary agricultural labor certification under 20 CFR part 655, subpart B must comply with the ARS requirements at part 653, subpart F. *See, e.g.,* §§ 655.121 and 655.131655.133. The Department, therefore, declines to adopt the recommendation. and adopts this paragraph, as proposed.

The Department also proposed to add paragraph (b) to § 658.500, which would explain that for purposes of this subpart, employer refers to *employers,* as defined at § 651.10, and *agents, farm labor contractors, joint employers,* and *successors in interest,* as proposed to be defined at § 651.10. Proposed paragraph (b) therefore describes which entities may experience discontinuation of services. Each of these entities may engage in the ES clearance system by creating or submitting clearance orders, or by managing or utilizing workers placed on ES clearance orders. *Agents* and *farm labor contractors* often engage the ES clearance system by submitting clearance orders and controlling many aspects of recruitment activities relating to clearance orders. *Joint employers* may utilize workers placed on clearance orders in the same or similar manner as the *employer,* defined at § 651.10, with whom they jointly employ those workers, and each joint employer is responsible for the violations of the other joint employers. A *successor in interest* may have reincorporated itself from an *employer* whose ES services have been discontinued into another business entity that maintains the same operations or interests, allowing that entity to undermine the effect of the discontinuation of the original entity in contravention of the purpose of the discontinuation regulation. The revisions were proposed to clarify and expand the entities who engage the ES clearance system and are, thus, subject to discontinuation. Specifically, the proposed change would make it clear that agents, farm labor contractors, joint employers, and any successor in interest to an agent, farm labor contractor, or joint employer, are subject to discontinuation of services.

Finally, as the proposed *agents, farm labor contractors, joint employers,* and *successors in interest* also seek temporary agricultural labor certifications from OFLC under part 655, subpart B, adding these entities here brings the discontinuation regulation in line with the existing H–2A regulations, which permit the debarment of agents, farm labor contractors, joint employers, and successors in interest, as well as fixed-site H–2A employers, and agricultural associations. For the reasons set forth in the NPRM and below, the Department adopts the proposed paragraph (b), with one addition.

The UFW Foundation, UFW, North Carolina Justice Center, UMOS, PCUN, CAUSE, and Green America all expressed support for greater accountability to third parties, stating one of the strongest protections in the proposed rule would be a series of changes that would strengthen enforcement actions against employers' agents, contractors, joint employers, and successors in interest. Similarly, the National Women's Law Center stated that the proposed rule would improve administration of the H–2A program, including discontinuation of services, to help prevent employers and their agents from abusing the H–2A program.

Several commenters expressed concern that the proposed changes would make third parties liable for the actions of employers, and employers liable for the actions of third parties. The Arizona Farm Bureau Federation, North Carolina Farm Bureau Federation, Inc., Golden Plain Farms, Inc., Western Range Association, and Roossinck Orchards, Inc. opposed the proposed changes, stating that they hold farmers responsible for violations committed by farm labor contractors, recruiters, attorneys, etc. Similarly, wafla stated that the inclusion of entities who are not the principal employer, have no clear control of day-to-day workplace conditions, and have nothing to do with potential rule violations giving rise to discontinuation is overbroad. The American Immigration Lawyers Association (AILA) opposed inclusion of successors in interest, stating that successors in interest are not responsible for issues created by former owners and should not have to answer for those issues merely by purchasing a business. The National Cotton Ginners Association and Texas Cotton Ginners' Association opposed the inclusion of agents, stating that the rule makes small agricultural business that rely on agents for recruitment services subject to

discontinuation because of potential violations by the agent that may be outside of the employer's control. The Mountain Plains Agricultural Service stated that the proposal extends enforcement of employment-related laws to agents that are not employers and not subject to said laws and regulations. Relatedly, the International Fresh Produce Association (IFPA), the Georgia Fruit and Vegetable Growers Association (GFVGA), U.S. Custom Harvesters, Inc., Texas International Produce Association (TIPA), NHC, the U.S. Chamber of Commerce, Titan Farms, LLC, Demaray Harvesting and Trucking, LLC, an individual, and an anonymous commenter all opposed the changes stating that they do not make clear who—whether the filing entity, the underlying employer, or both—will be subject to discontinuation of services when a SWA determines that a basis for discontinuation exists.

Additionally, commenters opposed the inclusion of agents and attorneys because of the legal and ethical duties they owe to their clients. USApple stated that agents and attorneys are legally and ethically bound to carry out their clients' intentions, and the proposed rule would allow for discontinuation of services to agents and attorneys where their client refuses to, for example, modify a job order. Similarly, másLabor stated that agents and attorneys are not free to unilaterally take action that is contrary to the intent of the client, and if an employer disagrees in good faith with the SWA and instructs the agent or attorney not to modify an application in accordance with the SWA's instructions, the agent is therefore duty-bound to follow that instruction and push back against the SWA.

Several commenters asked that the Department consider the economic implications of the proposed changes and their potential effect on the industry. IFPA, GFVGA, U.S. Custom Harvesters, Inc., TIPA, NHC, the U.S. Chamber of Commerce, Titan Farms, LLC, Demaray Harvesting and Trucking, LLC, an individual, and an anonymous commenter all stated that agents and attorneys play an invaluable role in processing criteria clearance orders, certifications, and petitions for employers—particularly for small farm employers without staff or expertise to undertake the process. Discontinuation of services to third parties would impact farm employers across the country who, in good faith, rely on that third party and could not anticipate the SWA action. Because the timing for filing a clearance order and date of need is incredibly tight, under the proposed rule, farmers will suffer significant financial losses caused by circumstances over which they have no control, leaving them with crops in the field and no harvesters to collect them. Additionally, farmers will have increased costs associated with hiring a new third party to file their clearance orders or redirect staff resources to undertake the task while the company is preparing for harvest.

Relatedly, wafla stated that discontinuation to an attorney or filing agent would negatively impact the other clients that attorney or agent serves, such that all of that attorney's or agent's clients would be debarred from the program. MásLabor stated that discontinuation to an attorney or agent would preclude that agent or attorney from filing job orders in that State for its other clients. The Western Range Association stated that discontinuation to agents would be disconcerting to the entire industry because there are only two agents that the majority of ranchers in its service area use. USApple stated that discontinuation to an attorney or agent would reach much further than a single clearance order to affect many employers and upwards of hundreds, if not thousands, of workers. The Wyoming Department of Agriculture stated that discontinuation to any affiliate of the employer would result in a domino effect of reduced services and job opportunities for employees who work with agents, attorneys, or others due to their names being placed on the discontinuation list.

The Department reiterates that all entities who engage the ES clearance system, including agents (which include attorneys), farm labor contractors, joint employers, and successors in interest, should be subject to discontinuation, if appropriate. The proposed changes are meant to hold these entities accountable for compliance with ES regulations. They are not meant to hold, for example, agents, attorneys, or farm labor contractors accountable for the actions of the employers they represent, or vice versa. For example, if an employer is discontinued because, under § 658.501(a)(4), they are found by a final determination by OSHA or WHD to have violated an employment-related law, the discontinuation is not imputed to the employer's agent who had nothing to do with the violation. If an employer is discontinued because, under § 658.501(a)(1), they refuse to correct terms and conditions in the job order that are contrary to employment-related laws, and the employer's agent made a good-faith attempt to bring the employer's terms and conditions into compliance, the discontinuation is not imputed to the employer's agent. Conversely, an agent or farm labor contractor's noncompliance would not necessarily be imputed to an employer. Thus, under the proposed rule, an agent, attorney, or farm labor contractor who is blameless would not be subject to discontinuation based on the acts of the employer, and an employer who is blameless would not be subject to discontinuation based on the acts of their agent, attorney, or farm labor contractor. As to joint employers and successors in interest, the Department reiterates that joint employers who utilize workers placed on clearance orders should be subject to discontinuation; and successors in interest, who maintain the same or similar operations as the former employer whose services have been discontinued, should also be subject to discontinuation.

Regarding the legal and ethical duties that agents and attorneys owe to their clients, the proposed changes do not interfere with those duties. For example, an agent or attorney who engages the ES system on behalf of an employer must do so in conformance with the requirements of the ES regulations and must advise their employer-client to use the ES system in conformance with the regulations. In the example provided by commenters, if an employer refuses to modify a job order to comply with employment-related laws, the agent or attorney will have presumably advised the employer to bring the terms or conditions in the job order into compliance. In that instance, and as noted above, a blameless agent or attorney would not be subject to discontinuation based on the acts of the employer.

The Department recognizes and acknowledges the critical role that agents and attorneys play in navigating the ES system for the employers they serve. The Department also recognizes that the discontinuation of services to an agent or attorney may have an economic impact on the industry, particularly for small farms that rely heavily on agent/attorney services. However, the Department considers requiring SWAs to discontinue services to agents and attorneys, where appropriate, necessary to protect the integrity of the ES system and protect users—both workers and employers—of the ES system. Without the ability to discontinue services to agents and attorneys, SWAs would have no mechanism to prevent agents or attorneys that violated ES regulations from accessing the ES system. The impact to the industry may be mitigated in light of other changes made to the

discontinuation regulations. Specifically, the discontinuation action will be stayed pending any appeal of a final SWA decision to discontinue services to an agent or attorney; alternatively, an agent or attorney can have services reinstated at any time if they have resolved the issues leading to the discontinuation. In addition, the Department reiterates that inclusion of agents, farm labor contractors, joint employers, and successors in interest is necessary to align the definition of agent here with the definition of agent in § 655.103; and that the economic effects of discontinuation to third parties are the same or similar as the effects of debarment on the same third parties in the existing H–2A context. Finally, as noted in the discussion of the *successor in interest* definition in § 651.10, the Department is relocating part of that proposed definition, on liability of successors in interest, to this section of part 658 (''A successor in interest to an employer, agent, or farm labor contractor may be held liable for the duties and obligations of that employer, agent, or farm labor contractor for purposes of recruitment of workers through the ES clearance system or enforcement of ES regulations, regardless of whether such successor in interest has succeeded to all the rights and liabilities of the predecessor entity.'') As with the separate structure of § 655.104(a) and (b), the Department is separating the language relating to liability for discontinuation purposes from the definitional language of § 651.10 and has determined this liability language is more appropriately located in part 658, subpart F, which generally describes the situations in which entities are subject to discontinuation of services, Regarding the concerns commenters raised with the scope of successor liability and the language in proposed §§ 651.10 and 655.104, ''regardless of whether such successor in interest has succeeded to all the rights and liabilities of the predecessor entity,'' the Department is retaining this and other proposed language on successors as part of § 658.500—and is not finalizing the remainder of the proposed sentence (''A successor in interest includes an[y] entity that is controlling and carrying on the business of a previous employer, agent, or farm labor contractor'')—for the reasons stated in the discussion of § 655.104 below.

3. Section 658.501, Basis for Discontinuation of Services

Section 658.501 describes eight bases for which SWA officials must initiate discontinuation of services to employers. The Department proposed several edits to paragraphs (a)(1) through (7), except paragraph (a)(3), including a substantive revision to paragraph (a)(4).

In paragraph (a)(1), the Department proposed to state that SWA officials must discontinue services to employers who submit and refuse to correct or withdraw job orders containing terms and conditions contrary to *employment-related laws.* The existing regulation contains the terms *alter* and *specifications.* The Department proposed to change *alter* to *correct* to more clearly articulate that the employer must specifically correct the noncompliant term or condition rather than simply change the term or condition, which might not result in correction of the noncompliance. The Department also proposed to change *specifications* to *terms and conditions* to align the language in paragraph (a)(1) with the language used in § 653.501. For the reasons discussed in the NPRM and below, the Department adopts paragraph (a)(1) as proposed.

Several trade associations, including the Florida Fruit and Vegetable Association (FFVA), GFVGA, Western Growers, USA Farmers, USApple, NHC, Snake River Farmers' Association (SRFA), AmericanHort, NCFC, IFPA, wafla, and FSGA, along with másLabor, USAFL and Hall Global, the Michigan Farm Bureau, McCorkle Nurseries, Inc., Northern Family Farms, LLP, Mountain Plains Agricultural Service, Willoway Nurseries, an individual, and an anonymous commenter, opposed or expressed concerns regarding the Department's proposal to change the word ''alter'' to ''correct.'' These commenters stated that SWAs often misstate, misinterpret, or incorrectly apply the meaning of various employment-related laws when processing jobs orders. Some cautioned that SWAs do not have sufficient familiarity with applicable laws to make determinations as to whether the terms and conditions in an employer's job order comply with employment-related laws. Others stated that SWAs have limited resources to conduct fact investigations in making such determinations. One commenter noted that the NPRM does not indicate whether SWAs will receive training or guidance on applicable State and Federal laws.

Additionally, commenters raised concerns as to how disagreements between employers and SWAs under proposed paragraph (a)(1) will be resolved. Some stated that use of the proposed ''correct'' presumes that the SWA's interpretation of employment-related laws is accurate, does not allow employers to challenge the SWA's interpretation, flips the burden of demonstrating a basis for discontinuation onto employers, and requires employers to prove a negative. Others stated that proposed paragraph (a)(1) is vague, does not allow employers to resolve disagreements with SWAs in good faith, and allows for discontinuation where the employer's alleged noncompliance with employment-related laws has not been adjudicated on the merits.

In the H–2A context, several commenters questioned the interplay between proposed paragraph (a)(1) and the emergency application procedures at §§ 655.121 and 655.134, which allow employers to appeal to a DOL Certifying Officer (CO) where they are unable to resolve outstanding deficiencies in the contents of H–2A job orders with the SWA. Because proposed § 658.501 describes the circumstances in which SWAs *must* initiate discontinuation, commenters asked whether every emergency application will automatically require initiation of discontinuation proceedings. Additionally, commenters asked whether employers would undergo discontinuation proceedings before the DOL CO resolves the emergency application; and whether the SWA would still be under an obligation to discontinue services after a CO has determined that a job order is, in fact, compliant with employment-related laws. Commenters stated that SWAs frequently assert that the contents of a job order are contrary to employment-related laws—only to have the CO overturn that determination in a subsequent emergency filing under § 655.134.

Finally, commenters opposed application of proposed paragraph (a)(1) to agents and attorneys. One commenter stated that proposed paragraph (a)(1) extends enforcement of employment-related laws to agents, who are not employers and, thus, not subject to said laws. Another commenter stated that application to agents and attorneys may unlawfully force agents and attorneys to violate legal and ethical duties to their clients by requiring them to change terms and conditions in job orders contrary to the express wishes of their clients. That commenter also expressed concern with the effect of proposed paragraph (a)(1) on agents and attorneys, stating that a SWA's incorrect interpretation of an employment-related law, and subsequent discontinuation of services, could lead to irreparable harm to that agent or attorney's business, and

to the clients who use the agent or attorney to file job orders.

Commenters suggested several changes to proposed paragraph (a)(1), including: (1) requiring an enforcement agency to make a predicate finding of a violation of an employment-related law; (2) limiting proposed paragraph (a)(1) to repeated failures to correct or withdraw job orders that have already been adjudicated; (3) allowing employers to contest discontinuation by demonstrating that the matter has not been adjudicated on the merits; (4) clarifying that failure to include State and local laws in a job order is not a basis to refuse to open a job order or discontinue services; (5) automatically staying discontinuation proceedings if an employer files an emergency application under § 655.121, § 655.134, or § 655.171 until the CO or Administrative Law Judge (ALJ) reaches a final determination on the merits; (6) automatically terminating discontinuation if a CO issues a Notice of Acceptance under § 655.143; (7) modifying § 658.504 to require reinstatement where a CO determines that the job order is compliant with employment-related laws; (8) allowing employers to appeal directly to an ALJ in lieu of a State hearing official; and (9) excluding application to agents and attorneys.

The Department appreciates commenters' views and recommendations. The Department emphasizes that its proposal to change the word *alter* to *correct* in paragraph (a)(1) is a clarifying edit that is not intended to make any substantive change to the regulation. As discussed above, the proposed change more clearly articulates that employers must correct terms and conditions in job orders that are contrary to employment-related laws, rather than simply change them. For example, § 653.501(d)(2) provides that SWAs may place an intrastate or interstate order seeking workers to perform farmwork for a specific farm labor contractor or for a worker preferred by an employer, provided the order meets ES non-discrimination criteria. It further states that an order would not meet such criteria, for example, if it requested a *white male crew leader* or *any white male crew leader.* In this example, were an employer to subsequently change this term from ''white male crew leader'' to ''white crew leader,'' the employer has altered the term but has not corrected it to bring it in compliance with non-discrimination laws (including, *e.g.,* the requirement at § 653.501(c)(1)(ii) that clearance orders not contain an unlawful discriminatory specification). The word *correct,* therefore, better aligns with the intent of paragraph (a)(1), which is to ensure that clearance order terms and conditions comport with employment-related laws and that SWAs take appropriate action where such terms and conditions are not corrected.

The Department further emphasizes that proposed paragraph (a)(1) does not impose any new requirements, and the discontinuation process is separate and distinct from the review process for criteria clearance orders (orders that are attached to H–2A applications) in § 655.121. That process includes an initial review, a deficiency notice, where applicable, an opportunity for an employer to respond, a final determination from the SWA, and an allowance for employers to file an emergency Application for Temporary Employment Certification when the SWA and the employer are unable to resolve outstanding deficiencies regarding the contents of criteria clearance orders. Where the SWA ultimately approves a criteria clearance order there would be no basis for the SWA to initiate discontinuation proceedings. Where the SWA disapproves the order and the employer files an emergency application, a CO will review and approve or deny certification (*see* § 655.160). Where the CO denies certification, and the employer does not appeal, the CO's written determination is final (*see* § 655.164). Where the employer appeals, an ALJ will issue a written determination (*see* § 655.171). Applicable here, only where there is a final determination from either the CO or ALJ that the terms and conditions in an employer's criteria clearance order are contrary to employment-related laws, and the employer refused to bring the terms and conditions into compliance, would the SWA have reason to initiate a discontinuation action.

For *non-criteria clearance orders* (orders that are not attached to H–2A applications), under § 653.501, SWAs must review and approve clearance orders within 10 business days of receipt of the order. Where a SWA reviews and approves the clearance order, there would be no basis for the SWA to initiate discontinuation proceedings. Where a SWA reviews and the terms and conditions of the order are contrary to employment-related laws, and the employer updates the order by correcting the terms and conditions, there would be no basis for discontinuation. However, where a SWA reviews and the terms and conditions of the order are contrary to employment-related laws, and the employer refuses to bring the terms and conditions into compliance or to withdraw the clearance order, the SWA must initiate discontinuation of services under § 658.501(a)(1). Only where the SWA denies the clearance order because the employer refused to bring the terms and conditions into compliance, would the SWA have reason to initiate a discontinuation action.

As noted in the NPRM, the Department intends to increase the reach and utility of the discontinuation of services provisions, which SWAs have underutilized in recent years. While proposed paragraph (a)(1) does not include any substantive changes or new requirements, the Department recognizes and appreciates the concerns and recommendations raised by commenters—particularly those regarding effective and efficient resolution of employer and SWA disagreements, and the interplay of proposed paragraph (a)(1) and the H–2A emergency application process. In addition to the discussion above, the Department intends to issue further guidance on this basis for discontinuation.

Regarding application of proposed paragraph (a)(1) to agents and attorneys, the Department disagrees with commenter concerns. The Department reiterates that agents, attorneys, and other entities who engage the ES clearance system should be subject to discontinuation if they meet a basis for discontinuation; and that the effects and reach of discontinuation on agents/attorneys will be the same or similar as the effect of debarment on agents/attorneys in the existing H–2A context. As to the commenter concern that the proposal may unlawfully force agents and attorneys to violate legal and ethical duties to their clients by requiring them to change terms and conditions in job orders contrary to the express wishes of their clients, the Department emphasizes that paragraph (a)(1) is intended to ensure terms and conditions in clearance orders comply with employment-related laws. It does not require or compel agents/attorneys to violate any legal or ethical duties to their clients. To the extent an employer includes terms or conditions that violate employment-related laws, the employer's agent or attorney—who has professional and ethical duties relating to representation of the employer—would advise the employer to bring the term or condition into compliance. Discontinuation of services would not apply to an agent or attorney who attempted to bring the employer's terms and conditions into compliance. On the

other hand, a SWA would initiate discontinuation procedures where, for example, an agent/attorney instructs an employer to include in its clearance order a rate of pay that is contrary to employment-related laws and refuses to correct the rate of pay. An agent or attorney who is blameless would not be subject to discontinuation based on the acts of the employer, just as an employer who is blameless would not be subject to discontinuation based on the acts of their agent/attorney. Additionally, where there is, in fact, a good-faith disagreement with the SWA as to whether a term or condition complies, the procedures at § 658.502(a)(1) allow for submission of evidence to show that the terms and conditions are not contrary to employment-related laws; and the procedures at §§ 658.503 and 658.504 allow for appeal.

The Department proposed to reorganize paragraph (a)(2) for clarity by moving the language regarding withdrawal of job orders that do not contain required assurances to earlier in the sentence. The Department also proposed to remove language in paragraph (a)(2) that currently limits this basis for discontinuation to only those assurances involving *employment-related laws.* The Department proposed to remove this language because employers must provide all assurances described at § 653.501(c)(3), which include more than the assurance to comply with *employment-related laws.*

Wafla opposed the proposed removal of language that limits this basis for discontinuation to assurances involving *employment-related laws.* Wafla stated that the proposed change broadens the scope of discontinuation beyond employment related laws, and that discontinuation of services can be for any H–2A assurance violation.

The Department notes that the proposal did not broaden the scope of discontinuation beyond those assurances listed in § 653.501(c)(3). The proposed change to paragraph (a)(2) was made because the Department thought that discontinuation was appropriate where an employer refused to include any assurance required by subpart F of Part 653. The proposed change makes clear that employers must provide all assurances described at § 653.501(c)(3) when requesting the placement of a job order into clearance, and that SWAs must provide the same treatment to all required assurances (*i.e.,* the SWA will initiate discontinuation for employers' refusals), regardless of which assurance is involved. For these reasons and the reasons set forth in the NPRM, the Department adopts paragraph (a)(2) as proposed.

The Department proposed to amend paragraph (a)(4) to add that SWA officials must initiate procedures for discontinuation of services for employers who are currently debarred from participating in the Department's H–2A or H–2B foreign labor certification programs. It proposed no changes to the regulatory text that states that SWA officials must initiate procedures for discontinuation of services to employers who are found by a final determination by an appropriate enforcement agency to have violated any employment-related laws and notification of this final determination has been provided to the Department or the SWA by that enforcement agency. The Department received numerous comments on proposed paragraph (a)(4), though the vast majority of them related to this existing language in § 658.501(a)(4) where no changes were proposed.

The Department also requested comments on whether the SWAs should also initiate discontinuation of services to employers who are debarred from participation in any of the Department's foreign labor certification programs. The Department did not receive many comments in relation to this question.

After careful consideration of the comments, the Department has adopted the proposed language without change. The comments are discussed in detail below.

In relation to the portion of (a)(4) that states that discontinuation of services must be initiated for employers who are found by a final determination by an appropriate enforcement agency to have violated any employment-related laws, the Department received many comments expressing opposition. IFPA, U.S. Custom Harvesters, Inc., GFVGA, NHC, USApple, TIPA, Titan Farms, LLC, wafla, Texas Cotton Ginners' Association, Wyoming Department of Agriculture, Burley and Dark Tobacco Producer Association, and a couple of individuals believed that the ''new'' proposal would result in discontinuation of services for minor infractions by employers who are acting in good faith to comply with regulations. For example, wafla expressed concerns that this proposal would allow discontinuation of services for minor paperwork violations, or a lack of documented safety meeting records. The commenters explained that there are a lot of regulations and stated that even the best employers have unintentional violations as a result of misunderstanding the requirements or conflicting guidance from government agencies.

The commenters also alleged that the discontinuation of services based on minor infractions would lead to delays in processing as well as the cost of time for agents/attorneys to respond to the discontinuation notice. Instead, they argued that discontinuation of services should be a result of willful violations that affect the health and safety of workers.

NCFC, Western Growers, AmericanHort, and Willoway Nurseries also objected to this provision. They explained that sometimes WHD may cite an employer for a violation but ultimately decide not to debar that employer, and in such a case, it argued that the SWA should not then effectively debar an employer by discontinuing services. They stated that if the Federal government, via WHD, already conducted an investigation and issued what it viewed to be an appropriate citation without debarment, then the SWA should not then subsequently try to issue another punitive sentence against the employer by discontinuing services.

The Department thanks the commenters for their concerns but believes they are unfounded. The provision of paragraph (a)(4) relating to a final determination by an appropriate enforcement agency to have violated any employment-related laws is not new—it has been a part of the regulations for over 40 years and the Department did not propose any changes regarding that aspect of paragraph (a)(4) in this rulemaking.

Regardless, the Department disagrees with the argument that more minor infractions, as opposed to willful violations, do not warrant a sanction such as discontinuation of services—if an employer has been found by an enforcement agency to have violated an employment-related law, then discontinuation is appropriate to protect the integrity of the ES system and protect workers. They may rebut the proposed discontinuation or apply for reinstatement after a final discontinuation order has been issued by, among other methods, providing evidence that they have adequately responded to any findings, including any restitution or payment of fines. The Department does not believe it unreasonable to require an employer, who has been found in a final determination to have violated an employment-related law to have to remedy the violation or appeal the discontinuation before they are permitted to recruit workers through the ES system. While the Department does not think that this provision will lead to any greater delays than may currently

occur under this pre-existing ground, as noted above the Department thinks that the benefit of the provision outweighs any potential delay that may occur.

Finally, the Department is also unconvinced by the notion that if an enforcement agency, such as WHD, decides to issue a final determination against an employer, but ultimately not debar the employer, this prevents or should prevent the SWA from discontinuing services. Debarment is not the same as a discontinuation of services—while discontinuation would preclude an employer's ability to access the H–2A program, they are different actions taken by different actors with different consequences under different authority. As discussed in the NPRM, the goal of discontinuation is to protect workers and the integrity of the ES system by preventing employers from using the system to recruit workers if they have misused the ES system or otherwise engaged in actions that are harmful to workers until they have corrected the issue(s) giving rise to their discontinuation. Sections 658.502 and 658.504 explain that an employer can respond to a proposed discontinuation or seek reinstatement if they have responded to the findings of an enforcement agency, including payment of restitution or fines, and establish that they have addressed or revised any policies, procedures, or conditions that gave rise to the violation(s). The ability to seek reinstatement is an important distinction from debarment, which is for a set period of time regardless of any remedial action taken by the debarred entity.

IFPA, GFVGA, NHC, and an anonymous commenter stated that this proposal to allow for discontinuation of services for an employment-law related violation was overly punitive because the underlying issue would have already been cited by another agency, and a final determination would have already been reached. They also argued that this went beyond the legal purview of the SWA in its review of the job orders.

The Department disagrees. Again, as noted above, the Department thinks that it is reasonable for an employer to have to remedy their violations before being allowed to receive services. Until those violations are remedied, it is appropriate and well within the purview of a SWA to discontinue ES services to better protect workers, and to maintain the proper functioning of the ES system by serving employers who demonstrate the ability to comply with State and Federal laws governing the employment relationship.

Wafla, USA Farmers, AgriMACS, Inc., and one individual argued that this proposal lacked due process, but it is unclear if this comment related specifically to provision (a)(4), or how this section lacks due process. USA Farmers elaborated that with regard to H–2A applications, the Department will not refuse to process them simply because an employer is under investigation by WHD, for example, but in this context, an employer would have their services discontinued without an appeals process.

The SWA must *initiate* discontinuation of services to employers who are found by a final determination by an appropriate enforcement agency to have violated employment-related laws, or those who have already been debarred. First, in both instances, employees would have had the opportunity to go through appropriate procedures, including, in the case of H–2A and H–2B findings (including those resulting in debarment), a robust appellate process. Second, this provision only relates to the *initiation* of the discontinuation of services. Employers will still have 20 working days to respond to the discontinuation notice pursuant to § 658.502 and may appeal a final determination regarding discontinuation of services pursuant to § 658.504. As discussed throughout the preamble, if a final determination regarding discontinuation is appealed then the effect of the discontinuation is generally stayed. The Department therefore thinks that this provides entities with ample due process protections.

U.S. Custom Harvesters, Inc., IFPA, GFVGA, NHC, TIPA, and one individual requested the Department identify a look back period so that they could know whether noncompliance adjudications or settlements from previous years would affect them.

In the NPRM, in the section of the preamble discussing § 658.501(b), the Department had asked commenters if SWAs should limit their examination of previous labor certifications or potential violations of a labor certification to a certain time period. 88 FR at 63763. The Department believes that this comment is more appropriately addressed in the section relating to § 658.501(b). To the extent the comment is relevant to this provision, while the Department did not propose a look-back period or suggest that it was contemplating adding such a provision, we note that H–2A and H–2B program debarments are time limited and that an employer whose services have been discontinued as a result of an H–2A or H–2B debarment can seek reinstatement once their period of debarment has ended.

An anonymous commenter opposed the new provision of the regulation that requires discontinuation for employers who are currently debarred from participating in the H–2A or H–2B foreign labor certification programs pursuant to § 655.73 or § 655.182 of this chapter or 29 CFR 501.20 or 503.24. They argued that this would be overly punitive and that debarment is a harsh enough punishment. They explained that if they were a farm that was dependent on H–2A workers and was debarred, and then subsequently not able to hire U.S. workers via the SWA, they would need to go out of business or alter their business significantly. Another anonymous commenter stated it did not support expanding or empowering SWA authority under a Federal program.

The Department does not believe it punitive to initiate discontinuation of services against a debarred H–2A or H–2B employer, but rather believes it is necessary to protect workers and effectuate the purpose of the ES system, which is to improve the functioning of the nation's labor markets by bringing together individuals who are seeking employment and employers who are seeking workers. As stated in the NPRM, the Department recognizes that many employers who use the ARS also seek temporary agricultural labor certifications from OFLC under part 655, subpart B. These employers may attempt to recruit workers through non-criteria orders in the ARS if they are prohibited from using the H–2A program as a result of their debarment. The Department does not want the ES system to facilitate placement of U.S. workers with employers whom the Department has determined should not be permitted to employ nonimmigrant workers through its H–2A and H–2B programs, particularly where the U.S. workers may perform similar work and, thus, be subject to the same or similar violations giving rise to the employer's debarment.

This requirement will protect workers who use the ARS by ensuring that ES offices do not place U.S. workers with H–2A/H–2B debarred employers during any such period of debarment. Debarment is a serious sanction that, in the case of H–2A employers for example, results from a finding not only that an employer violated a material term or condition of its temporary agricultural labor certification, but also that the violation is so substantial as to merit debarment, and it is imposed only after an employer has exhausted or forfeited an opportunity to respond to

the debarment action, appeal it, or both. Violations may be related to worker safety, failure to provide required wages or working conditions, failure to comply with recruitment requirements or participate in required investigations or audits, or failure to pay required fees, among other substantial violations. Entities that have committed such violations should be excluded from participation in the ES, and the Department is better able to protect U.S. workers by ensuring that they will not be placed with debarred employers that have substantially violated a material term or condition of their temporary agricultural labor certification.

The new regulatory provision would also ensure that the ES system would have more resources to assist law-abiding employers to recruit available U.S. workers for jobs because SWAs would spend less time and resources serving noncompliant employers, and law-abiding employers would receive referrals of qualified U.S. workers that might otherwise go to noncompliant employers.

UMOS, Green America, CAUSE, PCUN, North Carolina Justice Center, UFW, the UFW Foundation, and CCUSA and USCCB provided generalized support for the provision that requires the initiation of discontinuation of services against employers who are debarred from H–2A and H–2B labor certification programs without much further elaboration.

The Agricultural Justice Project and an individual supported expanding the provision to require SWAs to initiate discontinuation proceedings against employers who are debarred from any of the Department's other foreign labor certification programs. The Agricultural Justice Project stated that doing so will help stop repeat violators. An individual expressed the opinion that requiring a discontinuation of services against employers debarred from other programs would not have ''any negative effect.'' Also, it would provide more consistent outcomes between DOL and SWA actions rather than allowing employers to circumvent debarment.

The Colorado Department of Labor and Employment did not directly oppose the expansion to include other debarred employers but noted that it would be difficult to initiate a discontinuation of services because they are not as knowledgeable about the rules and regulations that govern the programs not administered by the SWAs.

The Department thanks commenters for their supportive comments. As noted above, the Department will adopt the proposed regulation without change. It is true that expanding the provision to require an initiation of discontinuation of services against an employer who is debarred from any foreign labor certification program may deter repeat violators, or those who attempt to circumvent debarment in one program by using another. However, at this time, the Department will not expand this provision to include employers who are debarred under any foreign labor certification program, only the H–2A and H–2B programs. The Department did not receive a significant number of comments in support of the expansion. Furthermore, the Department, as articulated above, has had more experience with H–2 employers who use or misuse the ES system and will therefore focus current efforts on employers that have been debarred from the H–2A and H–2B programs. Finally, the Department appreciates the comment from the Colorado Department of Labor and Employment and, should expansion be proposed again, will consider if additional guidance to SWAs will be needed.

Finally, the Department did receive some additional comments that offered conditional support, suggestions, or both. The Colorado Department of Labor and Employment lamented that enforcement agencies do not have a standard practice of sharing findings with the SWA. It suggested that if a debarment action is taken against an H–2A or H–2B employer, the Department should immediately inform the SWAs of said debarment. Another anonymous commenter suggested something similar as well.

Farmworker Justice echoed some of these concerns noting that SWA officials have informed them that they have been unable to discontinue services in some instances because they were not given the final investigative determinations by enforcement agencies. Farmworker Justice further explained that, allegedly, SWA officials have been told to file Freedom of Information Act (FOIA) requests for information on employers, but if they do not know which employers are being investigated, they cannot submit such a request. Farmworker Justice suggested that the Department adjust § 501(a)(4) to adopt more expansive language from § 501(a)(3) to trigger mandatory discontinuation of services whenever the SWA learns of a final determination from the enforcement agency, or via another manner.

Farmworker Justice also suggested the Department require its agencies to notify SWAs of final determinations where an employer was found to have violated an employment-related law or regulation. In support of expanding discontinuation of services, Farmworker Justice noted that discontinuation, unlike debarment, can result in more farmworkers receiving restitution, and an employer adopting corrective action plans.

The Department thanks the commenters for their suggestions but declines to adopt further changes to the regulatory text. Many SWAs have existing relationships with the Department's enforcement agencies, and the Department will continue to engage with appropriate enforcement agencies to encourage the sharing of information with SWAs where appropriate to provide SWAs the information necessary to initiate a discontinuation action.

The Department notes that a SWA may also learn of a final determination of noncompliance issued by an appropriate enforcement agency through sources other than the enforcement agency (*e.g.,* through a press release, a newspaper, or farmworker advocates). While the initial information the SWA receives from another source would not require the SWA to initiate discontinuation of services, the information might constitute an *apparent violation,* which § 651.10 defines as a suspected violation of employment-related laws or ES regulations by an employer that an ES staff member observes, has reason to believe, or regarding which an ES staff member receives information (other than a complaint as defined in this part). Under § 658.419(b), if the employer has filed a job order with the ES office within the past 12 months, the ES office must attempt informal resolution of the apparent violation as described at § 658.411. As a part of the SWA's informal resolution attempt, the SWA may contact the enforcement agency to confirm the final determination and, at that point, the enforcement agency may provide notice to the SWA of the final determination, which would prompt the SWA to initiate discontinuation of services.

The Department further notes that under § 658.501(a)(3), which the Department did not propose to revise, a SWA must initiate procedures for discontinuation of services to employers that the SWA finds, either through field checks or otherwise, to have either misrepresented the terms or conditions of employment specified on job orders or failed to comply fully with assurances made on job orders. Therefore, if a SWA obtains sufficient facts evidencing that an employer failed to comply fully with assurances made on job/clearance orders and, after reviewing the matter, determines that

discontinuation is warranted, it should initiate discontinuation even absent a final determination from an enforcement agency. For example, if a SWA has sufficient evidence that an employer violated an employment-related law relative to a clearance order and after reviewing or investigating the matter as appropriate, the SWA determines that the employer did not comply with the required assurance at § 653.501(c)(3)(iii) that the working conditions comply with applicable Federal and State minimum wage, child labor, social security, health and safety, farm labor contractor registration and other employment-related laws, the SWA should initiate discontinuation of services citing § 658.501(a)(3). This could occur in situations where the SWA has conclusive evidence of a violation. For example, there have been several recent cases where employers were on video threatening workers with physical violence in retaliation for workers asserting their employment-related rights. The Department notes that, in addition to initiating discontinuation of services, SWAs are required to refer unresolved apparent violations and complaints that involve employment-related laws to applicable enforcement agencies, as described at part 658, subpart E.

The Department is committed to providing protections for both U.S. workers and H–2A workers, as well as providing a fair and equitable ES system for employers. In light of the above-discussed comments, the Department adopts the proposed regulatory language at § 658.501(a)(4) without change.

The Department proposed to amend § 658.501(a)(5) by adding that this basis for discontinuing services includes employers who are found to have violated ES regulations pursuant to § 658.411 or § 658.419. This edit is intended to clarify that ES violations may also be found as a result of apparent violations that are described at §§ 651.10 and 658.419 (*i.e.,* violations that ES staff observe or about which they otherwise receive information).

USA Farmers opposed the inclusion of apparent violations, stating that, as proposed, a mere suspicion of a violation now constitutes a finding of a violation under proposed paragraph (a)(5). Washington State inquired generally as to whether the proposed changes in the H–2A program will result in additional findings during field checks or apparent violations or complaints. As to the H–2A program, they stated that while they provide business services and help ensure employer compliance through outreach and technical assistance, using discontinuation of ES services when warranted, SWAs are not enforcement agencies with jurisdiction over H–2A program violations. SWAs should not be positioned as a substitute for timely and comprehensive WHD enforcement of potential violations of H–2A rules.

The Department appreciates the commenters' concerns. As noted in the proposed rule, the change in paragraph (a)(5) is a clarifying edit that does not make any substantive change or impose any new requirement. Section 658.411, entitled ''Action on complaints,'' addresses complaints filed with the ES. However, under § 658.419, apparent violations are also documented and processed under the ES Complaint System (*see* part 658, subpart E), including, in some instances, pursuant to procedures in § 658.411. The Department's change just clarifies that ES violations triggering discontinuation may be found as a result of either the complaints or apparent violations that are processed in the ES Complaint System. The Department emphasizes that discontinuation under paragraph (a)(5) is limited to findings of violations of ES regulations only and does not require or compel SWAs to make formal findings regarding apparent violations of other employment-related laws. Nor does it allow SWAs to initiate discontinuation based on suspicion alone. Rather, the SWA must make formal findings as it relates to the apparent violation of ES regulations before the requirement to initiate discontinuation is triggered. As to apparent violations of employment-related laws, the Department notes that § 658.419 continues to provide for informal resolution and referral to appropriate enforcement agencies. Where an informal resolution of ES violations is reached that remedies the immediate violation and ensures future compliance, the Department does not think that discontinuation would be appropriate. Further, neither § 658.419 nor proposed paragraph (a)(5) impede on WHD's enforcement authority over the H–2A program or the enforcement authority of other appropriate agencies, and none of the changes made in this regulation are meant to give SWAs authority to enforce the requirements of the H–2A program. For these reasons and the reasons set forth in the NPRM, the Department adopts paragraph (a)(5), as proposed.

a. Section 658.501(a)(6)

The Department proposed to amend paragraph (a)(6) by clarifying that discontinuation of services on the basis of failure to accept qualified workers would be appropriate only for employers placing criteria clearance orders. The requirement to accept qualified workers referred through the clearance system applies only to criteria clearance orders filed pursuant to § 655.121. For non-criteria clearance orders, the regulations at part 653, subpart F, do not require employers to hire all qualified workers referred through the ES, so this basis for discontinuation does not apply to non-criteria clearance orders.

USAFL and Hall Global commented that the final rule should modify paragraph (a)(6) to only permit SWAs to initiate discontinuation of services for employers that willfully refuse to accept qualified workers referred through the clearance system. As an example, they described a rancher who advertises a ranch hand job with an experience requirement. If the SWA refers a person who had experience but two decades in the past and in a different country, that person has no experience with modern U.S. production methods, and it is unclear whether that person is qualified. They explained that adding the word willfully would allow the employer to use its best good-faith judgment even in cases where the SWA or enforcement agency may disagree in similar good faith. They also contended that instead of qualified workers, the proposal should apply to workers who are able, willing, and qualified, and who will be available at the time and place needed to conform to 8 U.S.C. 1188.

The Department does not find it appropriate to add that an employer must willfully refuse to accept qualified workers, as the commenter described. The example the commenter provided describes a situation where a SWA or an enforcement agency may disagree with an employer regarding a worker's qualifications. While SWAs are responsible for making accurate determinations, under § 658.502(a)(6), the employer may present evidence to the SWA that workers were not qualified upon initial notification or during the 20 days that the employer has to respond to the SWA's intent to discontinue services. The Department also notes that the corresponding requirement in § 655.135(c)(3) requires that the employer must consider all U.S. applicants for the job opportunity until the end of the recruitment period, as set forth in § 655.135(d). Under § 655.135(c)(3), the employer must accept and hire all applicants who are qualified and who will be available for the job opportunity, and U.S. applicants can be rejected only for lawful, job-related reasons, and those not rejected on this basis will be hired. The requirements in part 655, subpart B do

not state or contemplate a willfulness standard. The Department declines to add a willfulness requirement here because it would not align with the requirements in part 655, subpart B.

The Department also declines to further revise § 658.501(a)(6) to expand the description of qualified workers. The Department notes, however, that as the change proposed and adopted by the Department is meant to clarify that § 658.501(a)(6) applies to criteria orders, SWAs should be applying this basis for discontinuation of services in light of the standards outlined in part 655, subpart B. Finally, the Department notes that proposed § 658.502(a)(6) allows employers to avoid discontinuation by providing evidence that the workers were not available or qualified.

The Department adopts paragraph (a)(6), as proposed.

b. Section 658.501(a)(7)

In paragraph (a)(7), the Department proposed to remove the words *in the conduct of,* which are currently present but do not add meaning and are therefore extraneous and unnecessary.

USAFL and Hall Global commented that the Department should revise paragraph (a)(7) to include a scienter element, which requires that an individual have both knowledge that an act or conduct is wrongful, and intent to act despite that knowledge. They contended that paragraph (a)(7) should begin with the words *bad faith refusal* and that the bad-faith standard should have a subjective and objective component. Citing Rule 11 of the Federal Rules of Civil Procedure, they stated that bad faith would not exist if the employer or legal counsel subjectively believed that the refusal was warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law, and that a reasonable person would agree that the refusal may be reasonably warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law. They stated that a bad-faith standard would provide a mechanism to effectively petition to redress grievances and ensure that issues are resolved cooperatively early on rather than having an enforcement proceeding reversed.

The Department declines to adopt a bad-faith standard. The Department's proposed change to paragraph (a)(7) is a clarifying edit that does not make any substantive change. Additionally, the commenters' recommendation exceeds the scope of the Department's proposed change and, if adopted, would deprive the full regulated community of its opportunity to comment. Even if it were not beyond the scope of the non-substantive clarifying edit, the Department thinks that implementing this suggestion would not be appropriate. The ES has a responsibility for conducting unannounced field checks on agricultural orders where U.S. workers have been placed, and employers utilizing ES services must assure that ES staff have reasonable access to workers so that ES staff can adequately fulfill their field check duties. *See* 45 FR 39454, 39455 (June 10, 1980). The field check provisions at § 653.503 reflect the Department's longstanding recognition that ES staff must abide by applicable laws when entering employer premises while employers must simultaneously allow the ES reasonable access to placed workers. *See id.* The Department believes that this balance of ES and employer obligations sufficiently mitigates against circumstances where, as the commenters describe, an employer's refusal to participate in a field check is warranted by existing law. As such, the Department does not view a ''bad faith refusal'' standard as necessary or appropriate. For these reasons, the Department adopts paragraph (a)(7), as proposed.

c. Section 658.501(a)(8)

Paragraph (a)(8) requires SWAs to initiate discontinuation of services to employers who repeatedly cause the initiation of discontinuation procedures pursuant to paragraphs (a)(1) through (7) of this section. The Department did not propose changes to paragraph (a)(8) in the NPRM but received several comments, discussed below.

The Michigan Farm Bureau, Western Growers, FSGA, NCFC, USApple, FFVA, AmericanHort, and Willoway Nurseries all stated that the Department should provide more clarity on what repeatedly causes the initiation of discontinuation of services under paragraph (a)(8). The commenters asked whether there is a prescribed number of times discontinuation must be initiated to be considered repeated. The commenters stated that the Department's intent and how the basis for discontinuation would be implemented is not clear. The commenters stated that employers are concerned that simple disagreements on terms and conditions and relevant labor laws might lead to SWAs initiating discontinuation services more often, which could also result in SWAs citing the basis in paragraph (a)(8) more frequently. USAFL and Hall Global also stated that the Department should eliminate paragraph (a)(8) entirely.

Willoway Nurseries, Michigan Farm Bureau, FSGA, NCFC, FFVA, and AmericanHort asked how paragraph (a)(8) affects criteria employers that file emergency applications under part 655, subpart B. They asked whether each time an employer files an emergency H–2A application because of a dispute with the SWA, the SWA will initiate discontinuation of services, and argued that, if so, there will be increased discontinuation actions under § 658.501(a)(8).

The Department appreciates these comments. As the Department did not propose to revise paragraph (a)(8), the comments exceed the scope of this rulemaking. Making changes to this paragraph through this final rule would deprive the full regulated community of its right to comment on any changes. Therefore, the Department declines to revise paragraph (a)(8).

d. Section 658.501(b)

Current § 658.501(b) explains the circumstances and procedures for immediate discontinuation of services. The Department proposed to move paragraph (b) to §§ 658.502 and 658.503 to clarify that existing paragraph (b) is not an independent basis for discontinuation and to better align it with the discontinuation procedures in §§ 658.502 and 658.503. The Department did not receive any comments on this proposed change and adopts it, as proposed.

e. Section 658.501(c)

The Department proposed to redesignate current § 658.501(c), which recognizes the unique interplay between the ES and H visa programs, to § 658.501(b), with revisions. The proposed § 658.501(b) explained what a SWA would be required to do when it has learned that an employer participating in the ES system may not have complied with the terms of its temporary agricultural labor certification under, for example, the H–2A and H–2B programs. The current regulation states that SWA officials must engage in the *procedures* for discontinuation of services to employers pursuant to paragraphs (a)(1) through (8) of § 658.501. The Department proposed to clarify that SWA officials must determine whether the SWA must *initiate* discontinuation of services pursuant to § 658.501(a). The proposed change would clarify that SWAs cannot proceed with discontinuation procedures based solely on information that an employer *may* have violated the terms of its temporary agricultural labor

certification. Rather, SWAs must take that information and look to paragraph (a) to determine whether one of the bases for discontinuation applies. Once a SWA determines that one of the bases for discontinuation under paragraph (a) does apply, then the SWA *must* initiate discontinuation of services. Finally, as the proposed paragraph (b) would apply to both currently active and previous labor certifications, in the NPRM, the Department invited comments on whether it would be appropriate to limit the scope of previous labor certifications or potential violations of a labor certification to a particular time period.

The Department received comments from Willoway Nurseries, Michigan Farm Bureau, Western Growers, FSGA, NCFC, USApple, FFVA, and AmericanHort, who each opined that it would be appropriate to limit the scope of previous labor certifications or potential violations of a labor certification to the previous 3 years. The commenters cited that employers in the H–2A and H–2B program are only required to maintain records under those programs for 3 years. They said that a longer time period would frustrate fact finding because employers may not have records beyond 3 years. Additionally, the commenters noted, WHD generally limits the investigative period for its H–2 investigations to no more than 3 years and the FLSA has a 3-year statute of limitations for willful violations and 2-year statute of limitations for non-willful violations. USA Farmers stated that if the Department finalizes any of the suggested changes for discontinuation of services, as to prior labor certifications, the SWAs should use only violations that are finalized after the date of this final rule when making a decision about discontinuing services. They stated that prior to the NPRM, employers would not expect that a minor violation could result in discontinuation of servicers; and that oftentimes employers choose to just pay fines for alleged violations because challenging them will often cost more money in legal fees even if the challenge is successful. They stated that under the current system, an employer has no idea that a minor violation can effectively get them debarred from the H–2A program, and that using a prior violation that the employer had no way of knowing would be used to exclude them from the program is unjust.

The Department agrees with the commenters that it is appropriate to limit the scope of previous labor certifications or potential violations of a labor certification, which SWAs must consider in determining whether there is a basis under paragraph (a) for which the SWA must initiate discontinuation of services. The Department also acknowledges that part 655 requires employers to retain certain records for not less than 3 years after the date of the certification. *See* § 655.122(j)(4) and (n); § 655.167(b); and § 655.173(b)(1)(i). Additionally, 2 CFR 200.334 generally requires SWAs to keep records pertinent to the ES program for 3 years from the date of submission of the final grant expenditure report. For these reasons, records necessary to determine if any basis under paragraph (a) is met should be available within a 3-year lookback. Finally, the Department does not find it appropriate to limit the applicability of proposed § 658.501(b) to violations that are finalized after the date of this final rule.

The Department noted in the preamble that this provision, which is substantively the same as the current regulation, would apply to both active and previous labor certifications. Regardless of whether an employer has already resolved a matter with, for example, WHD, including through a settlement, a SWA would have a basis to initiate a discontinuation action if sufficient facts exist under § 658.501, but, as discussed below under § 658.502, an employer can respond to a proposed SWA's notice of intent to discontinue services by providing evidence that it has taken all actions required by the enforcement agency, including payment of restitution or fines, and that they have addressed or revised any policies, procedures, or conditions that gave rise to the violation(s). When considering an employer's response to a notice of intent to discontinue, SWAs will consider and assess the evidence provided by an employer that they have, in fact, corrected policies, procedures, or conditions responsible for the violation and that the same or similar violations are not likely to occur in the future. The Department notes that, in order to avoid discontinuation of services, the employer must provide the evidence requested in the SWA's notice of intent to discontinue services, as described in § 658.502.

Accordingly, the Department is revising proposed paragraph (b) to limit the scope of previous labor certifications or potential violations of a labor certification that prompt SWAs to determine whether there is a basis under paragraph (a) to initiate discontinuation of services to the 3 previous years. The Department is making additional changes to incorporate the existing obligations on SWAs and ES offices under part 655 and 29 CFR parts 501 and 503 to notify OFLC and WHD upon receiving information that an employer may have committed fraud or misrepresentation in applying for a labor certification or may have violated its terms. The Department otherwise adopts changes to this section as proposed.

4. Section 658.502, Notification to Employers

Section 658.502 describes the notification and procedural requirements a SWA must follow when it intends to discontinue services to an employer. The Department proposed several changes throughout § 658.502 to clarify and streamline these requirements.

First, the Department proposed to revise the section heading to state that it relates to notification to employers of the SWA's intent to discontinue services. This change clarifies that this section relates only to initial notices proposing discontinuation and not to the final notices described in § 658.503. The Department did not receive comments on this change and adopts the section heading at § 658.502, as proposed.

Second, the Department proposed to add introductory language to the beginning of paragraph (a) to clarify that the procedures at paragraphs (a)(1) through (a)(8) relating to notification of intent to discontinue services apply where the SWA determines that there is an applicable basis for discontinuation under § 658.501(a), but do not apply to immediate discontinuation. The Department proposed additional revisions to paragraph (a) to clarify that the initial notices must provide the reasons for proposing discontinuation and must state that the SWA intends to discontinue services in accordance with this section. The proposed language removes the reference to part 654, to which discontinuation of services does not apply. The Department notes that if more than one basis under paragraph (a) applies, the SWA must initiate discontinuation under all applicable bases. The Department did not receive comments on these changes and adopts paragraph (a), as proposed.

Third, paragraphs (a)(1) through (7) provide specific notification requirements for each of the corresponding bases for discontinuation of services outlined in § 658.501(a)(1) through (7). The Department proposed to remove language in § 658.502(a)(1) through (7) that describes the applicable bases for discontinuation and instead cross-reference the applicable citations for clarity. For example, the Department proposed to revise § 658.502(a)(1) to state that the paragraph applies where

the proposed discontinuation is based on § 658.501(a)(1). This would replace current language that describes § 658.501(a)(1) and more clearly and succinctly directs the SWA to § 658.501(a)(1) as the applicable basis. The Department did not receive comments on these changes and adopts them throughout paragraphs (a)(1) through (7), as proposed.

Fourth, the NPRM proposed to remove language in § 658.502(a)(1) through (7) and § 658.502(b) and (d) providing employers the opportunity for a pre-discontinuation hearing—while maintaining the opportunity for employers to submit evidence contesting a SWA's notice of intent to discontinue services under § 658.502 and the opportunity for a post-discontinuation hearing in § 658.504. The Department proposed this change to better align the hearing procedures for discontinuation of services at part 658, subpart F, with the hearing procedures for the ES Complaint System at §§ 658.411(d) and 658.417, which allow for a hearing by a State hearing official only after the SWA issues a final decision on a complaint. This change also allows for a more efficient process without removing due process protections for employers and ensures that post-discontinuation hearings are decided on a more complete record. Having carefully considered the public comments, the Department adopts the language of the NPRM without change in the final rule.

The comments shared by several trade associations, employers/farmers, SWAs and H–2A consulting firms generally opposed the NPRM proposal to remove the option of a pre-discontinuation hearing asserting it would penalize employers by denying them access to the clearance system prior to the notice or opportunity to refute the alleged claims. USA Farmers asserted that the Department sought to weaponize the Wagner-Peyser system by creating a ''backdoor'' debarment process without meaningful due process. Other trade associations, such as IFPA and the U.S. Chamber of Commerce, as well as a couple of farm employers, submitted similar comments noting that the proposal took a guilty-first mentality and sharing the same due process concern. The American Farm Bureau Federation, for example, opposed the proposed change in the NPRM by arguing that failing to provide an employer the opportunity of a hearing before discontinuation would be burdensome and disruptive to the operation of any business, but it would be particularly injurious to America's farmers and ranchers.

Other commenters expressed similar concerns that the proposal would allow for immediate discontinuation, without notice or opportunity to refute claims against the employer or affiliate, and effectively debar employers from the H–2A program. The same commenters and others also worried that this proposal would cause an increase in notices sent without proper basis and cautioned that the proposed change might not protect employers from frivolous charges based on small infractions, such as failure to notify the ES of a delayed start date for a single employee. The lack of a pre-discontinuation hearing might place an employer or affiliate immediately on the discontinuation list and could cause a reduction of services and job opportunities for employees who work with agents, attorneys, or others due to their names being placed on the discontinuation list. A couple of commenters emphasized that the ability to present facts and information to refute the evidence the SWA is relying on to an impartial hearing officer is integral to an efficient clearance system.

Similarly, other commenters were concerned that the proposal would provide SWA officials sole discretion over an employer's ability to participate in the H–2A program. IFPA cautioned that removing the option of a pre-discontinuation hearing would lead to delays in processing clearance orders for all employers, not just those subject to additional scrutiny. MásLabor urged the Department to adopt reasonable standards to protect due process, and also cautioned against conferring broad powers to SWAs while limiting an employer or agent's recourse in contesting or refuting the SWA's findings, since, it argued, such actions would likely result in irreparable harm to the impacted businesses. An anonymous commenter expressed concern that the proposal would shift the burden of proof to the employer to show program compliance, instead of the SWA demonstrating noncompliance prior to issuing a notice of discontinuation.

USA Farmers referred to a purported case involving a farm where the SWA pursued discontinuation of services based on what the commenter perceived to be mere allegations, which the commenter claimed had disastrous results for the farm and was an egregious denial of the farm's due process rights, but the commenter provided no further explanation or details of the case.

After reviewing these comments, the Department has decided to adopt the NPRM proposal without change. The Department believes that removing the opportunity for a pre-discontinuation hearing allows SWAs to resolve discontinuation proceedings while providing sufficient due process expeditiously and fairly to employers. As discussed in the NPRM, the current process allows employers to bypass a formal decision from the SWA anytime they request a hearing and, because State administrative hearings may take several months to complete, inadvertently prolong any formal determinations. The proposed change allows for a more complete record than would result from an immediate appeal of a notice from the SWA proposing discontinuation as the record would include the employer's response to the proposed discontinuation, including relevant evidence and argument, as well as the SWA's final determination with the SWA's response to the employer's evidence and arguments.

The Department recognizes the commenters' concerns regarding due process, but the Department believes both the States and employers have sufficient time to address and resolve any disputes under the NPRM proposal. The Department's decision to remove the pre-discontinuation hearing is not injurious or disruptive to employers given that they still have the opportunity to submit rebuttal evidence to the SWA under the procedures in § 658.502 to resolve the SWA's initial findings. Once the SWA issues its final decision to discontinue services under the proposed § 658.503(a), the decision letter must specify the reasons for its final determination and state that the discontinuation of services is effective 20 working days from the date of the determination. The final determination also must notify employers that they may request reinstatement or appeal the discontinuation determination by requesting a hearing pursuant to § 658.504, and that a request for a hearing stays the discontinuation pending the outcome. The stay during the 20-day period allows SWAs to continue processing an employer's clearance orders, as no final determination on discontinuation has taken effect. A timely filing of an appeal also stays the discontinuation determination pending the outcome of the appeal. Contrary to the concerns of many commenters, the changes the Department is adopting will not result in the immediate discontinuation of services or limit employers' access to the clearance system; rather, the proposal provides sufficient due process to employers to refute any claims in the SWA's final determination, maintains employers' access to the ES system

pending resolution of a discontinuation action, and enables the development of a more complete record in the event of an appeal.

By staying the effect of discontinuation during an employer's appeal, the Department's process also provides the same due process rights to employers available in the current H–2A debarment procedures found at § 655.182(f)(3) and 29 CFR 501.20(e). Both sections grant stays in the debarment action so long as employers file timely appeals, and the stay continues through the appeal process. As with an H–2A debarment proceeding, an employer would not appear on a discontinuation list until final resolution of the discontinuation proceeding, including resolution of any appeals. Allowing employers to request a hearing only after issuance of a final determination is akin to the current OFLC process for H–2A labor certification applications under §§ 655.141 and 655.164, which provides employers the opportunity to remedy deficiencies in their applications before the CO issues a denial, but only allows employers to appeal after a denial has been issued, and not in response to a Notice of Deficiency (NOD). Providing for the opportunity to submit rebuttal evidence prior to the final determination and file an appeal after the final determination is also similar to the Department's audit resolution process for grant recipients under 2 CFR part 2900. The Department believes that the proposed discontinuation process is efficient, fair, and reasonable, and that because employers will have a full opportunity to contest the SWA's findings before they take effect, employers will be adequately safeguarded from the risk of erroneous deprivation of services.

As mentioned in previous sections, the Department also maintains that the purpose and application of discontinuation of services is distinct from debarment actions, which more narrowly apply to certain programs with different consequences under different authorities, though it notes that the process afforded employers under this regulation is similar to the process provided in a debarment proceeding. For these reasons, the Department adopts the changes to § 658.502(a)(1) through (7), as proposed.

Finally, in § 658.502(a)(1) through (7), the Department proposed changing the language that SWAs must notify employers that all *employment services* will be terminated to state that all *ES services* will be terminated. The proposed language would clarify that the services at issue are specific to the ES. The Department did not receive comments on this change and adopts it throughout paragraphs (a)(1) through (7), as proposed.

In addition to the changes described above, the Department proposed further revisions to paragraphs (a)(1) through (7) to provide greater detail and specificity regarding the type of information that SWAs must provide to employers when proposing to discontinue services. The proposed changes ensure that SWAs adequately explain their reasons for proposing discontinuation, and that employers have sufficient factual detail to respond to the proposed discontinuation. In these paragraphs, the Department also proposed small changes for clarity, including rewording sentences so they use the active voice. Specific proposed changes are discussed below.

MasLabor and USAFL and Hall Global expressed general, overall support for these proposed changes, stating that they include a greater level of detail and specificity regarding what SWAs must provide to justify discontinuation of services, and that they support and concur with the Department's reasoning in making the changes. Western Growers, Michigan Farm Bureau, AmericanHort, Willoway Nurseries, FSGA, NCFC, USApple, and FFVA expressed concern that employers, agents, attorneys, agricultural associations, joint employers, farm labor contractors, and successors in interest would likely receive more notices of intent to discontinue services and recommended that the Department provide clear instruction to SWAs regarding information they must include in notices. Additionally, they stated that it is prudent that the Department is providing instruction to the SWAs regarding what must be in the notices.

The Department thanks commenters for their support for these proposed changes. Given the greater level of detail and specificity regarding what SWAs must provide to justify discontinuation of services, the Department agrees with commenters that additional guidance for SWAs will help facilitate effective implementation of the notice requirement. As discussed throughout this final rule, the Department will issue guidance on the discontinuation of services regulation, including the SWA notification requirements in § 658.502.

a. Section 658.502(a)(1)

The Department proposed to revise paragraph (a)(1) to replace references to *specifications* with *terms and conditions* to clarify that the notification specifically involves terms and conditions of the job order, to align this paragraph with the proposed changes to § 658.501(a)(1), discussed above.

USAFL and Hall Global suggested that paragraph (a)(1)(i), which allows employers to submit evidence that the terms and conditions on clearance orders are not contrary to employment-related laws, should expressly permit legal argument. They further stated that SWAs should be allowed to invoke paragraph (a)(1) only when an agency with primary jurisdiction over the alleged violation has made a preliminary determination, with employer participation, that the language is in violation of employment-related laws. Additionally, they asked the Department to allow employers to contest and stay discontinuation pursuant to § 658.501(a)(1) by demonstrating that the matter has not yet been adjudicated on the merits. The commenters also added that the regulation should specify that the terms and conditions are those in § 655.122 and that the SWA may not add to them.

The Department appreciates the commenters' recommendations but declines to adopt them because they are beyond the scope of the non-substantive changes to this paragraph. Additionally, the Department believes a revision to expressly permit legal argument is unnecessary because submission of legal argument is not prohibited under § 658.502(a). The Department declines to specify that the terms and conditions in this paragraph mean only those terms and conditions in § 655.122 because §§ 658.501(a)(1) and 658.502(a)(1) apply to criteria and non-criteria orders, such that the terms and conditions in part 653, subpart F, and part 655, subpart B are applicable. Finally, as discussed above in the discussion of § 658.501(a)(1), the Department recognizes and appreciates the concerns and recommendations raised by commenters regarding effective and efficient resolution of employer and SWA disagreements under §§ 658.501(a)(1) and 658.502(a)(1). The Department intends to issue further guidance on discontinuation, including the notification and response procedures outlined in this paragraph. The Department adopts paragraph (a)(1), as proposed.

b. Section 658.502(a)(2)

In paragraph (a)(2), the Department proposed to add language explaining that SWAs must specify the assurances involved and must explain how the employer refused to provide the assurances. The Department also proposed a revision to paragraph (a)(2)(ii) to align this paragraph with the proposed changes to § 658.501(a)(2),

discussed above, regarding the scope of the required assurances.

USAFL and Hall Global stated that the regulation should specify in an appropriate section that the required assurances are those specified in § 655.135 and that the SWA may not add to them.

The Department declines to adopt the commenters' recommendation because it is outside the scope of the proposed changes in this paragraph. Additionally, the Department disagrees that assurances described in paragraph (a)(2) should be limited or otherwise pertain to those that are described in part 655, subpart B. Section 658.501(a)(2) states that the referenced assurances are those assurances required pursuant to the ARS for U.S. workers at part 653, subpart F, of this chapter. Accordingly, the assurances referenced in this paragraph are limited to those assurances listed in part 653, subpart F. The Department adopts paragraph (a)(2), as proposed.

c. Section 658.502(a)(3)

In paragraph (a)(3), to provide clearer direction to SWAs and better notice to entities receiving a notice, the Department proposed to add language stating that SWAs must specify the terms and conditions the employer misrepresented or the assurances with which the employer did not fully comply, and explain how the employer misrepresented the terms or conditions or failed to comply with assurances on the job order. In paragraph (a)(3)(iii), the Department proposed to remove the requirement that employers provide *resolution of a complaint which is satisfactory to a complainant referred by the ES,* replacing it with the requirement that an employer provide *adequate evidence that it has resolved the misrepresentation of terms and conditions of employment or noncompliance with assurance.* Evidence is adequate if the SWA could reasonably conclude that the employer has resolved the misrepresentation or noncompliance. The proposed change removes unnecessary and out-of-place language regarding ES complaints, which are addressed in paragraph (a)(5), and better aligns § 658.502(a)(3) with proposed § 658.501(a)(3). The Department also proposed combining paragraphs (a)(3)(iii) and (iv) to make clear that employers need to provide the information in paragraphs (a)(3)(iii) and (iv) together.

USAFL and Hall Global commented that the regulation should specify what *misrepresentation* means so that it identifies serious wrongdoing for which a serious penalty might be warranted and so that there is a uniform Federal standard as to its meaning. They stated that an employer in Michigan should be no better or worse than an employer in California. They suggested that the Department adopt the California misrepresentation standard because California offers wide-ranging worker protections and a large portion of H–2A workers work in that State. They stated that under the California standard, misrepresentation means: (1) a misrepresentation of a past or existing material fact; (2) without reasonable grounds for believing it to be true; (3) with intent to induce another's reliance on the fact misrepresented; (4) justifiable reliance thereon by the party to whom the misrepresentation was directed; and (5) damages. *See Petersen* v. *Allstate Indem. Co.,* 281 FRD. 413, 417 (C.D. Cal. 2012). They stated that this would allow the enforcement system to expend resources going after true and damaging misrepresentations rather than good-faith errors.

The Department declines to adopt the standard articulated in *Petersen* as it represents California's negligent misrepresentation standard (a misrepresentation made without reasonable ground for believing it to be true) and does not encompass intentional misrepresentation (a misrepresentation with knowledge of falsity). *See Nazemi* v. *Specialized Loan Servicing, LLC,* 637 F. Supp. 3d 856, 861 (C.D. Cal. 2022). The Department believes that any misrepresentation of the terms and conditions specified on the job order, whether intentional or negligent, is a basis for discontinuation. Job orders represent offers of employment and must include all material terms and conditions. Where a job order contains false, erroneous, or misleading statements regarding a term or condition of employment, for example an omission of a required job duty or an incorrect statement regarding rate or frequency of pay, potential workers are not fully apprised of the terms under which they might be employed and may rely (or reasonably be expected to rely) on the incorrect terms and conditions to their detriment. While this is important for all job orders, it is especially important in the case of intrastate and interstate clearance orders, through which employers recruit migrant farmworkers from outside of the commuting distance. Such workers rely on the accuracy of job orders to decide whether they will accept the offered employment, for which they must travel and are not able to return home within the same day, should they find that the employment is different than described. For criteria clearance orders, which represent most of the clearance orders SWAs process, H–2A workers travel from other countries for the advertised work and may have limited resources in the event of misrepresentation. Thus, it is critical that employers, agents, farm labor contractors, etc. do not misrepresent, intentionally or negligently, any terms or conditions on job orders. Finally, contrary to the commenter's concern, the Department thinks that this approach can be uniformly applied by the SWAs and is concerned that a multi-factor test could be inconsistently implemented or applied in States and, therefore, thinks that the commenter's suggestion will lead to less, not more, uniformity. The Department will issue guidance on § 658.501(a)(3) and § 658.502(a)(3) to ensure uniform application of these provisions.

Additionally, as discussed above, the Department intends for SWAs to initiate discontinuation proceedings against the party responsible for the misrepresentation. Where an employer reasonably relies on their agent or attorney regarding the contents of the clearance order, or the agent or attorney reasonably relies on an employer's description of the terms and conditions of the job, the Department does not anticipate that the SWA would initiate proceedings against those parties. While a SWA may initiate discontinuation against multiple parties, the ability for the SWA to initiate proceedings against only the party responsible for the misrepresentation will protect entities that act in good faith in the development and submission of clearance orders. For these reasons, the Department declines to adopt the California negligent misrepresentation standard suggested by commenters. The Department adopts paragraph (a)(3), as proposed.

d. Section 658.502(a)(4)

In paragraph (a)(4), the Department proposed to add language that SWAs must provide evidence of the final determination by an enforcement agency of a violation of an *employment-related law* or debarment with the notice of intent to discontinue services. For final determinations, the Department proposed adding language clarifying that the SWA must specify—as discussed in the final determination or debarment—the enforcement agency's findings of facts and conclusions of law as to the employment-related law violation(s). For final debarment orders, the Department proposed adding language requiring the SWA to specify the time

period for which the employer is debarred from participating in one of the Department's foreign labor certification programs.

The Department also proposed revisions to § 658.502(a)(4)(i) through (iii) to clarify and explain the evidence and assurances that the employer may provide to avoid discontinuation of services. In paragraph (a)(4)(i), the Department proposed to remove existing language stating that the employer may provide evidence that the enforcement agency reversed its ruling and that the employer did not violate employment-related laws; and to replace it with language stating that the employer may provide evidence that the determination at issue is not final because, for example, it has been stayed pending appeal, overturned, or reversed. The Department proposed a new paragraph (a)(4)(ii) that requires employers to submit evidence that their period of debarment is no longer in effect and that they have taken all actions required by the enforcement agency as a consequence of the violation. The proposed paragraph (a)(4)(ii)(B) incorporated existing language and was meant to more clearly encompass any and all actions required by final determination but does not substantively change what an employer has to show under current § 658.502(a)(4)(ii). The Department did not receive any comments on these proposed changes and adopts paragraph (a)(4), as proposed.

e. Section 658.502(a)(5)

In paragraph (a)(5), the Department proposed new language to clarify that the SWA must specify which ES regulation the employer has violated and must provide basic facts to explain the violation. The proposed language ensures that SWAs provide sufficient factual detail regarding the ES violation at issue so the employer can respond. The Department did not receive comments on this change and adopts, paragraph (a)(5), as proposed.

f. Section 658.502(a)(6)

The Department proposed to revise § 658.502(a)(6) to explain that SWAs must state that the job order at issue was filed pursuant to part 655, subpart B and specify the name of each worker who was referred and not accepted. The proposed revision would be consistent with the proposed change to § 658.501(a)(6) and would ensure that SWAs provide sufficient factual detail regarding the workers at issue so the employer can respond. In paragraph (a)(6)(iii), the Department proposed changing *and* to *or* to decouple paragraph (a)(6)(iii) from the assurances required in existing paragraph (a)(6)(iv), as it is not necessary for employers that did not violate the requirement to provide assurances of future compliance. The Department proposed a new paragraph (a)(6)(iv), to add an option for the employer to show that it was not required to accept the referred workers, because the time period under 20 CFR 655.135(d) had lapsed, and a new paragraph (a)(6)(v), to add an option for the employer to show that, after initial refusal, it subsequently accepted and offered the job to the referred workers or to show that it had provided all appropriate relief imposed as a result of the refusal. Finally, the Department proposed to move existing paragraph (a)(6)(iv) to paragraph (a)(6)(vi) to maintain the requirement that the employer provide assurances that qualified workers referred in the future will be accepted; and add new language to clarify the assurance that is required depending on whether the period described in 20 CFR 655.135(d) has lapsed, as after the end of the period the employer would no longer be required to accept referred workers on the particular clearance order involved. This change would provide a means of ensuring future compliance with the requirement that employers submitting criteria clearance orders hire all qualified workers referred to the order, as described in part 655, subpart B.

MásLabor and USAFL and Hall Global stated that they support the Department's proposal to add new paragraph (a)(6)(v), as written. They also supported the Department's proposal to require SWAs to provide the precise factual and legal basis, including concrete information regarding the specific job order and workers involved, for any initiation of discontinuation procedures.

The Department appreciates the supportive comments and adopts paragraph (a)(6), as proposed.

g. Section 658.502(a)(7)

In paragraph (a)(7), the Department proposed clarifying edits that provide clearer direction to the SWA but that do not change the regulation's meaning, including rephrasing sentences and changing the pronoun used for employers to *it* instead of *he/she.* The Department did not receive comments on these clarifications and adopts paragraph (a)(7), as proposed.

h. Section 658.502(a)(8)

The Department proposed to add a new paragraph (a)(8) to explain information the SWA must include in its notice to an employer proposing to discontinue services where the decision is based on § 658.501(a)(8) (repeatedly causes the initiation of discontinuation of services). The Department proposed that the SWA must list and provide basic facts explaining the prior instances where the employer has repeatedly caused initiation of discontinuation proceedings to provide notice of the basis for the SWA's action and to facilitate the employer's response. The Department proposed that the SWA must notify the employer that all ES services will be terminated unless the employer within that time provides adequate evidence that the SWA's initiation of discontinuation in prior proceedings was unfounded. The proposed paragraph (a)(8) would replace existing paragraph (c), which discusses discontinuation based on § 658.501(a)(8) but does not include clear direction to the SWA and does not provide sufficient notice to employers to allow them to respond. The Department did not receive comments on these changes and adopts paragraph (a)(8), as proposed.

i. Section 658.502(b) and (d)

The Department proposed to remove existing § 658.502(b) and (d) because these paragraphs pertain to the employer's pre-determination opportunity to request a hearing. As described in the discussion of § 658.502(a)(1) through (7) above, the Department proposed to eliminate the opportunity for an employer to request a hearing until after the SWA has provided its final notice on discontinuation of services to the employer. The Department received several comments regarding the removal of the opportunity for a pre-discontinuation hearing, which are summarized and addressed above. For the reasons fully explained in the discussion of § 658.502(a)(1) through (7), the Department adopts the NPRM's proposed removal of existing § 658.502(b) and (d) without modification.

The Department proposed a new § 658.502(b) to explain the circumstances that warrant immediate discontinuation of services. The proposed addition replaces existing § 658.501(b), in part, and states that SWA officials must discontinue services immediately, in accordance with § 658.503, without providing the notice of intent and opportunity to respond described in this section, if an employer has met any of the bases for discontinuation of services under § 658.501(a) and, in the judgment of the State Administrator, exhaustion of the administrative procedures set forth in

this section would cause substantial harm to workers. The prior version of § 658.501(b) stated that SWA officials *may* discontinue services immediately in these circumstances, whereas the proposed new § 658.502(b) states that SWAs *must* discontinue services immediately. Additionally, the prior § 658.501(b) allows for discontinuation when there would be substantial harm to a *significant number* of workers, whereas the proposed new § 658.502(b) requires immediate discontinuation when there would be substantial harm to workers. The Department proposed these changes because it thought that immediate discontinuation is warranted where the harm at issue would involve only one or a small number of workers, and that where such harm would occur, SWAs must be required to initiate discontinuation to prevent the harm from actually occurring to workers. Finally, this proposed paragraph clarified that immediate discontinuation is appropriate only when a basis under proposed § 658.501 exists *and* the SWA determines that substantial harm would occur; risk of substantial harm alone is not enough for a SWA to immediately discontinue services.

UMOS, Green America, CAUSE, PCUN, the North Carolina Justice Center, UFW, and the UFW Foundation expressed general support for *requiring* SWAs to immediately discontinue services in circumstances where it is warranted. In contrast, IFPA, GFVGA, NHC, Titan Farms, LLC, U.S. Custom Harvesters, Inc., Demaray Harvesting and Trucking, LLC, TIPA, the U.S. Chamber of Commerce, the American Farm Bureau Federation, USA Farmers, the Wyoming Department of Agriculture, wafla, an individual, and an anonymous commenter opposed the proposed changes to § 658.502(b), citing due process concerns. Specifically, they stated that the proposed changes do not define ''substantial harm'' and give State Administrators broad and vague discretion to determine what it means. They expressed concern that allegations of substantial harm to a single worker could give rise to immediate discontinuation, and that such allegations do not require any verification prior to immediate discontinuation. IFPA and TIPA both stated that the proposed changes pave the way for abuse by singularly disgruntled employees. Overall, commenters stated that the proposed changes curtail the rights of employers to meaningfully address allegations of substantial harm and will cause significant economic loss through delays or ultimate denial of access to the H- 2A program. They stated that mandatory, immediate discontinuation must be substantiated, must be based on more than one claim by a single worker, must be reserved for egregious acts causing significant harm, and must provide an opportunity for review prior to discontinuation.

Regarding what constitutes *substantial harm,* as discussed in the NPRM, the Department envisions immediate discontinuation in situations involving significant health and safety issues, including, but not limited to, physical violence, sexual harassment, assault, coercion, and human trafficking. The Department envisions a SWA will also consider immediate discontinuation of services when employers cause substantial risk of injuries due to unsafe working conditions like heat stress, infectious disease, exposure to chemicals or pesticides, and work-related machinery. Thus, where the State Administrator determines that exhaustion of the administrative procedures set forth in this section would cause such harm, the Department thinks immediate discontinuation is warranted to protect the safety and welfare of workers.

As discussed above, the Department believes that immediate discontinuation is warranted even where the harm at issue would involve only one or a small number of workers. The Department understands commenters' concerns that the allegations of a single employee, such as a disgruntled employee, could lead to immediate discontinuation. However, the Department believes that its proposed changes to the immediate discontinuation regulation safeguard against these concerns. The Department reiterates that immediate discontinuation is appropriate only where a basis under proposed § 658.501 exists; and is reserved only for those situations where the State Administrator determines that substantial harm to at least one worker will occur if action is not immediately taken. Thus, even where a single employee makes an allegation, the SWA must *first* have sufficient factual information—*e.g.,* a finding via a field check that an employer has misrepresented the terms in its job order (§ 658.501(a)(3)) or a finding of violations of ES regulations (§ 658.501(a)(5))—to articulate a basis for discontinuation. The SWA must *then* have a sufficient basis, supported by factual detail, to support its determination that *not* taking immediate action would cause substantial harm to workers (*see* proposed § 658.503(b)). For example, the SWA may rely on observation or findings of substantial harm from field checks and determine that such harm will continue if the SWA does not take immediate action. Similarly, the SWA may receive documentation or photos from public sources, such as newspapers, that an employer's working conditions have caused substantial harm to workers; and, after verifying or corroborating its accuracy, determine that such harm will continue if the SWA does not take immediate action. In all instances, there must be a basis for discontinuation that is supported by factual detail and a determination, with sufficient reasoning supported by factual detail, that exhaustion of administrative procedures would cause substantial harm. The Department will issue further guidance on immediate discontinuation, including the circumstances giving rise to immediate discontinuation.

As discussed in the NPRM and below, where a SWA issues a determination to immediately discontinue services, the discontinuation is effective the date of the notice. An employer's appeal will not stay the discontinuation, and the SWA will not process that employer's clearance orders during the period of discontinuation. Regarding commenter concerns that immediate discontinuation curtails the rights of employers to meaningfully address allegations of substantial harm, the Department emphasizes that, at any time following the issuance of the discontinuation notification, employers may rebut a SWA's determination via the reinstatement process (*see* proposed §§ 658.503(b) and 658.504). Regarding commenter concerns that immediate discontinuation will cause employers economic loss through delays or ultimate denial of access to the H–2A program, the Department believes that any delayed access to the ES Clearance System as a result of immediate discontinuation is warranted, as any burden employers face by not having access to ES services is outweighed by the Department's interest in protecting workers from the harmful, potentially dangerous situations giving rise to immediate discontinuation. Moreover, the Department notes that in lieu of an appeal, an employer subject to immediate discontinuation may request reinstatement from the SWA under proposed § 658.504(b). Thus, the burden to any employer is mitigated by the opportunity to request reinstatement, and the proposed 20-day timeframe for the SWA to respond to such a request may provide for timely and efficient resolution of an immediate discontinuation.

5. Section 658.503, Discontinuation of Services

Section 658.503 describes the procedural requirements a SWA must follow when issuing a final determination regarding discontinuation of services to an employer. The Department proposed to revise paragraph (a) to require that within 20 working days of receipt of the employer's response to the SWA's notification under § 658.502, or at least 20 working days after the SWA's notification is received by the employer if the SWA does not receive a response, the SWA must notify the employer of its final determination. When the SWA sends its notification, the Department proposed that it do so in a manner that allows the SWA to track receipt of the notification, such as certified mail. If the SWA determines that the employer did not provide a satisfactory response in accordance with § 658.502 the SWA's notification must specify the reasons for its determination, state that the discontinuation of services is effective 20 working days from the date of the notification, state that the employer may request reinstatement or a hearing pursuant to § 658.504, and state that a request for a hearing stays the discontinuation pending the outcome of the hearing. The Department proposed this stay pending appeal and the 20-working-day period to ensure that employers are provided an opportunity to challenge the SWA's determination before losing access to all ES services. Staying the effect of discontinuation during the pendency of an appeal is appropriate to allow for full adjudication and resolution of any issues related to the SWA's findings before they become final and binding on the employer and the ES system, mitigating the risk that an employer is erroneously deprived of access to services, similar to the procedures in § 658.502. Additionally, placing the effective date at the end of the 20-day period, rather than at the issuance of the notification, avoids depriving appealing employers of ES services for a short period of time prior to their request for hearing. This also makes for a more efficient process for SWAs and ETA, as these agencies would otherwise expend time and resources to effectuate a discontinuation that may be premature—if the employer requests a hearing a short time later, agencies would need to use additional resources to then stay the discontinuation they just effectuated. To facilitate implementation and maintenance of the proposed OWI discontinuation of services list, discussed above, the Department proposed that the SWA must also notify OWI of any final determination to discontinue ES services, including any decision on appeal upholding a SWA's determination to discontinue services. Proposed § 658.503(a) removed language regarding pre-discontinuation hearings to correspond with proposed changes to § 658.502.

The Department did not receive comments that identified § 658.503(a). However, the Department received many comments regarding the proposal to remove pre-discontinuation hearings through revisions to § 658.502, which the Department discussed above in the response to that section. The Department finalizes the changes to § 658.503(a) as proposed.

a. Section 658.503(b)

The Department proposed to add a new § 658.503(b) to explain the procedures for immediate discontinuation of services and to incorporate them into the general discontinuation procedures at § 658.503. The proposed new paragraph (b) replaces existing § 658.501(b), in part, and states that the SWA must notify the employer in writing that its services are discontinued as of the date of the notice. The proposed provision would also require that the notification must also state that the employer may request reinstatement or a hearing pursuant to § 658.504, and that a request for a hearing relating to immediate discontinuation would not stay the discontinuation pending the outcome of the hearing. The proposed new § 658.503(b) adds that SWAs must specify the facts supporting the applicable basis for discontinuation under § 658.501(a) and the reasons that exhaustion of the administrative procedures would cause substantial harm to workers. The proposed addition ensures that employers have sufficient information regarding the SWA's rationale for immediate discontinuation and makes clear that employers have recourse to the State administrative hearing process or reinstatement process if a SWA immediately discontinues services. While discontinuation under a determination issued under § 658.503(a) is delayed until the employer's time to appeal the determination has ended, in proposing this provision the Department determined that the circumstances justifying a notice of immediate discontinuation also justify that the discontinuation be effective immediately, and that it remain in effect unless the employer is reinstated or the determination is overturned. As noted in the NPRM and as discussed above, immediate discontinuation is reserved for those situations where the State Administrator determines that substantial harm to at least one worker will occur if action is not immediately taken. Delaying the effective date of the discontinuation would undermine the protection that the immediate discontinuation procedure is designed to provide. Finally, as with proposed § 658.503(a), to facilitate implementation and maintenance of the proposed OWI discontinuation of services list, discussed above, the Department proposed that the SWA must also notify OWI within 10 days of any determination to immediately discontinue ES services.

Wafla opposed the proposed change that would mean a request for a hearing does not stay discontinuation, stating that it allows SWAs to discontinue services without full due process. The Colorado Department of Labor and Employment asked that the Department provide examples of *information evidencing* that employers have made threats or perpetuated violence or other substantial harm, and whether a complaint or allegation alone is sufficient to immediately discontinue services. IFPA, GFVGA, TIPA, NHC, Titan Farms, LLC, and an individual asked that the Department substantiate its rationale for the proposed changes with evidence and verified data, particularly as it pertains to the Department stating that it received information regarding violations over the last several years. The commenters stated that the Department did not provide further information, such as whether that information included mere allegations by an unhappy employee, or whether the alleged incidents were isolated or represented a statistically valid percentage of violation to justify the proposed changes to immediate discontinuation.

The Department appreciates the commenters' concerns and requests for clarification. As to the Department's proposal that a request for a hearing will not stay discontinuation, the Department reiterates that employers who experience immediate discontinuation of services have recourse to the State administrative hearing process or reinstatement process. In instances that would give rise to an immediate discontinuation, the Department believes that its interest in protecting workers from the harmful, potentially dangerous situations giving rise to immediate discontinuation outweighs any burden employers may experience while services are discontinued. The burden to any employer is mitigated by the

opportunity to request reinstatement from the SWA, and that the proposed 20-day timeframe for the SWA to respond to such a request may provide for timely and efficient resolution of an immediate discontinuation.

As to the SWA's request for examples of information or evidence that would demonstrate substantial harm, the Department emphasizes that a complaint or allegation alone is insufficient to warrant immediate discontinuation. The State Administrator must have *information evidencing* that substantial harm to workers will occur if action is *not* immediately taken. For example, the SWA may rely on observation or findings of substantial harm from field checks and determine that such harm will continue if the SWA does not take immediate action. Similarly, the SWA may receive documentation or photos from public sources, such as newspapers, indicating that an employer's working conditions have caused substantial harm to workers; and, after verifying or corroborating its accuracy, determine that such harm will continue if the SWA does not take immediate action. The Department further reiterates that immediate discontinuation is appropriate only where there is a basis to discontinue services under § 658.501(a).

Finally, as to the request that the Department substantiate its rationale for the proposed changes, particularly as it pertains to the Department stating that it received information regarding violations over the last several years, the Department reiterates that the ability of SWAs to immediately discontinue services to employers due to substantial harm is not new. The Department confirms that SWAs have obtained conclusive evidence of employers in Virginia and Louisiana [10] threatening workers with physical violence in retaliation for workers asserting their employment-related rights, which could warrant immediate discontinuation of services. In these cases, evidence included video and audio recordings. For these reasons and the reasons set forth in the NPRM, the Department adopts § 658.503(b), as proposed.

b. Section 658.503(c) and (d)

The Department proposed to move current § 658.503(b), which requires the SWA to notify the relevant ETA regional office if services are discontinued to an employer subject to Federal Contractor Job Listing Requirements, to proposed new paragraph (c) and to make minor edits to use active voice and to improve clarity. The Department proposed to add paragraph (d) to require SWAs to notify the complainant of the employer's discontinuation of services, if the discontinuation of services is based on a complaint filed pursuant to § 658.411. This requirement would align with § 658.411(b)(2) and (d). The Department did not receive comments on these changes and adopts them, as proposed.

c. Section 658.503(e)

The Department proposed to add a new paragraph (e) to explain the effect discontinuation of services has on employers. The proposed new paragraph explains that employers that experience discontinuation of services may not use any ES activities described in parts 652 and 653, and that SWAs must remove the employer's active job orders from the clearance system and must not process any future job orders from the employer for as long as services are discontinued. The Department proposed that an employer's loss of access to ES services applies in all locations throughout the country where such services may be available. Through the NPRM, the Department solicited comments on the effect on both workers and employers of removing active job orders, particularly criteria orders.

The Department received a comment from wafla that disagreed that an employer's loss of access to ES services should apply in all locations throughout the country where such services may be available. Wafla said that the proposed change would allow SWA staff from different sides of the country to determine actions of other SWAs and alleged that this would cause due process concerns. They expressed concern that enforcement could be inconsistent and subjective between States. Wafla was also concerned that SWAs might initiate discontinuation of services to multistate employer organizations as a result of frontline supervisors or rogue individual management in different locations and said that national employers may not be aware of all supervisor actions in their companies. Wafla contended that if a violation is found in one State related to a supervisor or manager, the employer should have an opportunity to evaluate their management in different States without fear of one bad actor causing discontinuation of services, including access to the H–2A program for the entire company.

The Department believes it is necessary to establish that discontinuation of services in one State means that the employer cannot participate in or receive Wagner-Peyser Act ES Services provided by any SWA in any other State. The ES System is a national labor exchange service that facilitates job recruitment and placement across the States. The Department has an interest in ensuring proper, effective, and lawful use of the ES System, and the discontinuation provisions at part 658, subpart F are meant to prevent employers who do not comply with ES regulations from accessing ES services. As discussed in the NPRM, if the effect of discontinuation were limited to only the State that discontinued services, it would frustrate the purpose of discontinuation.

The Department disagrees that the proposed national effect of discontinuation would create inconsistencies or due process concerns. The regulations in part 658, subpart F prescribe uniform standards that all SWAs must follow, and against which the Department monitors and assesses SWA performance. If a SWA is not complying with the requirements in this part, the Department will take appropriate action. Moreover, the proposed OWI discontinuation of services list provides a mechanism to ensure that SWAs are not providing services to employers whose services have been discontinued, thereby facilitating consistent application of the discontinuation provisions across the States. The Department believes that these regulations provide sufficient due process as they provide employers several opportunities to address the SWA's action—first by responding to the SWA's initial notice under § 658.502, then by appealing the SWA's final determination by requesting a hearing or by requesting reinstatement (including requesting a hearing if the SWA denies the request for reinstatement) under § 658.504. If the employer requests a hearing, the SWA must follow procedures at § 658.417. As described at § 658.418(c), all decisions of a State hearing official must be accompanied by a written notice informing the parties that they may appeal the decision in writing with the ETA Regional Administrator, within 20 working days of the certified date of receipt of the decision. As noted above, if an employer requests a hearing in response to a SWA's decision to discontinue services, the discontinuation is stayed pending the outcome of the appeal, thereby

[10] *See, e.g.,* DOL, News Release, *Federal Court Orders Louisiana Farm, Owners to Stop Retaliation After Operator Denied Workers' Request for Water, Screamed Obscenities, Fired Shots* (Oct. 28, 2021), *https://www.dol.gov/newsroom/releases/whd/whd20211028-0.*

providing employers an opportunity to challenge the discontinuation *before* losing access to all ES services. Employers may also file complaints against the SWA or ETA regional office under part 658, subpart E if they believe the SWA's discontinuation of services procedures are not compliant with ES regulations. These complaints are processed pursuant to § 658.411(d).

Employers, including multistate employers, are responsible for ensuring that their staff do not perpetrate violations that cause SWAs to initiate discontinuation of services. If an employer identifies that an individual staff member is responsible for a violation that is not pervasive throughout the company, the employer has an opportunity to present that evidence along with remedial actions the employer has taken to resolve the violation and prevent future offenses, during the period described in § 658.502 or as part of a request for reinstatement pursuant to § 658.504.

The Department maintains that it is critical to worker protection for discontinuation of services to apply nationally to prevent discontinued employers from filing job orders or using other ES services without first resolving the violation at issue. Accordingly, the Department adopts paragraph (e), as proposed.

d. Section 658.503(f)

The Department proposed new paragraph (f) to explain that SWAs must continue to provide the full range of ES and other appropriate services to workers whose employers' services have been discontinued. The proposed new paragraph makes it clear that discontinuation of services to employers does not, and should not, negatively affect workers. SWAs must continue to provide necessary support to workers, including outreach to MSFWs, access to the ES and Employment-Related Law Complaint System, and all available ES services. The Department did not receive any comments on this provision and adopts the changes to paragraph (f), as proposed.

e. Section 658.504

Section 658.504 describes the procedural requirements for seeking reinstatement of ES services, which can be done either by requesting that the SWA reconsider its decision or by requesting a hearing. The Department proposed to restructure this section to more clearly explain how services may be reinstated, the timeframes in which the employers and SWA must act, and the circumstances under which services must be reinstated.

The Department proposed to revise paragraph (a) to make clear that employers have two avenues with which to seek reinstatement of services—via a hearing or a written request to the SWA at any time following the discontinuation. The revised paragraph (a) adds the new requirement that an employer who requests a hearing following discontinuation do so within 20 working days of the date of discontinuation.

The National Council of Agricultural Employers (NCAE), Ventura County Agricultural Association, Florida Citrus Mutual, and Labor Services International opposed the new requirement that the employer file an appeal within 20 working days of the SWA's final determination, stating that the requirement raises due process concerns and is arbitrary and capricious.

As discussed in the NPRM, the Department believes that both the State and the employer have an interest in timely and efficient adjudication of disputes. For example, SWAs have an interest in resolving discontinuation proceedings quickly and efficiently so that it can better protect workers who use the ES system and so that it uses Federal funds efficiently. Employers have an interest in quick and efficient access to the ES clearance system as part of their business operations, which includes efficient and timely resolution of discontinuation proceedings. The Department continues to think that providing 20 working days to appeal a final discontinuation determination balances the needs and interests of the SWAs and employers. In addition, the proposed 20-day requirement aligns with proposed § 658.503, which provides that a SWA's final determination is effective 20 working days from the date of notification, and that a timely appeal stays the discontinuation. Taken together, the stay pending appeal and the 20-day requirements in proposed §§ 658.503 and 658.504 ensure that employers who timely appeal can challenge a SWA's determination without losing access to ES services during the appeal process while ensuring timely and efficient adjudication of discontinuation matters. The Department further notes that the proposed 20-working-day requirement aligns with a similar requirement in the prior regulation as well as the new paragraph (b), which states that employers may request a hearing within 20 working days of a SWA's reinstatement determination. Finally, the Department notes that there is no time limit for requesting reinstatement under § 658.504, so if an employer missed the 20-day deadline to appeal, they could seek reinstatement at any time and appeal an adverse reinstatement decision. For these reasons, the Department adopts § 658.504(a), as proposed.

f. Section 658.504(b)

The Department proposed to revise § 658.504(b) by combining the parts of § 658.504(a) and (b) into a new § 658.504(b) to more clearly explain the circumstances and procedures under which SWAs must reinstate services when an employer submits a written request for reinstatement. The Department proposed new paragraph (b)(1), which retains the current 20-day timeline in existing paragraph (b) within which the SWA must notify the employer whether it grants or denies the employer's reinstatement request. The proposed paragraph (b)(1) also requires that if the SWA denies the request, the SWA must specify the reasons for the denial and must notify the employer that it may request a hearing, in accordance with proposed paragraph (c), within 20 working days.

The Department also proposed to move current paragraph (a)(2), which describes the evidence necessary for reinstatement, to proposed paragraph (b)(2) to align with the overall restructuring of the section. The Department also proposed to remove the word *any* to require that the employer show evidence that all applicable specific policies, procedures, or conditions responsible for the previous discontinuation are corrected, instead of *any* policies, procedures, or conditions responsible for the previous discontinuation. The Department is concerned that the current language could permit reinstatement despite an employer not correcting all relevant policies, procedures, or conditions, which would be inconsistent with the purpose of discontinuation. Finally, the Department also proposed to change the pronoun used for employers to *it* instead of *his/her.*

Farmworker Justice supported the proposed changes to paragraph (b) and suggested that the Department provide examples of employer action that would constitute adequate evidence of corrective action and restitution, as described under proposed paragraph (b)(2). For example, under proposed § 658.504(b)(2)(i), Farmworker Justice suggested that the Department require that corrective action plans be disclosed in future job orders as evidence that policies, procedures, or conditions responsible for the previous discontinuation of services have been

corrected; that corrective actions plans be in English and the native language of workers at the site; and that the Department create an anonymous tip line for workplaces subject to a corrective action plan to report any noncompliance with the plan. Farmworker Justice also suggested that the Department provide a nonexhaustive list of the types of restitution that may be available to employers under proposed § 658.504(b)(2)(i), and suggested liquidated damages paid to the workers for housing violations set on a scale based on the severity of the violation, damages paid to non-H–2A workers who were offered fewer hours than their H–2A counterparts, and damages to workers assigned non-agricultural duties.

The Department notes that it did not make any substantive edits to proposed paragraph (b). The Department's proposal was limited to restructuring paragraph (b) to more clearly explain how services may be reinstated. The Department moved existing paragraph (a)(2) to proposed paragraph (b)(2), and existing paragraph (b) to proposed paragraph (b)(1), with minor clarifying edits. While the Department appreciates the commenter's suggestions, they are outside of the scope of the proposed changes in this paragraph. Accordingly, the Department adopts paragraph (b), as proposed, without change.

g. Section 658.504(c)

The Department proposed to revise § 658.504(c) to explain the circumstances and procedures under which SWAs must reinstate services when an employer submits a timely, written request for a hearing. The proposed revisions maintain the procedures in existing paragraphs (a)(1), (c), and (d), but have reorganized them into the same paragraph for clarity. The Department also proposed to replace the abbreviated term *Federal ALJ* in the existing regulation with *Federal Administrative Law Judge,* commonly abbreviated as ALJ.

MásLabor submitted comments that USAFL and Hall Global adopted. They recommended that the Department modify paragraph (c)(2) to also state that SWAs must reinstate services where a CO determines that a job order is compliant with all employment-related laws, as evidenced through the CO issuing a Notice of Acceptance. MásLabor also said that the Department should modify the hearing procedures to allow the employer to appeal directly to an ALJ in lieu of a State hearing official and that, at minimum, the Department should permit an appeal to an ALJ if the basis for the SWA's discontinuation is a dispute about Federal employment-related laws.

The Department declines to modify paragraph (c)(2) to require SWAs to reinstate services if a CO determines that the job order was compliant with all employment-related laws, as evidenced through the CO issuing a Notice of Acceptance. Such a change would exceed the scope of proposals that the Department made in this section and, were the Department to implement it in this final rule, it would deprive the public of its right to comment. The Department did not propose substantive changes in paragraph (c)(2); rather it proposed to maintain the procedures in existing paragraphs (a)(1), (c), and (d), and to reorganize them for clarity. The Department notes that an employer may provide evidence during a hearing or other appeal procedures that a CO issued a Notice of Acceptance related to a criteria clearance order. The Department also notes that employers may submit such evidence to SWAs during the 20-day response period before SWAs make a final determination to discontinue services, which is described at § 658.502. This evidence will be evaluated based on the particular facts and circumstances. As mentioned in other sections, the Department plans to provide guidance to SWAs regarding these procedures for discontinuation of services, including reinstatement.

Similarly, the Department declines to modify the hearing procedures to allow the employer to appeal directly to an ALJ in lieu of a State hearing official or to permit a direct appeal to an ALJ if the basis for the SWA's discontinuation is a dispute about Federal employment-related laws. These changes are also outside of the scope of the non-substantive clarifying edits to this paragraph. Regardless, the Department notes that the State hearing process is long established and remains necessary because States have an interest in hearing issues involving employers in their territories. Additionally, SWAs carry out requirements of the Wagner-Peyser Act ES, which is a Federal grant program, and have authority to apply the requirements of the Federal program. As described at § 658.504(c)(1), if the employer submits a timely request for a hearing, the SWA must follow the procedures set forth in § 658.417. Section 658.417(a) states that a State hearing official may be any State official authorized to hold hearings under State law. Examples of hearing officials are referees in State unemployment compensation hearings and officials of the State agency authorized to preside at State administrative hearings. Pre-existing regulations at § 658.418(a)(4) further state that a State hearing official may render rulings as are appropriate to resolve the issues in question. While a State hearing official does not have authority or jurisdiction to consider the validity or constitutionality of the ES regulations or of the Federal statutes under which they are promulgated, the State hearing official does have jurisdiction to rule on employer compliance with Federal ES regulations.

For the reasons described above, the Department adopts § 658.504(c), as proposed.

h. Section 658.504(d)

The Department proposed a new paragraph (d) to require that SWAs notify OWI of any determination to reinstate ES services, or any decision on appeal upholding a SWA's determination to discontinue services, within 10 working days of the date of issuance of the determination.

The Department received a comment from the Colorado Department of Labor and Employment that asked how SWAs would know if an employer is reinstated in the State that discontinued services to the employer, and whether the discontinuation of services list will be updated when an employer is removed from the list.

The Department notes that the purpose of new paragraph (d), is to facilitate the Department's ability to update and keep the discontinuation of services list accurate. The list will be updated continually as SWAs notify ETA of determinations regarding discontinuation and reinstatement. SWAs will know if an employer has been reinstated because the employer will have been removed from the list. The Department expects that SWAs will regularly consult the discontinuation of services list and will provide further guidance regarding notification procedures relating to its maintenance and use. The Department adopts new paragraph (d), as proposed.

VI. Discussion of Revisions to 20 CFR Part 655, Subpart B

A. Introductory Sections

1. Section 655.103(e), Defining Single Employer Test

In the NPRM the Department proposed to define a new term, ''single employer,'' to codify and clarify its long-standing approach to determine if multiple separate employers are operating as one employer for the purposes of the H–2A program. As

noted in the NPRM, the Department has encountered numerous instances over at least the last decade where it appears separate entities are using their corporate structure—intentionally or otherwise—to bypass statutory and regulatory requirements to receive a temporary agricultural labor certification or to circumvent regulations aimed at protecting workers in the United States. *See, e.g., Lancaster Truck Line,* 2014–TLC–00004, at *2–3, 5 (BALCA Nov. 26, 2013) (employer was ''frank about separating the legal entities of his operation'' from his father to ''comply with the H–2A program's seasonal permitting restrictions'' and the ALJ held the attempt to divide work did not demonstrate temporary need).

The Department received numerous comments both opposed to and in support of this proposal and will address the comments in turn. Several comments from advocacy organizations, States, an individual, U.S. House Members, and U.S. Senators expressed general support for the proposal without further elaboration. Numerous other commenters expressed at least some support for the additional definition and will be discussed further below. The remaining comments opposed the addition of the definition of the single employer test. After careful consideration, the Department will incorporate the proposed definition of the single employer test, also known as the integrated employer test, into the regulations without change.

This section discusses: (1) the definition and use by OFLC; (2) the authority by which the Department adds this definition to the regulation; (3) the Four Factor Test, various business structures, and NODs; (4) Board of Alien Labor Certification Appeals (BALCA) case law and ''joint employers''; (5) other OFLC-related comments pertaining to the new definition; and (6) application of the test during enforcement by WHD.

a. Definition and Use by OFLC

As noted in the NPRM, the Department already applies a single employer test in the H–2A program in certain contexts. OFLC currently uses this test to determine if multiple nominally separate employers should be considered as one entity for the purposes of determining whether an applicant for labor certification has a temporary or seasonal need, and WHD uses this test to determine whether H–2A employers complied with program requirements. This test originated with the National Labor Relations Board (NLRB) and has been adopted by courts and Federal agencies under a wide variety of statutes. *See South Prairie Const. Co.* v. *Local No. 627, Int'l Union of Operating Eng'rs, AFL–CIO,* 425 U.S. 800, 803 (1975) (NLRA); *see also Knitter* v. *Corvias Military Living LLC,* 758 F.3d 1214, 1215 (10th Cir. 2014) (Title VII); *Bristol* v. *Bd. Of Cty. Comm'rs,* 312 F.3d 1213, 1218 (10th Cir. 2002) (Americans with Disabilities Act (ADA)). As the Second Circuit has explained, the single employer test may be used to determine liability for employment-related violations, as well as to determine employer coverage. *Murray* v. *Miner,* 74 F.3d 402, 404 n.1 (2d Cir. 1996). The policy underlying the doctrine is ''fairness . . . where two nominally independent entities do not act under an arm's length relationship.'' *Id.* at 405. Consistent with judicial and administrative decisions, the Department has typically looked to four factors to determine whether the entities at issue should be considered a single employer for purposes of temporary need and compliance: (1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) degree of common ownership/financial control (the ''Four Factor Test''). *See, e.g., Sugar Loaf Cattle Co.,* 2016–TLC–00033, at *6 (BALCA Apr. 6, 2016) (citing to *Spurlino Materials LLC* v. *NLRB,* 805 F.3d 1131, 1141 (D.C. Cir. 2015)). The new definition incorporates the four factors noted above and, as under current practice, the Department will consider the totality of the circumstances surrounding the relationship among the entities, with no one factor determinative in the analysis. The factors will be discussed in further detail below.

The Department's main purpose in determining whether two or more entities are operating as one is preventing employers from utilizing corporate structure to circumvent the program's statutory and regulatory requirements. As such, the Department's focus when examining whether two or more employers are a single employer is both the relationship between the employers themselves and each employer's use of the H–2A program. *See Knitter* v. *Corvias Military Living LLC,* 758 F.3d 1214, 1227 (10th Cir. 2014) (Title VII case in which the court noted that ''the single employer test focuses on the relationship between the potential employers themselves''). The Department emphasizes again that no one factor is determinative as to whether entities are acting as one.

The California Labor & Workforce Development Agency (California LWDA) supported the proposal and echoed the concerns of the Department by explaining that it had ''encountered numerous instances . . . where related entities use separate corporate structures to evade statutory and regulatory wage and hour requirements.'' As examples it noted that its Labor Commissioner's Office has discovered some agricultural employers who ''attempt to insulate themselves from liability'' via their multiple entities, as well as instances where businesses have separated their corporations to hire less than the minimum numbers of workers that would trigger minimum wage and overtime obligations. An individual also expressed support for the proposal and believes it will help ensure consistent application by BALCA. They nevertheless expressed concern that the employers who are already exploiting the system via their corporate structures would develop other methods to continue to do so, and then suggested that there is no clear solution for the issue other than continuing to find the separate entities who are so intertwined as to be a single employer. The Department appreciates and shares the concern about corporations utilizing their structures to circumvent regulatory requirements and agrees that determining which separate entities are so intertwined as to be a single employer is a way to ensure statutory compliance.

As noted in the NPRM and adopted in this final rule, OFLC's COs will use the single employer test to determine if an employer's need is truly temporary or seasonal. As noted below in the *Authority* section, sec. 101(a)(15)(H)(ii)(a) of the INA permits only ''agricultural labor or services . . . of a temporary or seasonal nature'' to be performed under the H–2A visa category. 8 U.S.C. 1101(a)(15)(H)(ii)(a). Thus, as part of the Department's adjudication of applications for temporary agricultural labor certification, the Department assesses on a case-by-case basis whether the employer has established a temporary or seasonal need for the agricultural work to be performed. *See* 8 U.S.C. 1101(a)(15)(H)(ii)(a); 20 CFR 655.103(d), 655.161(a).

Some nominally distinct employers have agricultural operations such that when they apply for H–2A workers it appears that two or more separate entities are each requesting a different temporary agricultural labor certification. However, in reality, the workers on these certifications are employed by a single enterprise in the same AIE and in the same job opportunity for longer than the attested period of need on any one application.

For example, if Employer A has a need for two Agricultural Equipment Operators from February to December, and Employer B has a need for two Agricultural Equipment Operators from December to February at the same worksite, this may reflect a single year-round need for Agricultural Equipment Operators. *See, e.g., Katie Heger,* 2014–TLC–00001, at *6 (BALCA Nov. 12, 2013) (''Considering that the [two entities] appear to function as a single business entity and have identified sequential dates of need for the same work, their 'temporary' needs merge into a single year-round need for equipment operators.''). In these situations, the two nominally separate employers may be applying for certification for, and advertising for, one continuous, sometimes permanent, job opportunity, which calls into question whether either employer has a temporary or seasonal need.

The issue of whether an employer or nominally distinct employers have truly established a temporary need only arises when employers are filing multiple applications for the same or similar job opportunities in the same AIE, such that the combined period of need is continuous or permanent. It should be noted that determinations by OFLC and WHD as to single employer status may differ based on the evidence and information available at the time of assessment, though generally the agencies expect to reach the same conclusions when assessing single employer status.

Authority

An anonymous commenter and the Cato Institute, a public policy organization, alleged that the Department had failed to document its authority for adding this definition to the regulations. In particular, the Cato Institute argued that the Department provided no legal justification and instead used ''circular reasoning'' to justify the new definition. An anonymous commenter argued that the Department must provide statutory authority based on the INA and the authority granted to the Department in relation to the H–2A program, rather than looking to the NLRB as justification.

The Department articulated its authority for this proposal in the NPRM (*see* 88 FR at 63769) but will nevertheless explain in more detail the legal basis for the addition of this regulatory text in this final rule. The INA permits H–2A nonimmigrant workers to come ''temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature,'' and authorizes the Secretary to issue regulations. 8 U.S.C. 1101(a)(15)(H)(ii). The Department must evaluate the temporary or seasonal nature of the work, pursuant to the statutory definition of H–2A workers. 8 U.S.C. 1101(a)(15)(H)(ii) (describing a nonimmigrant ''who is coming temporarily to the United States''); 8 CFR 214.2(h)(5)(iv)(B) (''In temporary agricultural labor certification proceedings the Department of Labor separately tests whether employment qualifies as temporary or seasonal.''); *see also* 52 FR 20496, 20497–20498 (June 1, 1987) [11] (''What is relevant to the temporary alien agricultural labor certification determination is the employer's assessment—*evaluated, as required by statute, by DOL*—of its need for a short-term (as opposed to permanent) employee. The issue to be decided is whether the employer has demonstrated a *temporary need for a worker* in some area of agriculture.'' (emphasis in original)). Furthermore, the Secretary is authorized to take enforcement action ''to assure employer compliance with terms and conditions of employment under this section [8 U.S.C. 1188].'' 8 U.S.C. 1188(g)(2).

Therefore, the Department has the authority to publish regulations with respect to the employers—as defined by DOL's long-standing definition discussed further below—who are applying for an H–2A labor certification and to determine the true nature of those employers' need for temporary workers, as well as whether the employment of such workers will have an adverse effect upon wages and working conditions of workers in the United States similarly employed.

A trade association, agents, and a policy organization argued that the Department is not allowed to model its definition of the single employer test after the definition used by the NLRB because the definitions arise in entirely different contexts and the NLRA does not cover agricultural workers. *See* 29 U.S.C. 152(3). An agent, másLabor, pointed to BALCA's decision in *Mid-State Farms, LLC,* 2021–TLC–00115 (BALCA Apr. 16, 2021) for support of this proposition. The ALJ in that case noted that the single employer test was developed by the NLRB, and that the ''concerns of the NLRB, or for that matter cases under Title VII, are not the same as those under the INA.'' *Id.* at *22. The ALJ also stated that ''[t]he policy behind the use of the 'Single Employer Test' appears to be in favor of broadening jurisdiction in collective bargaining cases and widening the number of employers who fall under its dictates'' and then declared that this ''over-inclusive policy'' is not appropriate for the H–2A program. *Id.* An anonymous commenter agreed with the ALJ's sentiment and argued that the single employer framework in the H–2A context is too broad and overinclusive. The Department disagrees.

This rulemaking abrogates *Mid-State Farms, LLC* to the extent that it found that the single employer test was inappropriate in the H–2A context. As discussed further below, the Department believes that the single employer test may actually be the most appropriate way to assess temporary or seasonal need in certain circumstances. The Department has authority to craft regulations relating to the H–2A program and has the authority to overturn ALJ decisions. 8 U.S.C. 1101(a)(15)(H)(ii); 5 U.S.C. 305 (providing for continuing review of agency operations); *see also* 85 FR 30608, 30611 (May 20, 2020) (final rule allowing the Secretary to review decisions issued by BALCA ''lest disagreement on law and policy within the Department lead to protracted uncertainty and intractable problems''). The Department is not convinced by the ALJ's logic set forth in *Mid-State Farms, LLC* that because the single employer test originated in a different context, it may not be used in the context of foreign labor certifications. Nor is the Department convinced by the ALJ's policy-related conclusion that the test is not appropriate because allegedly it is used to broaden the jurisdiction of the NLRB and is ''over-inclusive.'' *Mid-State Farms, LLC,* 2021–TLC–00115, at *22 (Apr. 16, 2021). The INA authorized the Secretary, not ALJs, to promulgate appropriate regulations, adopt appropriate legal standards, and make policy. 8 U.S.C. 1101(a)(15)(H)(ii); *see also supra* ''*Authority.*''

Furthermore, while the single employer test included in the regulations may have originated with the NLRB, as noted above, the concept of a ''single'' or ''integrated'' employer evolved from common law, not statute.[12] It has been adopted by courts

[11] Interim Final Rule; Request for Comments, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States,* 52 FR 20496 (June 1, 1987) (1987 H–2A IFR).

[12] *See* Crandley, M., *The Failure of the Integrated Enterprise Test: Why Courts Need to Find New Answers to the Multiple-Employer Puzzle in Federal Discrimination Cases* (2000), 75 Ind. L. J., pp. 1041, 1052, 1057 (explaining that the test arose in the NLRB in the late 1940s and 1950s, and first appeared in Equal Employment Opportunity Commission (EEOC) administrative decisions in the 1970s). As noted below, 8 U.S.C. 1188 does not define ''employer'' and the common law definition applies. *See Nationwide Mut. Ins. Co.* v. *Darden,*

and Federal agencies under a wide variety of statutes. *See supra* ''*Definition and Use by OFLC.*'' While the Department agrees that the concept of a single or integrated employer may sometimes be utilized differently under the NLRA—or Title VII or the ADA—that does not preclude the Department from adopting the test for use in the H–2A context. For the reasons discussed in the NPRM and below, the Department thinks that this test is appropriate to assess the nature of an employer's need.

The Cato Institute stated that the term ''employer'' as used in the INA ''clearly'' does not apply to related businesses. It also argued that Congress could have defined ''employer'' to include other entities if it had chosen to do so. As an example, it pointed to how Congress articulated a definition of ''employer'' in the context of the H–1B program, or how Congress discussed the concept of a ''joint employer'' in the INA. It then stated that the ''absence of this defining language limits the meaning of this term to its ordinary definition: the employer entity that has submitted the petition.''

The Department agrees that the INA does not define the word ''employer'' in the context of the H–2A program at 8 U.S.C. 1101 and 8 U.S.C. 1188 and thus the common law definition is applied. ''[W]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'' *Nationwide Mut. Ins. Co.* v. *Darden,* 503 U.S. 318, 322 (1992) (quoting *Community for Creative Non-Violence* v. *Reid,* 490 U.S. 730, 739 (1989)). The common law definition for ''employer'' is the basis for the Department's regulatory definition of ''employer.'' *See* 20 CFR 655.103(b); 84 FR 36168, 36174 (July 26, 2019) [13] (footnote omitted) (''Controlling judicial and administrative decisions provide that to the extent a federal statute does not define the term employer, the common law of agency governs whether an entity is an employer. Accordingly, the proposal continues to use the common law of agency to define the terms employer and joint employment for associations and growers that have not filed applications.''); 73 FR 8538, 8555 (Feb. 13, 2008) (''The Department is proposing to include the definition of employee and to modify the definition of employer to conform these definitions to those used in other Department-administered programs. The definition of employee conforms to the Supreme Court's holding in *Nationwide Mutual Insurance* v. *Darden,* 503 U.S. 318, 322–324 (1992).''); *see also* 20 CFR 655.103(b) (defining an employee as ''[a] person who is engaged to perform work for an employer, as defined under the general common law of agency''). Congress authorized the Secretary to implement the statute via regulations, and they do so by appropriately using the common law definition of the term. 8 U.S.C. 1101(a)(15)(H)(ii). The Department disagrees with, and does not accept, the Cato Institute's articulated definition—that an ''employer'' is the ''entity that has submitted the petition''—a definition that is not included in the statute, not found in common law, is not a generally established meaning of the term, and is inconsistent with the Department's regulatory definition and historic practice in the H–2A program.

The Cato Institute argued that the Department may not define ''employer'' at all, stating that the Department must utilize DHS's definition of ''employer.'' The commenter claims, with no support, that ''DHS now has sole authority over deciding the outcome of a petition and who is a petitioner, meaning that DHS's definition of 'employer' governs the meaning of employer in section 218 [8 U.S.C. 1188].'' The Cato Institute also argued that ''INA section 218 clearly defines a petitioning employer . . .'' but provides no citation for this definition. A definition of ''petitioning employer'' does not appear in INA sec. 218. *See* 8 U.S.C. 1188(i) (the ''Definitions'' section).

The Department is not convinced by the Cato Institute's arguments. While DHS does have authority to adjudicate the H–2A petition, Congress clearly envisioned that DOL would play a crucial role in the process as the Secretary issues certifications, assesses temporary need, and takes actions to ensure employer compliance with the terms and conditions of employment, including promulgating regulations to effectuate their responsibilities under the INA. 8 U.S.C. 1101(a)(15)(H)(ii); 8 U.S.C. 1188(a)–(g)(2). DHS did not reference its own definition of employer when it recognized the Department's nonexclusive responsibility to assess an employer's need as either seasonal or temporary. 8 U.S.C. 1188(a); 8 CFR 214.2(h)(5)(iv)(B) (''In temporary agricultural labor certification proceedings the Department of Labor separately tests whether employment qualifies as temporary or seasonal.''). Therefore, in carrying out this responsibility, the Secretary is authorized to adopt a common law definition of the term ''employer.''

In discussing the Department's authority in this space, the Cato Institute claimed that the Department may ''only deny a certification'' when certification would ''adversely affect'' workers in the United States similarly employed, or when workers in the United States are not able to perform the labor or services in the petition. In actuality, the Department may deny a certification for a number of reasons, as outlined in the statute at 8 U.S.C. 1188(b), and may only issue a certification if the ''employer has complied with the criteria for certification'' and ''the employer does not actually have, or has not been provided with referrals of, qualified eligible individuals who have indicated their availability to perform such labor or services on the terms and conditions of a job offer which meets the requirements of the Secretary.'' 8 U.S.C. 1188(c)(3).

The Cato Institute argued that the Department's analysis of an application is limited to only the labor or services in the labor certification application it is currently adjudicating, and not to any other labor or services involved in other petitions or applications by separate employers. It stated that the Department may not identify adverse effects to workers in the United States similarly employed that were or are caused by job offers that are not the present employer-applicant's job offer. The Department disagrees with this characterization.

The statute does not limit the Department's review to one application or job offer. As discussed above, the Department must assess the employer's need for temporary workers when reviewing an application, an assessment that may require the Department to review other applications spanning more than one job opportunity, and looking to the same employer's filing history (and in the case of a single employer, the nominally distinct entities' filing histories) is part of analyzing an employer's need for said employment. This temporary need assessment is distinct from any adverse effect determination made by the Department.

It is well established that to analyze temporary need, the Department may look to other previously or simultaneously filed applications. 86 FR 71373, 71377 (Dec. 16, 2021) (''Similar

503 U.S. 318, 322 (1992) (''[W]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'') (citations omitted).

[13] NPRM, *Temporary Agricultural Employment of H–2A Nonimmigrants in the United States,* 84 FR 36168 (July 26, 2019) (2019 H–2A NPRM).

to USCIS' approach [which is the same for all H–2A petitions, including H–2A sheep and goat herder petitions] . . . the Department's adjudication will be conducted on a case-by-case basis and will take into consideration the totality of the facts presented, of which past periods of need will be one element that is considered in determining whether an employer's need is truly temporary or seasonal.''); *see also* USCIS, *Policy Memorandum: Updated Guidance on Temporary or Seasonal Need for H–2A Petitions Seeking Workers for Range Sheep and/or Goat Herding or Production* (Feb. 28, 2020) (''USCIS evaluates all H–2A petitions based on the facts presented in the petitions as well as the past filings of the petitioner, as appropriate.''); [14] *see, e.g., Donald Parrish Dairy Inc.,* 2019–TLC–00006, at *4–5 (BALCA Dec. 19, 2018) (relying on previous certification to determine that employer had not proven that its need was seasonal). Having the ability to examine an employer's filing history is crucial to determining whether consecutive applications have been filed such that an employer truly has a temporary or seasonal need. 1987 H–2A IFR, 52 FR at 20498 (''DOL will take a careful look at repeated temporary alien agricultural labor certification applications for the same job''). If an employer files an application covering January to June, and another from June to December, the Department would only know about the sequential period of need and potential year-round employment if it may look at previous filing history. Furthermore, it would also be impossible to determine if multiple applications have been filed in the same AIE without the ability to look at other applications. 20 CFR 655.130(e)(2) (''[a]n employer may file only one *Application for Temporary Employment Certification* covering the same AIE, period of employment, and occupation or comparable work to be performed''). This approach is consistent with the above-referenced USCIS Policy Memorandum regarding the assessment of an employer's need.

The Cato Institute also argues that the purpose of the H–2A program is to ''secur[e] the border or stop[ ] illegal immigration'' and faults the Department for not mentioning this purpose in its stated justification for codifying the single employer test. The Department disagrees. The plain language of the statute does not create any such obligation by DOL to secure the border or stop unauthorized immigration. *See* 8 U.S.C. 1188(a). Statutory construction begins with the statute and ends with the statute if the statute is unambiguous. *Rotkiske* v. *Klemm,* 140 S. Ct. 355, 360 (2019). Congress may have many different purposes when enacting a statute, but the particular provisions of the INA that relate to DOL's role in the H–2A program do not mandate the Department consider how to secure the border or stem unauthorized immigration.

For these reasons, the Department concludes that the above-mentioned commenters' assertions that the Department lacks authority to promulgate a definition of the single employer test in the context of the H–2A program are unfounded, and the Department adopts the definition as proposed.

b. The Four Factor Test, Business Structures, and Notices of Deficiency

As noted above, the four factors that the Department proposed to determine single employer status were: (1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) degree of common ownership/financial control. The Department reiterates and expands upon the discussion of the factors in the NPRM below.

Regarding the ''common management'' factor, the ''relevant inquiry is whether there is 'overall control of critical matters at the policy level.' '' *K & S Datthyn Farms,* 2019–TLC–00086, at *6 (BALCA Oct. 7, 2019) (quoting *Spurlino Materials,* 805 F.3d at 1142). Shared day-to-day management may also indicate common management. *Spurlino Materials,* 805 F.3d at 1142. For example, where the same president, treasurer, and chief operating officer oversee the actions of multiple entities and resolve disputes, this suggests a common management between entities. *Pepperco-USA, Inc.,* 2015–TLC–00015, at *30–31 (BALCA Feb. 23, 2015).

Regarding the ''interrelation between operations'' factor, the Department may look to whether the entities operate at arm's length. *Id.* It may examine whether companies share products or services, costs, worksites, worker housing, insurance, software, or if they share a website, supplies, or equipment. *See, e.g., id.; Sugar Loaf Cattle Co.,* 2016–TLC–00033, at *6–7 (Apr. 6, 2016) (finding an interrelation of operations in part because the work locations were ''fundamentally at the same place''); *David J. Woestehoff,* 2021–TLC–00112, at *11 (BALCA Apr. 2, 2021) (comparing employers' housing locations and worksites to analyze their relationship).

Regarding the ''centralized control of labor relations'' factor, the Department may look to whether the persons who have the authority to set employment terms and ensure compliance with the H–2A program are the same. *K & S Datthyn Farms,* 2019–TLC–00086, at *5 (Oct. 7, 2019) (noting the same manager signed different H–2A applications and this was a ''fundamental labor practice[ ], at the core of employer-employee relations for any business'').

Finally, regarding ''common ownership and financial control,'' the Department may look to the corporate structure and who owns the entities, whether it be, for example, a parent company or individuals. *See Pepperco-USA, Inc.,* 2015–TLC–00015, at *30–31 (Feb. 23, 2015) (two nominally distinct entities were owned by one parent company). It may also explore whether the owners of the entities at issue are related in some way. *See, e.g., JSF Enterprises,* 2015–TLC–00009, at *12–13 (BALCA Jan. 22, 2015) (entities owned in varying degrees by members of the same family); *Larry Ulmer,* 2015–TLC–00003, at *3–4 (BALCA Nov. 4, 2014) (two companies with similar names were owned by father and son); *Lancaster Truck Line,* 2014–TLC–00004, at *2–3 (Nov. 26, 2013) (father and son sought to separate a business in an attempt to meet seasonal need requirements); *see also Overlook Harvesting,* 2021–TLC–00205, at *13 (BALCA Sept. 9, 2021) (though analyzing the relationship using joint employment test, looking to the marital relationship between owners). These examples of analysis and lines of inquiry related to each of the factors are not exhaustive.

The Department received several comments on this aspect of the proposal. After consideration of the comments, discussed in detail below, the Department adopts the proposal without change.

One anonymous commenter, as well as USAFL and Hall Global, commented that the factors are inappropriately vague, open-ended, and that they are not defined within the text of the definitions. USAFL and Hall Global stated that these factors are ''superficial'' and that something as simple as a ''shared mailbox'' would lead OFLC to draw a conclusion that multiple employers' needs are the same need. An anonymous commenter lamented that these four factors would establish an unjustified ''limitless standard'' that would make it

[14] USCIS, *Policy Memorandum: Updated Guidance on Temporary or Seasonal Need for H–2A Petitions Seeking Workers for Range Sheep and/or Goat Herding or Production* (Feb. 28, 2020). *https://www.uscis.gov/sites/default/files/document/memos/2-PMH2A-SeasonalSheepGoatHerder_PolicyMemo.pdf.*

impossible to know if they have satisfied some or all of the factors.

The Department understands the concerns that this test and these factors do not establish a bright-line rule, which can present difficulties in administration. Tests that involve weighing factors are naturally fact-dependent, and reasonable people may disagree as to the outcome of the test. However, as noted previously, the single employer test has been used by administrative tribunals and Federal courts for decades. As stated above, DOL itself has been using this test already in the H–2A context as well. To date, the Department has found this to be a reasonable test that the Department has been able to apply fairly without overburdening employers.

USAFL and Hall Global suggested that rather than use the Four Factor Test, the Department should focus its inquiry on ''economic substance,'' or in other words, whether there is a valid business reason for the corporate structure. Allegedly this ''economic substance'' analysis would help determine whether employers have only divided their business for ''sham'' reasons. The Cato Institute made a similar suggestion that if the Department were to keep the single employer test, it should be limited to times where evidence shows that the separation of business occurred solely to obtain a labor certification. USAFL and Hall Global claimed that this ''economic substance'' standard is administrable, easy to litigate, and protects business interests.

The Department disagrees with commenters that this ''economic substance'' type test would be easier to administer and litigate and declines to accept the suggestions. The Department must determine that an employer's need is temporary or seasonal regardless of whether there is a legitimate reason for dividing a business, therefore adopting this suggestion would be inconsistent with the INA. Furthermore, while it may be possible to determine in some cases whether the businesses have been separated to specifically meet H–2A requirements—*see, e.g., Lancaster Truck Line,* 2014–TLC–00004, at *2–3, 5 (Nov. 26, 2013), in which the employer was ''frank about separating the legal entities of his operation'' from his father to ''comply with the H–2A program's seasonal permitting restrictions,''—it is rarely so clearly established, making a test based on whether there is or is not a ''sham'' reason for splitting a business *more* difficult to administer. What the Department is tasked with determining, and what is well-within its authority to administer, however, is whether or not the employer has a true temporary or seasonal need.

The Department understands that, as many commenters noted, there are legitimate business reasons for complex corporate structures, and that there are many family-owned and family-run farms that may form various entities for insurance, tax, inheritance, or other purposes, including risk management. One example provided was of a fixed-site grower who also created a labor contracting company to provide labor services to other growers. U.S. Custom Harvesters, Inc. gave an example of intertwined businesses that have both ''seasonal custom harvesting needs'' and ''seasonal needs for their farm business.'' It expressed concern that these types of legitimate arrangements would be questioned as to their single employer status.

The fact that an employer is not trying to circumvent regulatory requirements, does not mean that it then automatically has a valid temporary or seasonal need for agricultural labor. Even if an employer, or single employer, has legitimate reasons for dividing their business(es) and then separately applying for H–2A workers, it is a statutory requirement that the H–2A work be of a temporary or seasonal nature, and therefore employers submitting an application for temporary agricultural labor certification are required to establish that they have a temporary or seasonal need for agricultural labor. 8 U.S.C. 1101(a)(15)(H)(ii)(a); 20 CFR 655.103(d), 655.161. Permitting employers with a permanent need to simply divide their business so that multiple entities can establish a temporary need, and thereby obtain a labor certification, would violate the statute. *See, e.g., Intergrow East, Inc.,* 2019–TLC–00073, at *5 (BALCA Sept. 11, 2019) (''An employer may not circumvent the temporary need requirement by using a closely related business entity to file an overlapping application'').

Even if employers have genuine business needs for dividing their business and then separately applying for H–2A workers, this approach to filing labor certification applications is problematic. It undermines the statutorily required labor market test and the Department's ability to protect workers in the United States as each application, standing alone, does not fully convey the potential job opportunity to any applicant—for example, the job opportunity could be for 12 total months rather than 6 months with one employer and 6 months with only a nominally separate entity. It is possible that a U.S. worker would be interested in a job that could last a year, or even permanently, rather than only 6 months—a sentiment echoed by numerous supporters of this proposal. These supporters agreed that U.S. workers may be more interested in a year-round job, as opposed to numerous temporary job opportunities posted separately.

The Cato Institute argued that the Department cannot assert that there is harm to prospective U.S. workers who are unable to see the full nature of the job opportunity because the Department, in order to state that these workers are not aware of the full nature of the job opportunity, must make an assumption about the full nature of the job opportunity.

The Department disagrees with the commenter's assertion because it is the employer's burden to establish eligibility for this program. 8 U.S.C. 1361. If the employer cannot establish that it has truthfully disclosed the full nature of its job opportunity, then the employer has not established eligibility for the program. *Id.* Furthermore, even if the Department were to ''assume'' that a job opportunity is not as it seems, many commenters echoed and supported the ability of the Department to investigate and conclude that there may be impacts on the labor market test if the full nature of the job opportunity is not disclosed.

The Cato Institute also asserted that employers could ''already hire U.S. workers without bureaucratic interference . . . [and] [t]he only reason that [an employer] would participate in the H–2A program is because they cannot find U.S. workers to do the jobs.'' The commenter did not provide evidence for their assertion, and it is unclear what conclusion the Department is supposed to draw from this statement, but to the extent that it is implying that an employer who applies for the program must automatically be eligible because it applied, the Department disagrees. Again, the statute requires petitioners to obtain a certification from the Secretary. The statute specifically notes that a certification may only be issued after an employer ''has complied with the criteria for certification (including criteria for the recruitment of eligible individuals as prescribed by the Secretary),'' thereby establishing that not only must an employer meet all the criteria and engage in recruitment, but also that Congress did not presume an employer would be automatically eligible for a certification simply because it applied to the H–2A program. 8 U.S.C. 1188(c)(3)(A)(i). The Secretary has an active role to play in recruitment

and for this recruitment to be meaningful, as noted above, the employer must truthfully disclose the full nature of its job opportunity. *See* 8 U.S.C. 1188(b); 8 U.S.C. 1188(g)(1)(A).

Americans for Prosperity Foundation, another public policy organization, in response to the idea that a single employer may not accurately convey the full nature of a permanent job opportunity because it has split the job between two nominally distinct companies, stated that prospective workers could simply ''search through the [SWA] interstate employment system'' to ''have full view of all the H–2A job opportunities available by all employers.'' The Department points out that this would not solve the problem that the job opportunity the employer-applicant is putting forth in their application is not fully accurate, and furthermore, it should not be the responsibility of worker-applicants to piece together job postings from nominally distinct entities, nor may it even be possible for worker-applicants to tell from a job posting alone that any two employers are so intertwined as to be acting as a single employer.

The Cato Institute argued that it is legal for employers to split their businesses to comply with the law. The commenter went so far as to state that the Department requires certain employers—in its example H–2ALCs—to manipulate its need. The commenter further stated that ''[a] contractor that continuously services all types of farms in the same area throughout the year will automatically have a year-round need in that area'' and that if they want to ''operate in the same area but service different crops, the owner must create a separate legal entity.'' The commenter wrote that it is a ''good thing'' for employers to arrange their businesses so that they comply with the law.

The Cato Institute has taken a presumably hypothetical example of an H–2ALC that has a full-time, permanent need and explained that it purposely manipulates its structure to find a loophole to a statutory requirement. The position that employers should be able to utilize existing loopholes to circumvent statutory requirements of temporary or seasonal need is not a convincing argument to rescind or amend the proposal. In fact, it is concerning to the Department. It is also concerning that the Cato Institute believes the Department is requiring employers to manipulate their corporate structures to qualify to use the program. The INA makes clear that employers may only use the H–2A program if they establish eligibility for the program, including that they have a temporary or seasonal, as opposed to permanent, need; they are not entitled to use it as a matter of course. *See* 8 U.S.C. 1361; 8 U.S.C. 1188(b). Therefore, if an employer cannot qualify because their need is permanent, they are in no way required to manipulate their need; they simply do not qualify.

USAFL and Hall Global argued that the Department has not ''take[n] into account reliance interests,'' presumably in relation to business and corporate structures. It explains that employers have tax, estate planning, and other legitimate reasons for dividing their businesses and that this creates ''reliance interests.'' However, it is unclear exactly what ''reliance interests'' this commenter is referring to or how this proposal would affect employers. As previously noted, the Department has been utilizing some variation of the single employer test for nearly a decade, so there should be no change with regard to these ''reliance interests.'' Also, regardless of how it structures its business or the reasons for doing so, as stated above, an employer must establish its temporary or seasonal need pursuant to the statutory requirements. To the extent the commenter is suggesting reliance interests in prior certifications, if an employer is denied certification for failure to establish a temporary need it does not matter that it was approved in the past, as a previous certification does not mandate approval of a subsequent application, especially when this past certification was in error, as each application must be evaluated on its own merits. *See Sussex Eng'g, Ltd.* V. *Montgomery,* 825 F.2d 1084, 1090 (6th Cir. 1987) (''It is absurd to suggest that . . . any agency must treat acknowledged errors as binding precedent''). If the employer did not have a seasonal or temporary need in the past, it should not have been certified.

The Department acknowledges again that there are legitimate reasons that agricultural employers structure their businesses the way they do, and also believes the vast majority of users are not attempting to manipulate the program, but that the Department nonetheless has a statutory responsibility to verify that the employers are eligible to participate in this program.

Should a CO suspect that an employer-applicant has an actual need that stretches longer than their stated need because the employer is a single employer with another entity or entities based on the four factors above, the COs may issue a NOD or NODs to clarify the status of said entities. To analyze whether entities are a single employer, COs may request, via NOD, information necessary for this determination, including, but not limited to: (1) documents describing the corporate or management structure, or both, for the entities at issue; (2) the names of directors, officers, or managers and their job descriptions; (3) incorporation documents; or (4) documents identifying whether the same individual(s) have ownership interest or control. The COs may additionally ask for explanation as to: (1) why the businesses may authorize the same person or persons to act on their behalf when signing contracts, applications, etc.; (2) whether the businesses intermingle money or share resources; (3) whether workspaces are shared; and (4) whether the companies produce similar products or provide similar services. These lists of documentation or evidence are not exclusive, and the COs may request other information or documentation as necessary. An anonymous commenter and USAFL and Hall Global both expressed concern that these factors and related NODs would lead to a limitless inquiry into the business operations of employers and, as noted above, arguing that the Department has not provided justification as to why the factors are so open-ended and vague. Wafla stated that these factors and related NODs would lead to intrusive inquiries, responses for which would take ''40 to 100 hours or more to compile.'' NHC believed that the Department was giving itself too much authority to ask for information and that it would cause an undue burden on employers. Many commenters felt that OFLC questioning an employer as to their single or integrated employer status would generate more NODs and delays in processing of applications, or even delays in the arrival of H–2A workers. Many also stated that this test would be overly burdensome for the whole industry, just to target a ''few bad apples.'' An anonymous commenter criticized the Department's use of NODs and stated that the Department should ask for information about temporary or seasonal need before ''rendering a decision.'' It is unclear what the commenter meant by this statement, as the NOD is the means by which the Department requests further information before rendering a final determination on a case.

The Department understands the concerns regarding NODs and delays in processing but believes the concern is exaggerated and that the benefits of an additional NOD or slight delay, if one

occurs, nevertheless outweigh the potential inconvenience. The Department may issue multiple NODs if the application or job order is incomplete, contains errors or inaccuracies, or does not meet the regulatory requirements. 20 CFR 655.141 and 655.142. If an employer has not demonstrated their eligibility or compliance with the regulations, the NOD is the opportunity for the employer to remedy the deficiencies. A NOD is not punitive, as suggested by one anonymous commenter; instead, it is a means by which employer-applicants are given the opportunity to remedy the deficiencies without the need to wait for a decision denying the application and a subsequent appeal, and without the need to start the application process over.

NODs may request information related to the four factors discussed above, but the Department does not intend to use the NOD to gather unnecessary business information or, as one anonymous commenter suggested, to engage in ''a never-ending fishing expedition.'' Instead, the NOD is the employer's opportunity to submit what evidence it deems appropriate to establish its eligibility for the program. The Department may require the actual submission of materials that are required to be maintained by the regulations, materials that are commonly and routinely used by businesses such as tax documentation, or materials that should be readily available like an organizational chart. Generally, though, employers have some flexibility to provide documentation that establishes their own eligibility for the program. The factors for the single employer test are purposely open-ended to allow employers some choice with how to support, or refute, findings related to the said factors. Employer relationships are increasingly complex, and it would be difficult for the Department to outline every type of documentation or information that could be used to analyze these factors. It would also not be to the advantage of employers, who may have different types of documentation, to submit only specific types of documents, if the submission or maintenance of this documentation is not otherwise required, to prove that they do or do not satisfy the factors, provided that the alternative documentation actually demonstrates their eligibility.

Employers must establish their eligibility for the H–2A program, including that they have a temporary or seasonal need. Should the situation arise that an employer must establish that it is not a single employer with another entity to establish that it does in fact have a temporary or seasonal need, the Department does not believe this to be an undue burden, as this is a statutory requirement. 8 U.S.C. 1101(a)(15)(H)(ii); 8 U.S.C. 1188(a)(1).

Furthermore, as stated in the NPRM and discussed further below, the Department has already been applying this single employer test for at least the last decade. As the Department has already been issuing NODs related to single employer status, there should only be a nominal increase in NOD issuance, *if* there is an increase at all. The Department only intends to utilize the single employer test for the purposes of determining temporary or seasonal need if the employer and its nominally distinct counterparts are applying for certifications in the *same* AIE, for the *same or comparable* job opportunities, for a period of time that would suggest the single employer does not have a temporary or seasonal need. *See* 20 CFR 655.130(e)(2) (''[a]n employer may file only one *Application for Temporary Employment Certification* covering the same [AIE], period of employment, and occupation or comparable work to be performed''). The Department does not intend to determine if every employer-applicant happens to be a single employer, or even a related employer, without any basis to do so.

c. Single Employers, BALCA, and Joint Employers

As noted in the NPRM, OFLC used an informal, fact-focused method of inquiry, involving a comparison of case information (*e.g.,* owner and manager names, locations and AIEs, recruitment information, job descriptions, and other operational similarities across applications) for nearly a decade to address the issue of nominally separate entities using their corporate structure—either purposefully or not—to circumvent statutory requirements. In approximately 2015, OFLC began to frame its analysis using the single employer test (see above under *Definition and Use by OFLC*) to improve consistency and transparency and to address more complex business structures (*e.g.,* corporate organizations) filing H–2A applications through nominally different employers. *See Pepperco-USA, Inc.,* 2015–TLC–00015, at *2–5 (Feb. 23, 2015). Some commenters argued that, in fact, the single employer test was not a ''long-standing'' approach, with an anonymous commenter observing that the ALJ in the *Pepperco-USA* case described the test as ''novel.'' The Department notes that *Pepperco-USA, Inc.* was decided in February 2015—almost a decade ago—and it is no longer ''novel.'' The Western Range Association opposed the addition of the definition and stated that they wished for the Department to continue to use ''current practice.'' It is unclear what this commenter meant, as the current practice is and has been to utilize some form of the single employer test.

Historically, BALCA has affirmed many OFLC denials that either explicitly used the single employer test or used a similar analysis. *See, e.g., D & G Frey Crawfish, LLC,* 2012–TLC–00099, at 2, 4–5 (BALCA Oct. 19, 2012) (affirming the CO's denial and stating that ''[employer's] ability to separate her operation into two entities does not enable her to hire temporary H–2A workers to fulfill her permanent need'').[15] However, in more recent decisions, BALCA has sometimes rejected the single employer test, noting that it had not been promulgated through notice-and-comment rulemaking. *See Mid-State Farms, LLC,* 2021–TLC–00115, at *16 (Apr. 16, 2021) (''This court can find no published instance where the 'Single Employer Test' has been debated openly, subjected to public comment or accepted as official Department policy.''). In response to these concerns, some ALJs have applied the ''joint employer'' test to analyze temporary

[15] Other decisions either explicitly applying the single employer test, or simply using a similar analysis include: *David J. Woestehoff,* 2021–TLC–00112, at *11 (Apr. 2, 2021) (ALJ looked to the four factors in the single employer test to determine if the entities were a single employer but was unable to determine if they were); *K.S. Datthyn Farms, LLC,* 2019–TLC–00086, at *4–6 (Oct. 7, 2019) (applying four-part NLRA and Title VII integrated employer test to determine whether two H–2A applicants for temporary labor agricultural certification were one integrated employer with single labor need); *Intergrow East, Inc.,* 2019–TLC–00073, at *5–6 (Sept. 11, 2019) (same); *Pepperco-USA, Inc.,* 2015–TLC–00015, at *26, 30–31 (Feb. 23, 2015) (see above); *JSF Enterprises,* 2015–TLC–00009, at *12 (Jan. 22, 2015) (''The four entities . . . fill the same need on a year round basis because of the interlocking nature of the businesses and regardless of the distinction in crops each harvests.''); *Anthony Mock,* 2015–TLC–00008, at *6–8 (BALCA Dec. 30, 2014) (ALJ, while not mentioning the single employer test, looked to whether or not the two entities at issue were separate legal entities, and looked at whether there was shared ownership, employees, or assets); *Cressler Ranch Trucking,* 2013–TLC–00007, at *3 (BALCA Nov. 26, 2012) (''The Employer only disguises this need through subsequent applications from a separate entity with the same owner and slight alterations in the wording of the Form ETA–9142. Accordingly, the CO reasonably concluded that the Employer failed to demonstrate a temporary need for agricultural labor or services, as required by 20 CFR 655.103(d).''); *see also Maroa Farms Inc.,* 2020–TLC–00110, at *13 (BALCA Sept. 4, 2020) (affirming the CO's decision on other grounds but noting that ''an employer may not circumvent the temporary need requirement by using a closely related business entity to file an overlapping application'').

need because a definition of ''joint employment'' is included in the regulations. *See, e.g., id.* at *26; *Overlook Harvesting,* 2021–TLC–00205, at *10 (Sept. 9, 2021) (adopting a modified ''joint employer'' test).

Many commenters, in agreeing with the logic of the ALJ in *Mid-State Farms, LLC,* opposed the addition of the single employer test and argued that the ''joint employer'' test was more appropriate as it was already defined in the regulations and BALCA had endorsed it. *See Mid-State Farms, LLC,* 2021–TLC–00115, at *25–26 (Apr. 16, 2021). Many commenters argued that the Department may not now adopt the single employer test because BALCA had ''rebuffed'' attempts to use the test. The Americans for Prosperity Foundation also cited *Mid-State Farms, LLC* and noted that BALCA had criticized the single employer test, stating that it had not been subject to notice and comment. USAFL and Hall Global argued that the Department lacks ''clear criteria'' for identifying applications that may have integrated enterprises and that there is seemingly no discernable way to know why some employers are questioned as to their status and others are not.

These commenters ignore that a lack of a regulatory definition pursuant to notice-and-comment rulemaking was a major reason BALCA ''rebuffed'' the single employer test in *Mid-State Farms, LLC.* As noted above, the Department disagrees with BALCA's conclusion in *Mid-State Farms,* but in any event, the Department here is engaging in the notice-and-comment rulemaking to enact the single employer or integrated employer test and to provide clear criteria to stakeholders, COs, and ALJs, such as the one in *Crop Transport,* who stated that ''[i]t would be helpful . . . if meaningful regulatory criteria were promulgated through notice-and-comment procedures as to when ETA will consider two nominally separate entities as a single applicant for purposes of temporary [agricultural] labor certifications under the Act.'' *Crop Transport, LLC,* 2018–TLC–00027, at 6 n.6 (Oct. 19, 2018). The Secretary is authorized to establish policy and promulgate regulations. *See supra,* the *Authority* section. This rulemaking will provide more uniformity as to the application of the single employer test.

Many commenters argued that the Department proposed to change how to determine when two employers were jointly employing an employee by adding the single employer definition to the regulations. These comments mischaracterize the Department's proposal. The Department is not proposing to change the definition of ''joint employer'' located in 20 CFR 655.103(b), or proposing to change how to determine if two employers are jointly employing an employee. As stated in the NPRM, ''this proposal is not meant to eliminate or undermine appropriate use of the joint employment test.'' 88 FR at 63770. A ''joint employer'' is not necessarily a ''single employer,'' nor is a ''single employer'' necessarily a ''joint employer.''

Joint employment under the H–2A program, generally, is ''[w]here two or more employers each have sufficient definitional indicia of being a joint employer of a worker under the common law of agency.'' 20 CFR 655.103(b) (definition of ''joint employment'' at paragraph (i)).[16] This joint employment inquiry thus focuses on the relationship between the putative joint employer and the employee(s), while the single employer test focuses on the relationship between the nominally distinct employers. *See Knitter,* 758 F.3d at 1227 (''Unlike the joint employer test, which focuses on the relationship between an employee and its two potential employers, the single employer test focuses on the relationship between the potential employers themselves.''). Joint employment assumes that the entities are separate while the single employer test asks whether ''two nominally separate entities should in fact be treated as an integrated enterprise.'' *Id.* at 1226–27 (quoting *Bristol* v. *Bd. Of Cty. Comm'rs,* 312 F.3d 1213, 1218 (10th Cir. 2002) (en banc)). ''In the case of the single employer doctrine, the two entities are essentially the same entity. In the case of the joint employer doctrine, the two share control of the employee to such an extent that they both function as an employer, even though they are operationally distinct.'' *Bonilla* v. *Liquilux Gas Corp.,* 812 F. Supp. 286, 289 (D.P.R. 1993).

Determining whether two entities are joint employers, contrary to BALCA's assertion in *Mid-State Farms,* is unhelpful when assessing temporary or seasonal need where, for example, an employer splits their business between two seemingly separate entities in order to circumvent the requirement to establish a temporary or seasonal need. In those situations, employees are generally not employed at the same time, though there may be overlap between the periods of need, making the analysis of joint employment largely impractical. In assessing the temporary or seasonal need of nominally distinct entities, the focus of the Department's analysis is not on the relationship between the employer and the employees, but rather between the employers themselves.

As an anonymous commenter noted, and another alluded to, *Mid-State Farms* claimed that ''the leading BALCA decisions'' applied a ''joint employer analysis.'' However, upon closer examination, the cases the ALJ referenced in *Mid-State Farms* were analyzed using the factors of the single employer test, and furthermore, several of them may not have met the joint employer test. *Mid-State Farms, LLC,* 2021–TLC–00115, at 27. Specifically, *Mid-State Farms* cited the following cases that actually utilized some form of the single-employer test: *Larry Ulmer,* 2015–TLC–00003, at 4 (Nov. 4, 2014) (''Since the business entities of Larry Ulmer and Ulmer Farms are so intertwined, it would be reasonable to infer that they function as one and are attempting to circumvent the temporary employment requirement.'' (citations omitted)); *Lancaster Truck Line,* 2014–TLC–00004, at 1–3 (Nov. 25, 2013) (The companies shared the same FEIN, business address and owners, and ''[e]mployer was frank about separating the legal entities of his operation in order to comply with the H–2A program's seasonal permitting restrictions.''); *Katie Heger,* 2014–TLC–00001, at 6 (Nov. 12, 2013) (''Considering that the [two entities] appear to function as a single business entity and have identified sequential dates of need for the same work, their 'temporary' needs merge into a single year-round need for equipment operators.''); *Altendorf Transport,* 2013–TLC–00026, at 8 (Mar. 28, 2013) (employer's argument ''does not overcome the interlocking nature of the business organizations . . . . The Employer has the burden of persuasion to demonstrate it and [the other entity] are truly independent entities.''); *D & G Frey Crawfish, LLC,* 2012–TLC–00099, at 2, 4 (Oct. 19, 2012) (noting that two companies had the same owner, mailing address, and worksite location and offered similar job opportunities, and stating that ''[employer's] ability to separate her operation into two entities does not enable her to hire temporary H–2A workers to fulfill her permanent need'').

FFVA, a trade association, and másLabor, an agent, expressed a preference for using the ''joint employer'' test, observing it would sufficiently prevent employers from circumventing the seasonal need requirements. As noted in the NPRM,

[16] Note that the regulations also define ''joint employment'' for specific filing contexts as well. 20 CFR 655.103(b) (definition of ''joint employment'' at paragraphs (ii) and (iii)).

however, the Department is hesitant to only use the H–2A joint employer test in these situations because it may not capture instances, such as those outlined above, where employers who are not H–2A joint employers, but who are only nominally distinct, hire workers sequentially such that they are employing workers all year or permanently. Neither commenter, however, addressed this shortcoming of the joint employer test.

MásLabor argued that the single employer test is ''more restrictive'' than the joint employer test. Wafla lamented that the Department formally adopting the single employer test will cause some employers who operate in the same AIE to no longer qualify for this program because they will no longer be able to demonstrate a temporary or seasonal need. If an employer is unable to demonstrate a temporary or seasonal need for workers, they are ineligible for the program; they also would have been ineligible before the promulgation of this rule.

As explained in the NPRM, joint employment can still be useful in analyzing temporary need in the H–2A program, and this proposal is not meant to eliminate or undermine appropriate use of the joint employment test. For example, there may be a situation where an employer applies for workers from January to April and then hires an H–2ALC or subcontractor for the months of May to December. It is possible that this relationship could be joint employment as defined in the regulations. If such an employer-applicant hires workers from January to April, and then jointly employs workers from May to December, this employer-applicant would have a year-round need. The use of the single employer test in temporary need analysis is meant to cover situations where employees may *not* be jointly employed, or not jointly employed for the entire alleged period of need. ''Joint employer'' is a concept also used in other aspects of the H–2A regulations, and again, the single employer test does not change or undermine the regulations regarding joint employers. *See, e.g.,* 20 CFR 655.131.

Farmworker Justice suggested that the Department specifically state in the regulations that the single employer test does not eliminate or undermine the joint employer test, and that the single employer test is about the relationship between the two different employers as opposed to a relationship between an employer and employee.

The Department appreciates the commenter's suggestions but declines to include them. The two definitions in the H–2A regulations—joint employer and single employer test—are distinct, not exclusive; describe different types of corporate relationships (relationships between two or more employers, versus relationships between employers and employees); and have been sufficiently explained in the preamble, such that additional text in the definition in the regulations could be cumbersome and confusing. It is likewise redundant to note that the single employer test applies between employer-entities and not between an employer and employee. The preamble and articulated definition make this clear, and furthermore the Department does not believe it would be possible to apply the ''single employer test'' to an employer and employee. Finally, Farmworker Justice suggested including the words ''nominally distinct'' somewhere in the definition, although they did not specify where. The Department also believes this to be unnecessary for the reasons specified earlier in this paragraph, as well as the fact that this test is used to determine whether any two or more entities are a single employer.

In light of the BALCA case law criticizing the Department's lack of notice-and-comment rulemaking regarding the single employer test, BALCA case law inappropriately applying the joint employer test to single employer situations, and to codify its long-standing practice, the Department now incorporates the single employer definition as proposed into the regulations and notes that COs will use the definition to analyze the temporary or seasonal need of nominally separate entities.

d. Other Comments on § 655.103(e)

i. Area of Intended Employment

One topic of concern that many commenters raised was whether the Department's assessment of temporary need would involve only those job opportunities in the same AIE. They suggested amending the definition of single employer such that it would read, in part, ''[s]eparate entities *filing for the same or similar job opportunities in the same [AIE]* will be deemed a single employer.'' After consideration, the Department declines to add the requested text to the regulatory provision as it believes the language is redundant.

The regulations state that ''[a]n employer may file only one *Application for Temporary Employment Certification* covering the same AIE, period of employment, and occupation or comparable work to be performed.'' 20 CFR 655.130(e)(2). It is already clear from the regulations that employers are limited to *one* application for *one* AIE and period of employment, and the *same occupation or comparable* work. Therefore, there is no benefit to adding to the single employer definition that temporary or seasonal need be evaluated based on only one AIE, as this is how it is already assessed. There is no prohibition on employers filing for labor certifications in multiple AIEs if they can establish eligibility in each application.

Furthermore, such constraining language may hinder WHD's ability to apply the single employer test in the context of enforcement, as such additional language could be construed as requiring each nominally distinct entity to have filed applications for labor certifications to be deemed part of a single employer.

ii. Single Employer Status Is Not an Automatic Bar

It is possible for a singular employer to have multiple needs—it may have a need for different job opportunities or may have needs in different AIEs. One anonymous commenter, who stated they opposed this proposal, argued that DOL's ''role here is to evaluate whether a need is temporary or seasonal, not to determine whether farms may be some, or any measure constitute a single or otherwise connected employer.'' As discussed extensively above, by adopting and applying the single employer test OFLC is assessing whether the employer's need is temporary or seasonal.

Multiple commenters, including an agent, an agricultural association, and trade associations, stated that the Department should move forward with caution so that the Fifth Amendment and due process rights are not violated but did not elaborate on how including this definition would violate the Fifth Amendment or any due process rights. It appeared, based on language used in the comments, though not always explicitly stated, that many commenters believe that the Department would be ''accusing,'' penalizing, or punishing employers who happen to be single or integrated employers and automatically denying applications for temporary agricultural labor certification if that employer were deemed to be a single or integrated employer.

The Department wants to make clear that being found to be a single employer is *not* an automatic bar to utilizing the H–2A program. One agricultural organization believed that the Department was going to deem all employers in a single industry as a single employer. Others suggested that

sharing an office space, or the fact that entities may both be agricultural producers, would make them ''single employer.'' This is not true. Just because an employer is related to, or is only nominally distinct from another company, does not mean that they are prohibited from using the H–2A program. Nor does it necessarily mean that they will be questioned as to their status via NODs.

The Department is not ''accusing'' any employers of wrongdoing simply by virtue of operating as a single employer with a nominally distinct entity. The single employer test is a means by which OFLC may ascertain an employer's true need for workers. Should entities who are acting as a single employer have distinct needs for workers, and assuming the applications are otherwise consistent with the regulations, the applications will not be denied simply because the employer is an integrated or single employer.

If the CO believes that an employer is unable to establish their temporary or seasonal need because they are a single employer, the employer will be given an opportunity through a NOD, if necessary, to explain their corporate structure and show their eligibility for the H–2A program and will still have the ability to appeal any final determination. The Department wants to make clear that the burden to establish eligibility for the H–2A program lies solely with the employer, and it is the employer, who even if found to be a single employer, must demonstrate its eligibility for the program. *See* 8 U.S.C. 1361. It is therefore unclear, with all these procedural protections in place, how adding this definition would violate due process.

iii. Clarifications

Many organizations expressed support for this proposal, but the Department wishes to clarify what appear to be some misconceptions in some of those comments surrounding the added definition. It appeared that a couple of organizations believed this proposal would group a wider range of entities together as one single employer than was intended, and the Department wants to reiterate two things. One, the single employer test is not the joint employer test and is not meant to undermine or replace the joint employer test. Two, the single employer test is to be used to determine if two or more separate entities are actually so intertwined as to be one entity for the purposes of determining temporary need and for enforcement purposes. It is not intended as a means by which to group any and all employers who have business relationships together under one umbrella.

e. Enforcement by WHD

As stated in the NPRM, the definition of single employer will explicitly provide that the Department may apply this test for purposes of enforcing an H–2A employer's program obligations. As noted in the preamble to the NPRM, and consistent with BALCA and Federal case law, WHD already applies the single employer test in certain circumstances to determine whether the H–2A employer has complied with its program obligations. Over the past several years, WHD has increasingly encountered H–2A employers that utilize multiple seemingly distinct corporate entities under common ownership. The employers have divided their H–2A and non-H–2A workforces onto separate payrolls, paying the non-H–2A workers less than the H–2A workers. However, the H–2A and other workers generally work alongside one another, performing the same work, under the same common group of managers, subject to the same personnel policies and operations. In these circumstances, to determine whether the H–2A employer listed on the *H–2A Application* employed the non-H–2A workers in corresponding employment, the common law test for joint employment may not be a useful inquiry because the interrelation of operations makes it difficult to determine the relationship between each distinct corporate entity and the workers. The single employer test is a more useful inquiry because it focuses on the relationship between the corporate entities to determine whether they are so intertwined as to constitute a single, integrated employer such that it is appropriate and ''fair'' to treat them as one for enforcement purposes. Absent application of the single employer test, this burgeoning business practice might be used—whether intentionally or not—to deprive corresponding workers of the protections of the H–2A program by superficially circumventing an employment relationship with the H–2A employer as described herein, contrary to the statute's requirements. 8 U.S.C. 1188(a)(1). And while WHD already utilizes this test, the Department believes that explicitly noting in the regulations the potential applicability of this test for purposes of enforcement, and the factors the Department will consider in applying this test, will provide clarity for internal and external stakeholders and could also deter employers from intentionally seeking to circumvent the H–2A program's requirements in this manner. However, as for purposes of temporary need, the Department is not replacing or superseding the definition of ''joint employment'' under the existing regulations. Rather, the single employer test would be used as an alternative to joint employment for purposes of enforcement, where appropriate.

The Cato Institute, in criticizing the authority of the Department to adopt this definition, commented that there is no ''adverse effect'' when employers have divided their H–2A and non-H–2A workforces onto separate payrolls, via nominally distinct companies, even if this allows the employer to pay H–2A workers more than other workers. They explained that this type of corporate structure is legal, and that the employment of H–2A workers was not adversely affecting the other workers because allegedly these other workers would not receive higher wages from these employers if the H–2A workers were not employed. In other words, the non-H–2A workers are no worse off because the company hired H–2A workers. The Department does not agree.

The Cato Institute's proffered hypothetical is completely inapposite because the hypothetical employer *has* in fact hired H–2A workers. What that employer would pay its other workers in the absence of H–2A workers is irrelevant to the topic at hand. Instead, the employer in this hypothetical is paying its non-H–2A workers less than it pays its H–2A workers to perform the same work, adversely affecting these workers. *Overdevest* v. *Walsh,* 2 F.4th 977, 984 (D.C. Cir. 2021) (finding the Department's corresponding employment regulations that require H–2A employers ''to pay non-H–2A workers the same amount that they pay the H–2A workers when they are doing the same work'' to be an ''eminently reasonable'' interpretation of the adverse effect mandate). The Cato Institute appears to argue that this hypothetical employer should be allowed to circumvent this requirement by splitting the payroll under nominally distinct entities despite operation of one single, integrated enterprise. Again, the argument that a business or businesses should be allowed to find loopholes to a regulatory system meant to protect workers in the United States is not a convincing one.

USAFL and Hall Global commented on the Department's application of the single employer test for enforcement purposes, stating that ''the use of 'contractual' liability is ambiguous'' and that questions of contract liability are typically matters of State law. USAFL and Hall Global posited that the

regulation thus impermissibly purports to ''preempt state law rules governing attribution of contractual liability.''

These concerns are unfounded. Significantly, the Department did not purport in the NPRM to apply the single employer test for purposes of attributing an entity's contractual ''liability'' under State contract law. *See* 88 FR 63770–63771. The Department has enforcement obligations under the H–2A program that are separate and distinct from any contractual liability that might arise under State law. As set forth in the NPRM and in this final rule, the Department has and will continue to apply the single employer test in the context of its ''enforcement of contractual obligations,'' *id.* Such obligations ''includ[e] requirements under 8 U.S.C. 1188 and 20 CFR part 655, subpart B, applicable to the employment of H–2A workers and workers in corresponding employment.'' 29 CFR 501.0; *see also* 8 U.S.C. 1188(g)(2) (authorizing the Department ''to take such actions . . . as may be necessary to assure employer compliance with terms and conditions of employment under this section''). In this final rule the Department has simply made explicit the potential application of the single employer test in the context of DOL enforcement. *See* 88 FR 63770–63771. Such enforcement is pursuant to and under the authority of the H–2A statute and regulations and not pursuant to State common laws of contract. *Cf. Sun Valley Orchards, LLC* v. *U.S. Dep't of Labor,* No. 1:21–cv–16625, 2023 WL 4784204, *15 (D.N.J July 27, 2023), *appeal filed* (3d Cir. No. 23–2608) (finding DOL's administrative adjudication of H–2A enforcement cases to be Constitutional because such proceedings arise from the employer's ''violations of DOL's regulations, deriv[e] from a federal regulatory scheme under the federal government's immigration related powers, and [are] integrally related to a particular Federal Government action'').

f. Conclusion

The Department sought comments relating to the impact this proposal may have on specific industries or types of employers, and while commenters discussed how this definition would affect agricultural organizations, sometimes with specific examples, there were no comments in response to the question of whether this would impact specific industries more than others. The Department now adopts the single employer definition as it relates to temporary need and contractual obligations without change.

2. Section 655.104, Successors in Interest

The Department proposed several revisions to its current regulations to clarify the liability of successors in interest and to streamline the procedures for applying debarment to a successor in interest to a debarred employer, agent, or attorney. As explained in the NPRM, since 2008 the Department's H–2A regulations have made explicit that successors in interest to employers, agents, and attorneys may be held liable for the responsibilities and obligations of their predecessors, including debarment, to prevent debarred entities from evading the effects of debarment. 73 FR 77110, 77116, 77188 (Dec. 18, 2008) (2008 H–2A Final Rule). However, the Department's current regulations governing debarment, as interpreted by the Administrative Review Board (ARB) and BALCA, are insufficient to effectively prevent program violators from ''circumvent[ing] the effect of the debarment'' as the Department originally intended. *Id.* at 77116. *See Admin.* v. *Fernandez Farms,* ARB No. 2016–0097, 2019 WL 5089592, at *2–4 (ARB Sept. 16, 2019) (holding that 29 CFR 501.31 requires WHD to issue a new notice of debarment to a successor before subjecting the successor to the predecessor employer's WHD order of debarment); *Gons Go, Inc.,* BALCA Nos. 2013–TLC–00051, –00055, –00063 (BALCA Sept. 25, 2013) (holding that 20 CFR 655.182 requires OFLC to first debar a successor of a debarred employer, by completing the full debarment procedures in § 655.182, before it may deny the successor's application for labor certification).

Accordingly, in the NPRM the Department proposed several revisions to its regulations to better effectuate its intent in 2008 when enacting its successor in interest regulations. Most significantly, the Department proposed a new § 655.104, *Successors in interest.* Proposed paragraph (a) clarified the liability of successors in interest and proposed paragraph (b) set forth the definition of a successor in interest. These proposed paragraphs were similar to—but slightly broader than—the first paragraph of the current definition of successor in interest at § 655.103(b). Proposed § 655.104(c) set forth streamlined procedural requirements to apply debarment to a successor in interest, explaining that when an employer, agent, or attorney is debarred, any successor in interest to the debarred employer, agent, or attorney would also be debarred. This proposed paragraph also set forth the procedures by which a putative successor could request review of a CO's determination of successor status. The Department proposed corresponding revisions to §§ 655.103, 655.181, and 655.182 and 29 CFR 501.20. The proposals and the changes adopted in this final rule are discussed more fully below.

The Department received many comments on its proposed revisions to its successor in interest regulations. Various worker rights advocacy organizations, Members of Congress, and public policy organizations, among other commenters, fully supported the proposed revisions, stating that the changes would improve the Department's existing enforcement remedies by expanding the definition of a successor in interest and streamlining debarment proceedings. Several commenters supporting the proposed revisions underscored the need for stronger enforcement against successors in interest in general. For example, FLOC commented that it has become ''all too common'' for H–2A employers to ''try to avoid their responsibilities for violations of the law by transferring their operations to a new person or entity, while all the time retaining control.'' FLOC also recommended additional revisions that would further strengthen debarment, such as applying a ''presumption'' of successor status to any H–2ALC hired by a farm to replace a debarred H–2ALC. Other commenters provided specific examples of entities that have evaded debarment under the current regulations through reconstituting under a different corporate entity with reshuffled ownership.

Along these lines, Farmworker Justice ''urge[d] the Department to focus on overlap of the work actually being done, the workforce, and the product that comes from the work'' when applying any revised regulations. Farmworker Justice and the Agricultural Worker Project of Southern Minnesota Regional Legal Services argued that ''the Department must scrutinize whether the principals or managers of [new] entities are family members of recently debarred entities . . . [and] scrutinize addresses contained in applications for labor certification.'' These commenters underscored the need for robust training and support for Department officials responsible for determining successor status to capture these nuances, so that debarred entities are not able to evade enforcement through rebranding or nominal changes in ownership. Similarly, a couple of SWAs requested guidance on the role of SWAs in determining successor status.

On the other hand, several commenters, including employers, employer associations, and agents, objected to the proposed revisions, though the majority of these commenters took issue with only the proposed definition of a successor in interest, as discussed further below. However, FFVA, a trade association, opined that the debarment of successors as a general matter is unnecessary to meet the Department's goals of ensuring that debarred entities do not continue to operate in the H–2A program because the Department can apply joint employment principles to achieve these goals.

After consideration of the comments received, the Department adopts the proposed changes to its successor in interest regulations in this final rule, with modifications to the discussion of the liabilities of a successor at § 655.104(a) and to the definition of a successor at § 655.104(b). With respect to FFVA's comment on the necessity of debarring successors in interest to debarred employers, agents, and attorneys, the Department notes that application of debarment to a successor in interest is not a new concept in this final rule. As explained in the NPRM, since 2008 the Department's H–2A regulations have explicitly provided for debarment of successors in interest to debarred employers, agents, or attorneys. As explained in the 2008 rulemaking and in the NPRM, application of debarment to successors in interest is necessary to ensure that debarment is an effective remedy, and that debarred entities are not able to circumvent the effects of debarment and continue operating in the H–2A program, despite having been found to have committed substantial violations of the program's requirements. *See* 73 FR at 77116, 77188. It is also unclear how a joint employment analysis could achieve this same goal, as FFVA suggested without further explanation. The Department therefore disagrees with FFVA that debarment of successors is unnecessary to ensure that debarred entities do not evade the effects of debarment. As multiple commenters agreed, however, the Department concludes that changes to its existing successor regulations are needed to better effectuate the intent of the regulations.[17] The Department discusses and responds to the specific comments received on each aspect of the proposal below.

a. Liability of Successors in Interest

Proposed § 655.104(a) set forth the liability of successors in interest, explaining that a successor in interest to an employer, agent, or attorney that has violated the H–2A program requirements may be held liable for the duties and obligations of the violating employer, agent, or attorney in certain circumstances. As discussed in the NPRM, the language in proposed § 655.104(a) is similar to the language in current § 655.103(b) defining a successor in interest, but the proposed language does not purport to limit application of the successorship doctrine to instances where the predecessor ''has ceased doing business or cannot be located for purposes of enforcement,'' as under the current regulations. *Id.* at 63772.

The Department received only one comment on this specific proposed revision. Farmworker Justice applauded the change, explaining that this revision combined with other proposed revisions would better reflect that ''[c]orporate succession, even when it is not based in fraud and deceit, is often far more complicated than, for example, Corporation A becomes Corporation B'' and that ''[f]irms often continue in existence while transferring some operations to a successor—liability attaches to that successor despite the original firm's continued existence.'' Farmworker Justice stated that the proposed revisions would close this ''loophole.'' The Department agrees. As reflected in the case law applying the successorship doctrine in the labor and employment law context, a successor may be deemed liable in a variety of factual circumstances, including but not limited to mergers, acquisitions, transfers of assets, and transfers of operations. *See, e.g., Golden State Bottling Co.* v. *NLRB,* 414 U.S. 168, 182 n. 5 (1973). Application of the successorship doctrine in the labor and employment law context is not limited to instances where the predecessor cannot be located or has ceased operating altogether. *Id.* The Department thus concludes that the revised language better reflects the weight of authority applying the successorship doctrine in the labor and employment context, and better achieves the Department's intent in enacting the successorship regulations in the first place. Therefore, the Department adopts proposed § 655.104(a), with one addition. For the reasons discussed below, the Department adds language from proposed paragraph (b) to the end of paragraph (a) in this final rule, clarifying that a successor in interest is liable for the H–2A program liabilities and obligations of the predecessor regardless of whether the successor has succeeded to such liabilities or obligations.

b. Definition of Successors in Interest

Proposed § 655.104(b) set forth a definition of a successor in interest similar to, but modified from, the current definition of a successor in interest at § 655.103(b). However, this proposed paragraph included a new sentence, not found in the current regulation, providing that a successor in interest ''includes an entity that is controlling and carrying on the business of a previous employer, agent, or farm labor contractor, regardless of whether such successor in interest has succeeded to all the rights and liabilities of the predecessor entity.'' 88 FR 63822. The Department explained that this new sentence, along with the proposed revisions in paragraph (a), was intended to capture successorship scenarios more accurately in the context of the H–2A Program. *Id.* at 63772. As discussed more fully below, the Department also proposed revisions to the list of nonexhaustive factors it would consider when determining a given individual's or entity's successor status.

The Department received various comments in support of the proposed revisions to the definition of a successor in interest. For example, the California LWDA stated that the proposed revisions more closely align with the successorship doctrine as well as with California's own efforts to increase enforcement against successor in interest. The Agricultural Worker Project of Southern Minnesota Regional Legal Services commented that these revisions are ''necessary.''

However, several commenters objected to the proposed definition, particularly inclusion of the new sentence that would describe a successor as ''an entity that is controlling and carrying on the business of a previous employer, agent, or farm labor contractor, regardless of whether such successor in interest has succeeded to all the rights and liabilities of the predecessor entity.'' Commenters asserted that this language is overbroad and conflicts with the notion that the definition of a successor is a factor-driven inquiry. For example, másLabor commented that this language would seemingly upset the fact-dependent ''balancing test'' under the current definition of successor in interest because ''[b]y stating that an acquiring

[17] *See also* U.S. Gov't Accountability Office (GAO), GAO–15–154, *H–2A and H–2B Visa Programs: Increased Protections Needed for Foreign Workers* (2015; Rev. 2017), p. 41, *https://www.gao.gov/assets/gao-15-154.pdf.* (GAO 2015 Report) (describing challenges of imposing debarment where debarred entities ''reinvent'' themselves under current procedures).

entity may be construed as a successor in interest regardless of whether it has succeeded to the rights and liabilities of the predecessor, the Department opens the door for asset purchases alone to trigger successor in interest obligations and liability if the asset purchase involves any degree of continuity with the seller's original operation.'' MásLabor recommended that the Department retain the current definition of a successor in interest at § 655.103(b), opining that it is ''sufficient to address the Department's stated objectives and has a balancing test that is clear and well-understood by the regulated community.'' Wafla, an employer association, commented that this language amounts to an ''automatic assumption of guilt'' that ''binds a new employer to the decisions of the previous employer even if the new employer wants to comply with the law in ways the previous employer did not.''

Similarly, NHC opined that debarment will likely leave an H–2A employer with few economic options but to sell or lease their farm, and in such instances, the purchaser or lessee (often a neighboring farm) typically will use the same land, equipment, and even staff, at least initially, to avoid disruption in operations. NHC expressed concern that under the proposed revised definition, even if the purchaser or lessee has no connection to the debarred employer, they could be considered a successor. NHC requested that the Department ''revise this definition to clarify that purchasing or leasing entities with no connection with the debarred entity should not be considered successors-in-interest.'' Several other employers and employer associations made similar comments.

The Department appreciates these concerns. Insofar as these commenters argue that State laws of corporate succession or contractual limitations on liability should govern the successorship inquiry under the H–2A program, the Department disagrees. The successorship doctrine, as applied in the employment and labor law context, is an equitable inquiry, focused on continuity of the business identity. *See, e.g., Golden State Bottling Co.,* 414 U.S. at 182 n. 5. Whether a given entity is a successor is not dependent on the contractual arrangements between the entities, nor subject to State corporate laws of succession. *Id.* (''The refusal to [adhere to the strict corporate-law definition] is attributable to the fact that, so long as there is a continuity in the 'employing industry,' the public policies underlying the doctrine will be served by its broad application.''); *see also Teed* v. *Thomas & Betts Power Solutions, LLC,* 711 F.3d 763, 764–65 (7th Cir. 2013) (summarizing case law distinguishing application of successor doctrine in contexts of labor and employment law versus corporate-law, and demonstrating that disclaimer of successor lability is not a defense in the labor and employment law context). Thus, a determination of successor status in the labor and employment law context, including the H–2A program, is not dependent on whether the successor agreed to accept some or all of the predecessor's liabilities. Rather, the inquiry is circumstance specific. *Howard Johnson Co., Inc.* v. *AFL–CIO,* 417 U.S. 249, 264 n.9 (1974).

The Department intended its proposed revisions to the definition of a successor in interest to better reflect application of the successorship doctrine in the labor and employment law context, particularly the notion that successors may not disclaim successor liability through contractual agreement with the predecessor. However, the Department agrees with commenters that the proposed language in § 655.104(b) providing that a successor in interest includes ''an entity that is controlling and carrying on the business of a previous employer, agent, or farm labor contractor'' is itself seemingly at odds with the remainder of the proposed definition of a successor, and with application of the successor doctrine in the context of labor and employment law generally. The Department is concerned that this proposed sentence could have the unintended effect of placing an outsized focus by decision-makers on the degree of control exercised by the successor over the predecessor's operations. Instead, as the Supreme Court has explained, ''[t]here is, and can be, no single definition of 'successor' which is applicable in every legal context.'' *Howard Johnson,* 417 U.S. at 262 n.9. Rather, in the labor and employment law context, ''the real question in each of these 'successorship' cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative?'' *Id.* The Court further detailed that ''[t]he answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue.'' *Id.* The Department therefore concludes that the proposed language is unnecessary and potentially conflicts with its intent that the determination of a successor in any instance be a fact specific inquiry, guided by multiple factors.

However, as explained above and reflected in the comments received on the proposal, in the labor and employment law context, a successor in interest's liability is not dependent on whether the successor has agreed to accept all of the liabilities and obligations of the predecessor. The Department continues to believe it is appropriate and useful to clarify this point in the regulatory text, but believes this clarification is better placed in § 655.104(a), which sets out the liability of successors in the H–2A program, rather than in paragraph (b) setting out the definition of a successor. As a result, § 655.104(a) of this final rule includes the language from proposed § 655.104(b), explaining that a successor is liable for the obligations and liabilities of the predecessor, ''regardless of whether such successor in interest has succeeded to all the rights and liabilities of the predecessor.'' Section 655.104(b) in this final rule, providing the definition of a successor in interest, does not include the proposed first sentence, and instead defines successors in interest pursuant to a circumstance-specific inquiry (as under the current definition at § 655.103(b)), applying a nonexhaustive list of factors set out in the regulation.

With respect to those factors, proposed § 655.104(b) set out a revised list that the Department would consider when determining successor status of any given entity or individual. The proposed list of factors largely mirrored those used in the Department's current definition of successor in interest found at § 655.103(b), which incorporates the factors applied under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act. Under the current definition of a successor in interest at § 655.103(b), however, the Department provides that, ''[f]or purposes of debarment only, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.'' § 655.103(b) (2024). The Department proposed in the NPRM to remove the ''primary consideration'' requirement, such that for purposes of debarment, personal involvement in the underlying violation would remain a consideration, but not the primary consideration. As the Department explained in the NPRM, it proposed this change because the current emphasis on this factor is unduly limiting and in tension with the general principle that no one factor

should be dispositive in determining successor status.

The Department received some comments objecting to the proposed revised list of factors. MásLabor commented that the successor in interest framework in general is ''murkier'' when applied in the context of debarred agents and attorneys, given the nature of their role in the labor certification process, but that these concerns are somewhat alleviated under the current definition of successor in interest at § 655.103(b) with its focus on the personal involvement of those responsible for the underlying violation. Accordingly, másLabor ''encourage[d] the Department to retain . . . the qualification that, in the context of an agent or attorney, the primary consideration for purposes of debarment is the personal involvement in the violation(s) at issue.''

The Department appreciates these concerns but notes that whether any given entity or individual is deemed a successor in interest is a highly fact-dependent inquiry that requires consideration of all circumstances; in some instances, certain factors will be more relevant or useful to the inquiry than in other instances. *See, e.g., Fall River Dyeing & Finishing Corp.* v. *NLRB,* 482 U.S. 27, 43 (1987) (the successor inquiry ''is primarily factual in nature and is based upon the totality of the circumstances of a given situation''); *Cobb* v. *Contract Transport, Inc.,* 452 F.3d 543, 553–54 (6th Cir. 2006) (''[A]ll nine factors will not be applicable to each case. Whether a particular factor is relevant depends on the legal obligation at issue in the case. The ultimate inquiry always remains whether the imposition of the particular legal obligation at issue would be equitable and in keeping with federal policy.''). The same is true in the H–2A context. For example, whether a new agent is a successor to a debarred agent will involve significantly different facts and considerations than whether the purchaser or lessee of farm equipment from a debarred farmer is a successor to the debarred farmer.

Similarly, courts have recognized that definitions of a successor in interest similar to the Department's proposed definition properly balance the interests of employers, workers, and the Federal policy at issue, with equity and fairness at the heart of the inquiry. *See, e.g., Cobb,* 452 F.3d at 553–54; *Leib* v. *Georgia-Pac. Corp.,* 925 F.2d 240, 241–47 (8th Cir. 1991); *see also Criswell* v. *Delta Air Lines, Inc.,* 868 F.2d 1093, 1094 (9th Cir. 1989) (''Because the origins of successor liability are equitable, fairness is a prime consideration in its application.''). The revised list of factors is intended to better promote the balancing of such interests, rather than reduce it, by ensuring that the inquiry is always reasonable and fact dependent. The Department concludes that the proposed revised list of factors at new § 655.104(b), which remove dependence on any one given factor in any certain circumstance, better reflects the weight of authority applying the successorship doctrine in the labor and employment law context. Therefore, the Department adopts the list of nonexhaustive factors at § 655.104(b) as proposed.

Relatedly, the Department agrees with those commenters that observed the need for sufficient training to Department officials responsible for identifying potential successors in interest and determining successor status, such that relevant facts and factors are considered on a case-by-case basis. The Department provides training that is needed to effectively perform various job duties and will train staff about the provisions of this rule, including how to appropriately use the enhanced data collection elements in § 655.130 to determine successorship status. With respect to the comment requesting clarification on the role of the SWA in identifying and determining successor status, the Department notes that the SWA will have a primary role in making this determination for purposes of discontinuation of ES services under 20 CFR part 658, discussed further in Sections V.B and V.C. However, determinations of successor status for purposes of enforcement and debarment under 20 CFR part 655, subpart B, and 29 CFR part 501 would be the responsibility of the Department.

c. Streamlined Procedures To Apply Debarment to Successors

The Department proposed various revisions to its current regulations to streamline the procedures for applying debarment to successors in interest, set forth in proposed §§ 655.104(c), 655.181, 655.182, and 29 CFR 501.20. Under proposed § 655.104(c), applications filed by or on behalf of a putative successor in interest to a debarred employer, agent, or attorney would be treated like applications filed by the debarred employer, attorney, or agent. If the CO determines that such an application was filed during the debarment period, the CO would issue a NOD under § 655.142 or deny the application under § 655.164, depending upon the procedural status of the application. The NOD or denial would be based solely on the applying entity's successor status and would not address (nor would it waive) any other potential deficiencies in the application. If the CO determines that the entity was not a successor, the CO would resume with processing of the application under § 655.140. However, if the CO determines that the entity is a successor, the CO would deny the application without further review, pursuant to § 655.164. As with any other application denial, the putative successor could appeal the CO's determination under the appeal procedures at § 655.171, although review would be limited to whether the entity was, in fact, a successor in interest to a debarred employer, agent, or attorney. Accordingly, should a reviewing ALJ conclude that the entity was not a successor, the application would require further consideration and thus the ALJ would remand the application to OFLC for further processing.

Similarly, proposed § 655.104(c) also provided that the OFLC Administrator could revoke a certification that was issued, in error, to a successor in interest to a debarred employer, pursuant to § 655.181(a), and the entity could appeal its successor status pursuant to § 655.171. The Department explained in the NPRM that it currently may revoke a certification issued in error to a debarred employer or to a successor of a debarred employer under its current revocation authorities, but the Department proposed revisions to the grounds for revocation at § 655.181(a)(1) to clarify that fraud or misrepresentation in the application includes an application filed by a debarred employer (and, by extension, an application filed by a successor to a debarred employer). The proposed changes would simply clarify this existing authority. However, given the impact of revocation on both employers and workers, proposed §§ 655.104(c) and655.181(a)(1) did not explicitly contemplate revocation of a certification issued in error, based on an application filed by a debarred agent or attorney or by successors to a debarred agent or attorney, as distinct from a debarred employer or successor in interest to a debarred employer. The Department invited comment on whether revocation may be warranted in such circumstances.

The Department also proposed revisions to § 655.182 governing debarment, corresponding to proposed § 655.104(c), to state clearly that debarment of an employer, agent, or attorney would apply to any successor in interest to that debarred employer, agent, or attorney. The Department also proposed corresponding revisions to the

procedures governing WHD debarments under 29 CFR 501.20, including a new proposed paragraph (j) that explicitly addressed successors in interest. Under the successorship doctrine, as discussed above, and under the proposed rule, WHD would not be required to issue a notice of debarment to a successor in interest to a debarred employer, agent, or attorney; rather, debarment of the predecessor would apply equally to any successor in interest. However, as provided in proposed paragraph (j), as a matter of expediency WHD could, but would not be required to, name any known successors to an employer, agent, or attorney in a notice of debarment issued under § 501.20(a).

The Department received only a few comments in opposition to or commenting specifically on these revised procedures. Wafla commented that the revised procedures, coupled with the revised definition of a successor, ''would force a legitimate employer to prove its innocence in order to receive equal treatment under the law'' and opined that the Department should only impose debarment on a successor if the successor also violates the H–2A program requirements. NCAE, AILA, and others urged the Department to exercise caution in its application of the proposed regulations, if finalized, to protect the due process rights of employers, agents, and attorneys.

The Department also received comments in support of these proposed revisions, observing that the revised procedures would better effectuate the Department's debarment authority. For example, the California LWDA stated that the ''streamlined debarment process safeguards workers and compliant employers from those who violate H–2A requirements and hide behind shell companies and paper farms.'' Farmworker Justice opined that the proposed revisions are ''logically sound and in line with successorship doctrine'' and provide sufficient due process. Similarly, Farmworker Justice supported the proposed revision to § 655.181(a)(1) clarifying that OFLC may revoke a certification issued in error to a successor in interest to a debarred employer and explaining that ''[s]ituations where successors to debarred predecessor employers attempt to apply for workers during a debarment should be treated as cases of fraud and/or misrepresentation and warrant revocation under 20 CFR 655.181(a).''

The Department did not receive any comments in response to its request for input on whether revocation may be warranted under circumstances where a labor certification has been issued, in error, to an employer represented by debarred agent or attorney or a successor in interest to a debarred agent or attorney, although the Colorado SWA requested clarification on the effect of revocation of a labor certification on the visa process. The Colorado SWA also requested clarification as to when and whether WHD would name a known successor in interest in a debarment proceeding of a predecessor employer, agent, or attorney under 29 CFR 501.20(j).

After consideration of these comments, and for the reasons stated in the NPRM, the Department adopts these revised procedures as proposed. The Department concludes that the streamlined procedures are more consistent with the successorship doctrine than the Department's current procedures for imposition of debarment on successors while affording putative successors sufficient due process. These revised procedures also are more consistent with, and better effectuate, the Department's original intent in enacting its successor in interest regulations in 2008, namely ''to ensure that violators are not able to re-incorporate to circumvent the effect of the debarment provisions,'' and ''to prevent persons or firms who were complicit in the cause of debarment from reconstituting themselves as a new entity to take over the debarred employer's business.'' 73 FR 77116, 77188 (Dec. 18, 2008).

With respect to concerns for due process, rather than imposing a ''presumption of guilt,'' the revised debarment procedures coupled with the revised definition of a successor in interest will better reflect application of the successorship doctrine in the context of labor and employment law, which is an equitable, fact-driven inquiry. *Howard Johnson,* 417 U.S. at 264. For similar reasons, the Department declines to adopt the suggestion received in a comment that the Department impose a presumption of successor status on any given entity. Rather, the Department will determine on a case-by-case basis whether a given individual or entity is a successor in interest to a debarred employer, agent, or attorney, with notice and opportunity for hearing on successor status given to the putative successor. However, where an entity is deemed to be a successor to a debarred employer, agent, or attorney, the Department need not obtain a new order of debarment against the successor to impose the predecessor's debarment on the successor, as that is the ''whole point'' of the successorship doctrine, namely that the liabilities of the predecessor attach to the successor. *Criswell,* 868 F.2d at 1095.

In response to the Colorado SWA's request for clarification under 29 CFR 501.20(j) as to when and whether WHD would name a known successor in interest in a notice of debarment, such a decision will be a matter of enforcement discretion. For example, where WHD issues a notice of debarment to a violating employer and, at that time, a successor entity already is known to WHD, WHD may decide to name the successor in the predecessor's notice of debarment. If so, the putative successor could request a hearing on its successor status through the administrative procedures under 29 CFR part 501, subpart C. The intent of this new paragraph (j), however, is to reflect that WHD is not *required* to name successors in a notice of debarment issued to a predecessor, even if known at the time of issuance, for OFLC to apply the revised procedures to that successor under 20 CFR 655.104(c), 655.181, and 655.182. For example, where WHD obtains a final order of debarment against an employer under 29 CFR 501.20, it would not be a defense to OFLC's denial of an application filed by a successor in interest to that debarred employer, under new 20 CFR 655.104(c), that WHD was aware of the existence of the successor entity at the time WHD issued the underlying debarment notice to the debarred employer.

Finally, with respect to revocations under 20 CFR 655.181(a)(1), the Department adopts that revised paragraph as proposed, for the reasons as stated in the NPRM and as reflected in Farmworker Justice's comment. However, as in the NPRM, the revised regulations do not explicitly contemplate revocation where a labor certification has been issued in error to an employer represented by a debarred agent or attorney or a successor in interest to a debarred agent or attorney, given the severity of debarment as a remedy and the impact of a revocation on the workers. However, as under current § 655.181(a)(1), the Department retains authority and discretion to revoke a labor certification due to fraud or misrepresentation in the application process. Whether the above circumstances would warrant revocation would be determined on a case-by-case basis. In response to the Colorado SWA's request for clarification of the effect of revocation of a labor certification on the petition and visa application processes, the regulations at § 655.181(c) impose certain obligations on the employer in the event of revocation, including inbound and

outbound transportation requirements and satisfaction of the three-fourths guarantee. In addition, pursuant to § 655.181(b)(5), the Department notifies DHS and the Department of State of each revocation; further consequences are subject to and pursuant to the authorities of those agencies.

3. Section 655.190, Severability

The NPRM proposed to add new and identical regulatory text at § 655.190 and § 501.10 stating that if any provision of the Department's H–2A regulations is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law. The proposed regulatory text further stated that where such holding is one of total invalidity or unenforceability, the provision will be severable from the corresponding part and will not affect the remainder thereof.

As the NPRM explained, the Department believes that a severability provision is appropriate because each provision within the H–2A regulations is capable of operating independently from the others, including where the Department proposed multiple methods to strengthen worker protections and to enhance the Department's capabilities to conduct enforcement and monitor compliance. The NPRM also emphasized that it is important to the Department and the regulated community that the H–2A program continue to operate consistent with the expectations of employers and workers, even if a portion of the H–2A regulations is held to be invalid or unenforceable.

Several commenters offered views on the proposed severability provision. Farmworker Justice suggested two revisions related to severability: (1) require that clearance orders include a severability clause specifying that if any part of a clearance order is found unenforceable, the rest remains in effect; (2) revise the proposed access-to-housing provision, at proposed § 655.135(n), to ''clearly separate the access provisions for labor organizations from key service providers.'' As a rationale for the second suggestion, Farmworker Justice stated their view that access to housing for labor organizations and for key service providers have separate legal bases, citing *Cedar Point Nursery* v. *Hassid,* 141 S. Ct. 2063 (2021).

A few commenters objected to the proposed severability provision. One trade association, wafla, opposed the severability provision because, in its view, the topics covered by the proposed rule are linked together and build on each other to achieve the same goal of improving protections for workers in temporary agricultural employment in the United States. Another trade association, NCAE, argued that the Department should withdraw the severability provision because, in its view, Congress did not intend for the Department to enforce parts of the H–2A regulations without other parts. The trade association added that, in its view, the executive branch—including the Presidents who have signed H–2A legislation and the administrations that have administered the H–2A program—have similarly intended that the regulations be enforced as a comprehensive set.

Finally, an agent, másLabor, expressed the view that a severability provision would undermine the H–2A program's ''balanc[ing]'' of ''interests'' of ''multiple stakeholders.'' This commenter identified several provisions that, it said, provided ''examples of such interoperable and interdependent regulatory provisions.'' In particular, the agent asserted that § 655.122(i), which outlines the employer's obligations under the three-fourths guarantee, is inextricably intertwined with § 655.122(n) (relieving employers from the three-fourths guarantee where workers ''abandon'' employment or are ''terminated for cause''); § 655.122(o) (modified three-fourths guarantee in the event of contract impossibility); and § 655.122(j) (requiring employers to track earnings records). The commenter added that § 655.122(l) (which requires employers to pay certain pay rates) would be rendered ''ambiguous'' if proposed § 655.120 (which would require monitoring and tracking of piece rate production) were invalidated. MásLabor further asserted that proposed § 655.135(p) (respecting foreign labor recruitment) and § 655.137 (requiring disclosure of foreign labor recruitment) would ''make little sense'' absent § 655.135(j) and (k) (concerning foreign recruitment). The commenter further explained its position that the various recruitment provisions are ''interdependent'' such that ''[t]he invalidation of one provision would undermine the integrity of the scheme as a whole,'' citing § 655.135(c) (cooperation with the SWA on accepting and processing applicants and referrals); § 655.135(d) (pertaining to duration of recruitment activities); §§ 655.150–655.158 (specifying obligations concerning positive recruitment activities); and § 655.167 (pertaining to document retention).

The Department adopts the severability provision as proposed in the NPRM, with a few minor, non-substantive changes to the language of the provision. This final rule substitutes ''will'' for ''shall'' for internal consistency and to incorporate plain language. This final rule also omits references to ''subparts'' and ''subparagraphs'' for internal consistency.

As an initial matter, with respect to this final rule, it is the Department's intent that all provisions and sections be considered separate and severable and operate independently from one another. In this regard, the Department intends that: (1) in the event that any provision within a section of this rule is stayed, enjoined, or invalidated, all remaining provisions within that section will remain effective and operative; (2) in the event that any whole section of this rule is stayed, enjoined, or invalidated, all remaining sections will remain effective and operative; and (3) in the event that any application of a provision is stayed, enjoined, or invalidated, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law. It is the Department's position, based on its experience enforcing and administering the H–2A provisions of the INA, that the provisions and sections of this rule can function sensibly in the event that any specific provisions, sections, or applications are invalidated, enjoined, or stayed. Furthermore, the Department believes that it has balanced the interests of stakeholders in modifying this final rule in response to public comments, and that this rule covers a number of different topics, each of which furthers the Department's general goals of improving protections in the H–2A program but which can stand independently as a legal and practical matter. For example, the worker voice and empowerment provisions adopted in this rule, along with other provisions, provide layers of protection to prevent adverse effect, and these layers of protection would remain workable and effective at preventing adverse effect even if any individual provision is invalidated.

Farmworker Justice urged the Department to require that clearance orders include a severability clause specifying that if any part of a clearance order is found unenforceable, the rest remains in effect. The Department declines to adopt this proposal. The severability provision in this final rule and a severability provision in a

clearance order would serve different goals and would implicate different legal considerations. For example, while the severability provision in this final rule would ensure continuity in the H–2A program should a particular provision be invalidated, a severability provision in a clearance order would be relevant only to the interactions between a single employer and its workers.

Farmworker Justice also proposed separating, at proposed § 655.135(n), housing-access provisions for labor organizations from housing-access provisions for key service providers. As explained below in the discussion of § 655.135(n), the Department has decided to modify the access-to-housing provision in response to comments, and, given these modifications, this comment is no longer applicable.

Some commenters suggested the Department abandon the proposed severability provision; the Department declines to do so. Whether a regulatory provision is severable turns on: (1) the agency's intent; and (2) whether other provisions ''could function sensibly'' even if an individual provision is invalidated. *Belmont Mun. Light Dep't* v. *FERC,* 38 F.4th 173, 188 (D.C. Cir. 2022). As explained above and below, the Department intends that the provisions of this rule be severable and, based on the Department's experience implementing the program, believes its remaining provisions could function sensibly even if one is invalidated.

One commenter, wafla, objected to the proposed severability clause because every provision in the NPRM is intended to serve the same goal of improving protections for workers in temporary agricultural employment in the United States. However, whether regulatory provisions serve the same goal is not dispositive of whether the provisions may ''function sensibly'' if a single provision is invalidated. Moreover, this objection would render difficult the incorporation of a severability provision in *any* regulation, as agencies routinely issue regulations to serve a particular unified goal. Additionally, this rule covers a wide range of diverse topics, each of which furthers the goals of improving protections in the H–2A program but which can stand independently as a legal and practical matter.

Another commenter, NCAE, focused on intent, asserting that Congress and the executive branch have historically intended that the regulations be enforced as a comprehensive set, but did not point to any authority demonstrating such intent. The Department believes that the goal of enforcing the regulations comprehensively is not incompatible with the Department's stated intent that invalidated provisions be deemed severable. On the contrary, severing invalid provisions serves the aim of preserving the regulatory scheme and allowing the program to proceed even if one provision is deemed invalid.

Finally, although másLabor cited concerns about balancing competing interests in asserting that a severability provision would ''impair the proper functioning of the program [and] introduce conflicts and ambiguities,'' the Department believes that including a severability provision is the best way to balance those interests and promote certainty. Again, severing invalidated provisions permits the program to continue absent those provisions, and program continuity is in the interests of employers, workers, and the Department alike.

MásLabor also responded to the NPRM's request for comments on whether specific parts of the rule could operate independently. The Department believes that the provisions in this rule, including the provisions másLabor cited, can operate independently of each other.

The Department addresses in more detail másLabor's characterization of § 655.122(i) (establishing the three-fourths guarantee) as inextricably intertwined with several other provisions. The Department disagrees with this characterization. MásLabor asserted that without § 655.122(n), which relieves employers from the three-fourths guarantee where workers ''abandon'' employment or are ''terminated for cause,'' workers will have an incentive to abandon work to secure payment promised under the three-fourths guarantee. To be sure, the NPRM proposed clarifications to the construction of ''termination for cause'' under § 655.122(n) (although the NPRM did not make any changes respecting abandonment), but even absent that clarification, the regulatory term ''termination for cause'' would still be subject to interpretation by an adjudicator, and would therefore still serve as a limitation on the three-fourths guarantee. MásLabor further asserted that if § 655.122(o) (modifying the three-fourths guarantee in the event of contract impossibility) were invalidated, employers facing contract impossibility would sustain significant economic ramifications and argued that enforcement of the three-fourths guarantee would be ''all but impossible'' without the earnings record provision under § 655.122(j). This final rule does not propose any modifications to § 655.122(o) or § 655.122(j); therefore, should any provision of this final rule be invalidated that will not affect the validity of § 655.122(o) or § 655.122(j).

Similarly, the Department believes that the various protections for workers through the ES System can operate independently from the protections in Part 655. Additionally, the updates to the successor in interest provision at § 655.104 and the definition of single employer at § 655.103(b) operate independently from each other and from the new protections proposed at § 655.135(h), (m), and (n). The protected activities at § 655.135(h)(1)(v) and (vi) are, as the Department set forth in the NPRM, already protected by the existing regulations, and do not rely upon the existence of the other protected activities being added at § 655.135(h)(2). Furthermore, the addition of the explicit protection against passport withholding at § 655.135(o) does not rely upon the existence of the other worker protections being added to § 655.135. The provisions at § 655.135(j) and § 655.135(k), which the Department did not propose to change in this rulemaking, also do not rely upon the existence of new § 655.135(p) or § 655.137. Relatedly, new § 655.135(p) and § 655.137 do not mention § 655.135(j) and can operate even if the changes made to § 655.135(k) under the 2022 H–2A Final Rule were invalidated, as the version of § 655.135(k) under the 2010 H–2A Final Rule still requires contracts with third parties to prohibit the charging of fees from prospective employees. And, as discussed above, whether regulatory provisions serve the same objective is not dispositive of whether the provisions may ''function sensibly'' if a single provision is invalidated. The Department notes that although this preamble does not address every possible interrelationship between the various provisions included in this final rule, that does not imply that the Department believes that provisions not discussed are interdependent. Again, as explained, it is the Department's intent that each provision of this final rule be deemed independent and severable from other provisions.

Therefore, this final rule again states the Department's general intent that invalidated provisions should be severed.

B. Prefiling Procedures

1. Section 655.120(b), Offered Wage Rate

The Department proposed to clarify in the H–2A regulations the date on which an AEWR, for non-range occupations and wage sources, published in the

Federal Register will become effective. As noted in the NPRM, under the current regulations, the Department protects against adverse effect on the wages of workers in the United States similarly employed, in part, by requiring that an employer offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage. If an updated AEWR for the occupational classification and geographic area is published during the work contract and becomes the highest applicable wage rate, the employer must pay at least that updated AEWR upon its effective date, as published in the **Federal Register**. 20 CFR 655.120(b)(3). In accordance with § 655.120(b)(2) and (3), the Department publishes the updated AEWR at least once annually in the **Federal Register**. One **Federal Register** notice (FRN) provides annual adjustments to the AEWR for the field and livestock workers (combined) occupational grouping based on the U.S. Department of Agriculture's (USDA) publication of the Farm Labor Reports (better known as the Farm Labor Survey, or FLS), effective on or about January 1st, and a second FRN will provide annual adjustments to the AEWR for all other non-range occupations based on the Department's Bureau of Labor Statistics' (BLS) publication of the Occupational Employment and Wage Statistics (OEWS) survey, effective on or about July 1st.[18] Each notice specifies the effective date of the new AEWR, which, in recent notices, has been not more than 14 calendar days after publication. The current regulatory text does not address when an AEWR published in a **Federal Register** would become effective.

The Department proposed to revise § 655.120(b)(2) to designate the effective date of updated AEWRs as the date of publication in the **Federal Register**. For further clarity, the Department also proposed to revise § 655.120(b)(3) to state that the employer is obligated to pay the updated AEWR immediately upon the date of publication of the new AEWR in the **Federal Register**. The Department sought comments on all aspects of this proposal. After careful consideration of the comments, the Department is finalizing the proposal without change, as explained below.

The Department received many comments both in support of and in opposition to the proposed changes. Several trade associations, including NCAE, NCFC, Western Growers, and FFVA, as well as an agent, másLabor, opposed the proposal, asserting it abandoned the ''longstanding'' practice to delay the effective date of the AEWR, with some commenters noting delayed implementation has been in place ''as recently as June 16, 2023,'' and a couple of commenters adding that the delayed implementation simplified program requirements by eliminating the need for payroll changes in the middle of a pay period. Several trade associations (USApple, TIPA, IFPA, U.S. Custom Harvesters, Inc., NHC, and SRFA) and one employer (Titan Farms, LLC) commented that the adjustment period was needed because monitoring the BLS and FLS websites is burdensome, especially for small employers that may lack the resources to regularly check those websites for updates. In addition, the National Association of State Departments of Agriculture asserted that many farms lack access to the internet and cannot view the announcement on the OFLC website or the notice in the **Federal Register**. An agent, másLabor, acknowledged a delay to the effective date may deprive workers of earnings during the notice period, but noted workers are not ''harmed by a modest delay in the implementation of new rates'' because ''workers willingly accepted the job at the advertised pay rate, which would have been the existing AEWR.''

The Cato Institute, a public policy organization, wrote that the obligation to update AEWRs mid-contract constitutes a mandate imposed only on H–2A farmers, stating ''U.S. workers and [unauthorized] workers do not get pay bumps in the middle of contracts—let alone the middle of a pay period.'' This commenter also asserted, without elaborating as to how or providing any form of support for its contention, that the proposal ''makes planning for H–2A costs that much more difficult and incentivizes illegal employment.'' Several of the trade association commenters, the New York State Farm Bureau, American Farm Bureau Federation, Titan Farms, LLC, and AILA observed that advance notice of AEWR changes, a 14-day grace period prior to the effective date, or some other flexibility with respect to AEWR updates was necessary for various reasons. Some trade associations and an employer generally asserted payroll systems are not always simple adjustments, cannot always be accomplished by ''just chang[ing] a few items in [the employer's] payroll system,'' and may take weeks to adjust, while another commenter noted that agricultural employers, especially small employers, may need time to secure funds or sell assets because many of these employers do not have ''immediate cash flow'' to pay an updated AEWR due to ''incredibly tight'' operating margins. Several of the trade association commenters and an employer, Titan Farms, LLC, asserted it is not possible for employers to simply ''include into their contingency planning certain flexibility'' to account for AEWR adjustments because ''variability in wage rates can cost a single employer thousands, if not millions, of dollars and it is impossible to 'contingency' plan accurately.'' The U.S. Chamber of Commerce expressed general concern that immediate effective dates for AEWR would impose an ''administrative burden'' by ''forc[ing] employers to update the wages they need to pay'' on the ''date of publication in the **Federal Register**.''

Several commenters urged the Department to alternatively retain the 14-day grace period or a longer grace period, commit to publish updated AEWRs on dates certain in December and July, permit employers to provide back pay at a later date, provide employers notice of upcoming FRN publications via email, or some combination of those suggestions. A couple of U.S. House Members stated that this proposed change is unnecessary and would be challenging or impossible for employers to meet. Another U.S. House Member called the change unnecessary. An employer stated that the proposed change would lead to involuntary noncompliance by employers because they cannot update wages quickly enough. SRFA and NHC asserted that the Department did not provide reasoning for why the **Federal Register** publication date is more appropriate than other dates, such as when the wage data are published. The Western Range Association asserted that it is unreasonable to expect immediate wage adjustments when the Department takes 45 days to calculate the AEWR. AILA suggested the Department should provide ''a notification to employers via email'' when the Department is preparing to publish in the **Federal Register** and ''when the AEWR is updated.'' This commenter and NHC, NCFC, FFVA, Western Growers, and SRFA urged the Department to set annual dates certain for the effective date for each AEWR wage, which Western Growers asserted would allow ''for expectations to be met, and a reasonable period of time to adjust

[18] 2022 H–2A Final Rule; Final Rule, *Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in Non-Range Occupations in the United States*, 88 FR 12760 (Feb. 28, 2023) (2023 AEWR Final Rule).

payroll rates.'' IFPA, U.S. Custom Harvesters, Inc., TIPA, GFVGA, and Demaray Harvesting and Trucking, LLC said the Department should consider requiring that employees ''be back paid for the [AEWR] increase . . . while still giving an employer the flexibility to see the [FRN] and update systems accordingly.'' NCFC and the U.S. Chamber of Commerce suggested the Department should permit employers to provide retroactive payment to workers within 14 days of publication of notice in the **Federal Register**. New York State Farm Bureau urged the Department to ''exempt through an enforcement waiver, for a two-week period'' after publication of notice in the **Federal Register**, ''those farms who may need to move and adjust their payroll to pay the full back pay of affected employees.'' Finally, wafla urged the Department to make new AEWRs effective on the ''first day of the employer's next pay period.''

The Department also received many comments in support of the proposal to make AEWRs effective on the date they are published in the **Federal Register**. Federal elected officials and advocacy organizations supported the proposal as a way to provide clarity and ''make wages more predictable in the H–2A program.'' California LWDA, a SWA, supported the proposal because it would ''provide clarity regarding the effective dates of [AEWRs]'' and noted that it will help the SWA ''better determine when to issue notice of deficiencies when an employer is not paying the highest wage or the AEWR is incorrect'' because the SWA ''uses the **Federal Register** to determine the current and appropriate AEWR.'' Several advocacy organizations, Proteus, Inc., UMOS, Green America, and CAUSE, expressed support for the proposed rule noting specifically, among other items, the Department's proposal regarding the immediate implementation of the AEWR. The Economic Policy Institute (EPI), a public policy organization, supported the proposal as necessary to ''ensure that farmworkers are paid appropriately,'' asserting that farmworkers ''are likely being underpaid'' because the FLS-based AEWR ''are always one year behind,'' given the FLS data ''reflects average wages surveyed for the previous year.'' EPI also urged the Department to reject any suggestions to retain a delayed AEWR effective date, asserting that delayed implementation is not necessary because ''there are adequate public sources of information'' to provide employers early notice of forthcoming AEWR updates and the Department ''will publish a notice directing employers to those sources.''

The Department additionally received comments from a Federal elected official, a workers' rights organization (Agricultural Justice Project), a few trade associations (NCAE, SRFA, and Michigan Asparagus Advisory Board), a couple of agents (másLabor and Labor Services International), a public policy organization (EPI), and an anonymous commenter expressing general concerns related to the AEWR amounts or the methodology for calculating the AEWR. These comments are beyond the scope of this rulemaking and the Department's proposal regarding when updated AEWRs should become effective.

The Department appreciates the comments. After due consideration, the Department is adopting the proposed changes in this final rule. The proposed changes were intended to restore the longstanding practice in the H–2A program that workers be paid at least the updated AEWR, for all hours worked after the updated AEWR is published. The Department believes adoption of the proposed changes in this final rule is the best way to achieve that objective. As stated in the NPRM, the duty to pay an updated AEWR where it is higher than the other wage sources is not a new requirement, nor is the requirement to pay an increased AEWR immediately upon publication in the **Federal Register**. Between 1987 and January 2018, the Department required employers participating in the H–2A program to offer and pay the highest of the AEWR, the prevailing wage, any agreed-upon collective bargaining wage, or the Federal or State minimum wage at the time the work had been performed, effective upon the date of publication of new AEWRs in the **Federal Register**.[19] As noted in the NPRM, setting the effective date of updated AEWRs as the date of publication in the **Federal Register** is a return to longstanding prior practice. This change will ensure that agricultural workers are paid at least the most current AEWR when work is performed, thereby preventing the harm caused through even a modest delay. Moreover, the workers employed under the H–2A Application accepted terms and conditions of employment that include the employer's agreement to comply with the obligation to pay an updated AEWR if a higher AEWR is published during the work contract period. Immediate implementation also better aligns with the Department's mandate to prevent adverse effect on the wages of workers in the United States similarly employed by keeping wages paid to H–2A workers and workers in corresponding employment consistent with wages paid to similarly employed workers. The Department therefore disagrees that a delay in payment of an updated AEWR would not harm workers or that workers do not or should not expect the employer to fulfill this obligation.

The Department acknowledges that this rule is a departure from more recent practice and the proposal in the 2019 H–2A NPRM, which allowed a minor period for wage adjustment after publication of the FRN. However, as noted in the 2022 H–2A Final Rule in which the Department declined to adopt the proposal to allow an adjustment period of up to 14 calendar days, ''employers participating in the H–2A program historically have been required to offer and pay the highest of the AEWR, the prevailing wage, or the Federal or State minimum wage at the time the work is performed'' and ''employers have been required to make these adjustments for many years and neither program experience nor comments on the NPRM demonstrated that a longer adjustment period would be necessary to avoid significant operational burdens on employers or the layoffs and crop deterioration cited by some commenters.'' [20] Several commenters asserted, generally, that payroll adjustment may be difficult and require time to complete, but no commenter cited specific difficulties encountered when adjusting payroll systems to a new AEWR, and while one commenter did note it could take weeks to update payroll, this commenter provided no further explanation as to why that number of days, which is longer than even the 14-day period other comments suggested, would be necessary to make adjustments to payroll systems.

However, the Department is sensitive to commenter concerns that payroll systems may not allow adjustments to be made instantaneously and that some flexibility should be provided to permit difficult payroll adjustments and provide prompt retroactive payment. Under this final rule, where an employer's payroll systems permit pay to be adjusted in the middle of a pay period, it must immediately adjust them

[19] *See, e.g.,* 1987 H–2A IFR, 52 FR 20496, 20521; *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; H–2A Program Handbook,* 53 FR 22076, 22095 (June 13, 1988) (''Certified H–2A employers must agree, as a condition for receiving certification, to pay a higher AEWR than the one in effect at the time an application is submitted in the event publication of the [higher] AEWR coincides with the period of employment.'').

[20] 87 FR at 61688.

to reflect the updated AEWR (where the updated AEWR is or remains the highest of all potential wage sources). However, where the employer is able to demonstrate to the Department that it is not possible for it to update payroll systems by the pay date, the employer may provide payment on the pay date for the following pay period. For example, consider a scenario where the Department publishes an AEWR update notice in the **Federal Register** on January 1st, which is the middle of a pay period for an employer whose workers are paid biweekly. The next pay date is January 5th. The AEWR remains the highest of the applicable wages. It is not, however, possible for the employer to update payroll in time for the January 5th pay date. In this example, the worker would be momentarily underpaid for the remainder of that pay period when they receive their paycheck for that pay period. This final rule requires that the employer cure that underpayment by providing the entirety of all back wages due, calculated beginning on January 1st, no later than the following pay date, along with the following pay period's wages calculated entirely at the new AEWR for the entire pay period.

The Department declines to adopt suggestions to provide a delayed implementation period for the reasons described above, permit payment of back wages beyond the manner discussed in the preceding paragraph, or publish AEWRs on a specific date each year or around the time the FLS or OEWS data publishes. Revising the effective date to coincide with BLS or USDA publications or on certain dates is not possible and would represent a substantial deviation from longstanding pre-2018 practice. If the Department were to tie the effective date to the FLS or BLS publication dates, doing so would deprive the stakeholder community of any advance notice prior to effectiveness as, in neither instance, is the wage data made public prior to publication. The Department does not control the publication of the FLS data. Separately, it is administratively impractical for the Department to publish AEWRs on the same date that BLS and USDA publishes the underlying data, given that the Department lacks early access to that data and given the resources required to draft an FRN. While the Department does not control the publication dates of BLS and USDA data, it does prepare the OFLC FRN expeditiously upon publication of the corresponding BLS or USDA data.

Moreover, as noted in the NPRM and by a public policy organization commenter, EPI, employers have ample prior notice of upcoming changes to wage requirements in the H–2A program.[21] In particular, the vast majority of employers will be subject to the FLS wage and will continue to have the opportunity to view and assess the impact of the new AEWR rates prior to their publication by the OFLC Administrator in the **Federal Register** on or around January 1st.[22] Prior to that publication, USDA publishes its FLS in late November showing the wage data findings that become the new AEWR for the field and livestock workers (combined) occupational grouping.[23] The Department has no role in the development or finalization of the FLS wage rate findings and adopts them for each State or area without change as the AEWR. Employers can therefore review the FLS and know with certainty what the following year's AEWR wages will be several weeks before they become official.

Similarly, employers of workers subject to the OEWS will be able to view updated wages when BLS publishes its OEWS data each spring, which contains the wage data that become the new AEWR on or around July 1st for the small percentage of job opportunities that cannot be encompassed within the six SOC codes and titles in the FLS field and livestock workers (combined) reporting category. Moreover, the Department will provide employers advance notice of these AEWR changes through an announcement on the OFLC website. Specifically, and as mentioned in the NPRM, the Department will post a notice on the OFLC website when USDA publishes the FLS and when BLS publishes the OEWS data that will direct employers to the publicly available information.[24] Because the Department does not control the publication schedule for the underlying data on which AEWR are based, it cannot commit to publishing AEWR FRNs on the same date each year. Once OFLC publishes the FRN updating the AEWR, however, OFLC also will post an announcement on its website to notify employers that the FRN containing updated AEWRs has been published, consistent with current practice. Finally, the Department also emails notice to stakeholders that have registered for OFLC's email updates when the AEWR changes. Taken together, these measures help ensure stakeholders have advance notice of new AEWRs to the extent possible and do not need to monitor the BLS and FLS websites themselves. The Department believes that the revisions contained in this final rule will clarify employer wage obligations, provide sufficient notice of AEWR updates, and ensure that agricultural workers are paid at least the AEWR in effect at the time the work is performed, without new or additional impact to employers' ability to budget and plan.

2. Sections 655.120(a) and 655.122(l), Requirement To Offer, Advertise, and Pay the Highest Applicable Wage Rate

In the NPRM, the Department proposed revisions to 20 CFR 655.120(a) and 655.122(l) to clarify that where there is an applicable prevailing piece rate, or where an employer intends to pay a piece rate or other non-hourly wage rate, the employer must include the non-hourly wage rate on the job order along with the highest hourly rate. Under this proposal, all potential wage rates must be listed on the job order notwithstanding the fact that it may not be possible to determine in advance which of these rates is the highest. Once work has been performed, the employer must then calculate and pay workers' wages using the wage rate that will result in the highest wages for each worker in each pay period.

As the Department explained in the NPRM, the current regulations at §§ 655.120(a) and 655.122(l) require an employer to ''offer, advertise in its recruitment, and pay'' the highest of the AEWR, prevailing wage rate, collective bargaining agreement (CBA) rate, or Federal or State minimum wage. While seemingly straightforward, this requirement has been difficult to apply in practice because, for instance, where there is an applicable prevailing piece

[21] 88 FR 63750, 63773–63774.

[22] *See, e.g.,* 2023 AEWR Final Rule, 88 FR 12760, 12766 (the Department's program estimates indicate that 98 percent of H–2A job opportunities are classified within the six Standard Occupational Classification (SOC) titles and codes of the field and livestock workers (combined) occupational grouping).

[23] USDA's National Agricultural Statistics Service publishes the Farm Labor report on its website at *https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/*. OEWS wages for each SOC code and geographic area are available using the Department's search tool or searchable spreadsheet, available at *https://flag.dol.gov*. BLS publishes OEWS data on its website, available at *https://www.bls.gov/oes/data-overview.htm*. An overview of the OEWS survey methodology is available at *https://www.bls.gov/oes/current/oes_tec.htm*. An explanation of the survey standards and estimation procedures is available at *https://www.bls.gov/opub/hom/oews/pdf/oews.pdf*.

[24] As noted in the NPRM, employers of a small number of field and livestock workers (combined) job opportunities in States or regions, or equivalent districts or territories, for which the FLS does not report a wage (*e.g.,* Alaska and Puerto Rico) will not have similar direct access to the AEWR information prior to publication of the OFLC FRN. 88 FR 63750, 63773–63774.

rate, it is usually not possible to determine until the time work is performed whether the prevailing piece rate will be higher than the highest of the applicable hourly wage rates as this will depend on worker productivity. In such cases, OFLC currently only requires H–2A employers to list a wage offer that is at least equal to the highest applicable hourly wage—usually the AEWR—on job orders, consistent with BALCA decisions dating from 2009 to 2011 that concluded that under the regulations OFLC cannot require employers to include an applicable prevailing piece rate on the job order where OFLC does not know at the certification stage whether the prevailing piece rate will be higher than the hourly wage. *See, e.g., Golden Harvest Farm,* 2011–TLC–00442, at *3 (BALCA Aug. 17, 2011); *Dellamano & Assocs.,* 2010–TLC–00028, at *5–7 (BALCA May 21, 2010); and *Twin Star Farm,* 2009–TLC–00051, at *4–5 (BALCA May 28, 2009). The Department expressed concern with the uncertainty this practice can generate as to which rate or rates an employer must include as the required wage in a job order and pay to H–2A workers and workers in corresponding employment. Moreover, because the prevailing piece rate is not included on the job order, in most such instances, WHD is not able to enforce the prevailing piece rate. In other instances, such as when there is not a prevailing wage, employers sometimes voluntarily elect to pay a piece rate or other non-hourly wage rate but fail to include such rates on the job order, potentially mispresenting the offered wage rate and failing to meet their recruitment obligations.

The Department proposed several changes to the existing regulations to address these issues. First, the Department proposed to retain the current list of wage rates in § 655.120(a), redesignated as § 655.120(a)(1)(i) through (v), and to add to this list, at paragraph (a)(1)(vi), ''[a]ny other wage rate the employer intends to pay.'' This proposed addition was intended to clarify an employer's obligation to include on the job order any wage rate it intends to pay that could end up being the highest applicable wage rate for any worker, in any pay period. The Department also proposed to add at § 655.120(a)(2) an explicit requirement that, where the wage rates in paragraph (a)(1) are expressed in different units of pay, the employer must list the highest applicable wage rate for each unit of pay in its job order and must advertise all of these wage rates in its recruitment. Under this proposal, where one of the wage rates in paragraph (a)(1) is expressed as a piece rate and the others are expressed as hourly wage rates, the employer must list both the piece rate and the highest hourly wage rate on the job order. Where more than one of the wage rates in paragraph (a)(1) are expressed as non-hourly wage rates, the employer would be required to list the highest applicable wage rate for each potential unit of pay on the job order.

Next, the Department proposed corresponding changes at § 655.122(l), including replacing the list of wage rates with a cross-reference to § 655.120(a)(1), removing the current language in § 655.122(l)(1) that would be made redundant by the changes to § 655.120(a), and making other technical edits. In addition, the Department proposed to remove the current language at § 655.122(l)(2)(i) and (ii) that requires an employer to supplement workers' pay where a worker is paid by the piece and does not earn enough to meet the required hourly wage rate for each hour worked, but does not include an analogous requirement that an employer supplement workers' pay when a worker who is paid by the hour does not earn enough to meet the applicable prevailing piece rate. The Department proposed to replace this language with a new provision at paragraph (l)(1) explaining that the employer must always calculate and pay workers' wages using the wage rate that will result in the highest wages for each worker, in each pay period. Because employers would be required to pay whichever wage rate will result in the highest wages in a particular pay period, supplementing workers' pay to ensure that the required hourly wage is met would no longer be necessary. Proposed new paragraph (l)(2) explains that, where the wage rates set forth in § 655.120(a)(1) include both hourly and non-hourly wage rates, the employer must calculate each worker's wages in each pay period using the highest wage rate for each unit of pay and must pay the worker the highest of these wages for that pay period. Under this proposal, the employer would be responsible for evaluating the different wage rates applicable in each pay period of the growing season, including any mid-season increases in wage rate(s) that might not be reflected in the job order. Proposed paragraphs (l)(1) and (2) clarify that the wages actually paid cannot be lower than the wages that would result from the wage rate(s) guaranteed in the job order, so that, if there is a mid-season decrease in wage rate(s), the workers are still entitled to the higher wage rate(s) listed on the job order. Further, where an employer includes in a single job order multiple activities or tasks, each of which have different applicable wage rates, the employer would be required to engage in the analysis set forth above with respect to each activity or task.

The Department explained that these proposed changes were intended to help ensure that employers' recruitment efforts reflect the correct applicable wage rates so as to more accurately determine whether there are U.S. workers who would be available and willing to accept the employment. Further, they were intended to help ensure that H–2A workers and workers in corresponding employment are paid the wages to which they are entitled (*i.e.,* the highest of the AEWR, prevailing hourly wage or piece rate, CBA rate, Federal minimum wage, State minimum wage, or any other wage rate the employer intends to pay). The Department noted that, because H–2A employers are already required to accurately track and record both hours worked and field tallies pursuant to § 655.122(j), employers should already have processes in place to accurately record information needed for compliance with the proposed changes to §§ 655.120(a) and 655.122(l), minimizing any additional administrative burden these proposed changes would place on employers.

The Department sought comments on this proposal, particularly with respect to how the proposal would work in practice; whether there are circumstances, such as when an employer includes multiple activities or tasks in a single job order, where further clarification would be needed on which wage rates must be listed in the job order and how to calculate the worker's wages; whether corresponding changes to the recordkeeping requirements at § 655.122(j) and (k) or to the requirements for SWAs' review of job orders at part 653, subpart F, would be needed; and whether the requirement to list the highest applicable wage rate for each unit of pay on job orders placed in connection with an H–2A application would render unnecessary the requirement at 20 CFR 653.501(c)(2)(i) that an employer that pays by the piece or other non-hourly unit calculate and submit an estimated hourly wage rate with the job order. The Department explained that it was considering making similar revisions to the regulations at §§ 655.210(g) and 655.211 to require employers to disclose all potentially applicable rates of pay in the job orders for herding and range livestock production occupations, as well as to the regulations at 20 CFR

653.501(c) to require employers to disclose all potentially applicable rates of pay in non-H–2A (or non-criteria) clearance orders, and sought comments on whether it should include these proposed revisions in any final rule.

Worker advocates were largely supportive of the proposal and commented that the proposed changes are necessary to ensure that workers are receiving the wages to which they are entitled. Farmworker Justice explained that the proposal, which clarifies that employers must offer and pay the prevailing piece rate when it would result in higher wages for a worker than the AEWR or other hourly wage offered, is needed ''despite the clear language in the current regulation'' because the approval of clearance orders that fail to offer to pay prevailing piece rates limits the Department's ability to enforce and collect legally required piece rate earnings. A joint comment from 43 U.S. House Members stated that the proposal would help ''create stronger protections against exploitative practices commonly used by employers'' and a joint comment from 15 U.S. Senators commended the Department for ''taking this step toward ensuring fair and transparent wages for agricultural workers.'' Multiple worker advocacy organizations stated that the proposed changes around disclosure and consistency of wages are needed to address wage theft, and the UFW Foundation provided stories of workers' experiences with wage theft, such as employers orally promising to pay piece rates and then later paying an hourly wage rate that results in lower earnings.

These commenters also explained that the proposed changes are necessary to prevent an adverse effect on the wages of similarly employed workers in the United States. Using Washington State as an example of how permitting employers to offer only the hourly AEWR has had an adverse effect on the agricultural labor market, Farmworker Justice explained that experienced local workers will choose job opportunities that offer a market piece rate and thus, historically, employers have needed to offer these piece rates to attract experienced local workers. They further stated, ''[a]llowing these employers to bring temporary foreign workers to do this work without requiring them to pay these piece rates has exactly the adverse effect on local working conditions that Congress directed the Department to prevent in the H–2A statute.'' Similarly, a joint comment from 15 U.S. Senators asserted that low wages discourage American workers from taking these ''critical jobs'' and that the H–2A program was not intended to ''replace American workers with cheap, exploited labor'' to the detriment of workers and the economy as a whole.

Farmworker Justice explained that the proposal does not impose additional recordkeeping burdens on employers as employers already must track the number of hours worked and calculate workers' potential hourly earnings to ensure compliance with the AEWR and applicable minimum wage and employers already track production for business purposes.

The Department received comments from employers, trade association, and agents opposing the proposal. Several commenters, including FFVA and NCAE, asserted that the proposal is unnecessary because employers are already required to include any required wage rate in the job order. FFVA explained that the employers are already required to include piece rates in the job order both because of the requirement at § 655.120(a) and because of the prohibition against preferential treatment of H–2A workers at § 655.122(a). FFVA also asserted, without citation, that the current regulations provide employers sufficient flexibility by allowing employers to ''temporarily suspend piece-rate pay when worker safety or crop conditions require it.'' In contrast, NCAE stated that, while applicable wage rates must already be disclosed, the Department ''failed to recognize that whereas productivity incentive pay may be available with some employers, there is no 'prevailing piece rate''' and thus the proposal would require employers ''to disclose that which does not exist.'' Western Growers indicated that the current regulation is ''straightforward and sufficient to test the labor market and apprise workers of the wages they should expect to receive.'' A couple of commenters, SRFA and USAFL and Hall Global, stated that the proposal exceeds the Department's authority because it has not adequately connected the requirement to offer and pay an applicable prevailing piece rate to the need to prevent an adverse effect on the wages or working conditions of similarly employed workers in the United States. SRFA further stated that ''[c]reating a system whereby U.S. employers are required to offer a more attractive and lucrative pay structure than the employer might otherwise pay goes far beyond the Secretary's statutory authority.''

Many of the commenters opposed the proposal on the ground that it requires employers to offer and pay an applicable prevailing piece rate even when the employer does not wish to do so. For instance, the Cato Institute stated that under the proposal H–2A employers ''will no longer get to pick whether they pay a piece rate or not.'' SRFA asserted that the proposed change would be a ''de facto mandate'' that would require employers to pay by piece rate. Several commenters, including wafla, másLabor, NHC, and the U.S. Chamber of Commerce, opined that the proposal would eliminate an employer's ability to change wage rates based on market and crop conditions, or whether they wish to incentivize (or disincentivize) workers to work quickly. MásLabor asserted that prevailing piece rates are established based on survey results of employers already paying a piece rate and, therefore, do not accurately reflect wages in the marketplace. It suggested that employers should only be required to pay prevailing piece rates if they choose to use a piece rate compensation plan.

Commenters also asserted that complying with the proposal would be unduly burdensome, or even impossible. Employers and trade associations, including the U.S. Chamber of Commerce, USApple, and NHC, explained that the proposal would be confusing and difficult to implement because many employers use piece rates that vary based on the commodity, variety within that commodity, quality of the crop, and units of measurement of commodities. The U.S. Chamber of Commerce expressed concern that employers, especially smaller farms, would not be able to comply with these proposed changes because they do not have processes in place to accurately record the information required. Similarly, US Apple and NHC stated that employers are unlikely to have the existing staffing or software needed to implement the required changes. Wafla stated that only hourly rates should be required to be posted in the job order because piece rates cannot be determined before work starts.

Several commenters emphasized what they believed to be unintended consequences of the proposal. NCFC and AmericanHort stated that the proposal, if adopted, would ''further incentivize employers to not pay piece rates where they do not have to'' and ''in areas where there is a prevailing piece rate that has been certified by the Department, it will drive employers away from planting crops that have a prevailing piece rate.'' FFVA concurred and stated that this ''would likely reduce workers' wages, rather than ensuring they are higher, while reducing overall production for the employer.''

In response to the Department's specific request, several commenters identified language in the proposal for

which further clarification would be helpful. The U.S. Chamber of Commerce, Western Growers, and AmericanHort explained that the Department's proposed language at § 655.122(l)(2)—*i.e.,* ''the employer must calculate each worker's wages . . . using the highest wage rate for each unit of pay, and pay the worker the highest of these wages for that pay period. The wage actually paid cannot be lower than the wages that would result from the wage rate(s) guaranteed in the job offer''—is unclear and asked how this language would apply to employers that offer both hourly wages and piece rate wages in their job orders. Specifically, the U.S. Chamber of Commerce asked whether such employers would be required to pay a piece rate, where higher, ''even if the worker did not work on a piece-rate basis'' during the relevant time period. Farmworker Justice recommended several changes to the language of the proposal. Given the ''history of misinterpretation'' of the wage obligations of § 655.120(a), they recommended incorporating explicit references to piece rates in the language of the regulation by adding to paragraph (a)(1)(ii) the phrase ''whether expressed as a piece rate or other unit of pay,'' and to paragraph (a)(2) the parenthetical ''(including piece rates or other pay structures).''

The Department specifically sought comments on whether the requirement to list the highest applicable wage rate for each unit of pay on job orders placed in connection with an H–2A application would render unnecessary the requirement at 20 CFR 653.501(c)(2)(i) that an employer that pays by the piece or other non-hourly unit calculate and submit an estimated hourly wage rate with the job order. A private employer asserted that the requirement to submit an estimated hourly wage rate is burdensome, inaccurate, and unnecessary. MásLabor asserted that removing the requirement to include estimated hourly wage would improve disclosures for workers and avoid misleading them as to their earning potential because it is difficult to estimate the expected hourly wage for an average worker.

In the NPRM, the Department explained that it was considering making similar revisions to the regulations at §§ 655.210(g) and 655.211 to require employers to disclose all potentially applicable rates of pay in the job orders for herding and range livestock production occupations, as well as to 20 CFR 653.501(c) to require employers to disclose all potentially applicable rates of pay in non-H–2A (or non-criteria) clearance orders, and sought comments on whether these similar revisions should be made. Farmworker Justice expressed support for making similar revisions with respect to herders, reasoning that they should have the same job order transparency as farm labor workers. The Department received no other comments on these proposed revisions.

The Department received no comments on whether corresponding changes to the recordkeeping requirements at § 655.122(j) and (k) or to the requirements for SWAs' review of job orders at part 653, subpart F, would be needed.

While generally supportive, several worker advocacy organizations suggested that the proposal did not go far enough. Farmworker Justice recommended addressing the wages owed to misclassified H–2A workers who are assigned non-agricultural work for which higher prevailing wage rates should be paid (*e.g.,* landscaping or work at retail nurseries that falls under the ambit of the H–2B program and which would have potentially entitled a worker to a higher prevailing wage as set by the National Prevailing Wage Center (NPWC) if the work had been properly classified). Specifically, they suggested adding language explaining that the Federal minimum wage listed in paragraph (a)(1)(iv) ''includes the appropriate NPWC prevailing wage in the case of misclassified workers,'' and stated that ''[t]o do otherwise is inviting fraud'' because, in such cases, employers who are caught are only required to reimburse back wages at the lower AEWR rate instead of the appropriate and typically higher NPWC prevailing wage rate. They noted that such misclassification adversely affects local workers and working conditions. American Industrial Hygiene Association (AIHA) stated that ''regardless of whether or not the contract is for payment on a piece-work basis, there should be a limit on the number of working hours per day.''

After considering the comments discussed above, the Department adopts with certain modifications the proposed revisions to §§ 655.120(a) and 655.122(l) to clarify that where there is an applicable prevailing piece rate, or where an employer intends to pay a piece rate or other non-hourly wage rate, the employer must include the non-hourly wage rate on the job order along with the highest hourly rate, and must pay workers' wages using the wage rate that will result in the highest wages for each worker in each pay period.

The Department believes that these clarifying changes are necessary to ensure that employers' recruitment efforts reflect the correct applicable wage rates so as to more accurately determine whether there are U.S. workers who would be available and willing to accept the employment; that H–2A workers and workers in corresponding employment are paid the wages to which they are entitled under § 655.120(a), including any prevailing piece rate when it would result in higher earnings; and that the employment of H–2A workers does not adversely affect the wages or working conditions of similarly employed workers in the United States.

As set forth in the NPRM and above, and as evidenced by the numerous comments from employers, trade associations, and agents, the trio of BALCA decisions—*i.e., Golden Harvest Farm,* 2011–TLC–00442, at *3 (Aug. 17, 2011); *Dellamano & Assocs.,* 2010–TLC–00028, at *5–7 (May 21, 2010); and *Twin Star Farm,* 2009–TLC–00051, at *4–5 (May 28, 2009)—created significant confusion among the regulated community as to their obligations under §§ 655.120(a) and 655.122(l). *See, e.g.,* FFVA comment (opining that current regulations allow employers to ''temporarily suspend piece-rate pay''), and NCAE comment (arguing that prevailing piece rates do not exist). Specifically, while these decisions restricted OFLC from requiring employers to include an applicable prevailing piece rate on the job order on the ground that OFLC does not (and cannot) know at the certification stage whether a prevailing piece rate will be higher than the hourly wage and, as a result, also limited WHD's enforcement abilities, these decisions did not negate the clear regulatory requirement that an employer ''offer, advertise in its recruitment, and pay'' the highest of the wage rates enumerated in § 655.120(a), including any applicable prevailing piece rate. Yet, because employers are able to avoid this obligation, it is not possible for the Department to determine whether there are local workers who would choose the job opportunity if an applicable prevailing wage rate were offered, or to ensure that the employment of H–2A workers at the offered wage rate, instead of a potentially higher prevailing piece rate, will not depress local wages or working conditions. Permitting employers unfettered flexibility to pay wages rates not listed in the job order similarly undermines the Department's labor market test and its ability to prevent an adverse effect on the wages or working conditions of similarly employed workers in the United States.

Accordingly, the Department adopts the clarifying language proposed in the

NPRM with minor edits. Specifically, the Department agrees with Farmworker Justice that their suggested additions to the regulatory text to explicitly reference piece rates are warranted given the history of misinterpretation and confusion among the regulated public.

The Department disagrees with commenters who asserted that the Department failed to adequately connect the requirement to offer and pay an applicable prevailing piece rate to the need to prevent an adverse effect on the wages or working conditions of similarly employed workers in the United States. In addition to the explanation provided in the NPRM and above, the comment from Farmworker Justice explained the mechanisms by which such an adverse effect can occur. The Department similarly disagrees with commenters who stated that piece rates should not be required in the job order because prevailing piece rates are determined based on the survey results of employers who already choose to offer piece rates (másLabor), or because it is impossible to determine piece rates before the work is completed (wafla). Prevailing wage rates (whether hourly or by the piece) are determined by surveying a variety of agricultural employers; these surveys are not limited to employers that pay by the piece or by the hour. If a prevailing piece rate is issued, that unit of pay was used to compensate the largest number of U.S. workers whose wages were reported in the survey. *See* 20 CFR 655.120(c)(1)(v). Moreover, while it is not possible to determine at the certification stage whether an hourly wage rate or a piece rate will result in higher earnings, as this will vary based on a worker's productivity in the pay period, this does not mean that the piece rate itself cannot be identified and listed in the job order.

Nonetheless, the Department acknowledges the practical impact these clarifying changes will have on the regulated community, including, in some instances, the need to change their longstanding compensation practices and to ensure that they collect and maintain sufficient information to implement these changes (though the Department continues to believe that most employers do maintain the requisite information either for compliance with § 655.122(j) or for business reasons).

To assist the regulated community, the Department will consider issuing further guidance explaining an employer's obligations under §§ 655.120(a) and 655.122(l), particularly in instances where the relevant job order covers multiple crop activities or tasks for which there are different applicable piece rates.

In addition, the Department has determined that it is appropriate to make clarifying revisions to the regulations at §§ 655.210(g) and 655.211 to require employers to disclose all potentially applicable rates of pay in the job orders for herding and range livestock production occupations. Sections 655.210(g) and 655.211 include language analogous to that in § 655.120(a) and § 655.122(l). Specifically, the introductory text in § 655.210(g) has been redesignated to paragraph (g)(1) and revised to reflect that the employer must disclose any other wage rate it intends to pay if higher than the other potential wage sources listed in current § 655.210(g). Current § 655.210(g)(1) has been redesignated as § 655.210(g)(2), and revised to include reference to any other wage rate the employer intends to pay. Current § 655.210(g)(2) has been redesignated as § 655.210(g)(3). While the monthly AEWR will generally be the highest of these enumerated wage rates, in some cases an applicable State minimum wage, which may be expressed as an hourly wage rate, or another applicable wage rate (such as a higher monthly rate the employer intends to pay) may be higher. In addition, § 655.211(a)(1) has been revised to include reference to any other offered wage rate and the following language: ''The employer must list all potentially applicable wage rates in the job order and must offer and advertise all of these wage rates in its recruitment.''

Likewise, the Department has determined that it is appropriate to make such clarifying revisions to 20 CFR 653.501(c) to require employers to disclose all potentially applicable rates of pay in non-H–2A (or non-criteria) clearance orders. Because the SWAs are responsible for the review of both H–2A (criteria) clearance orders and non-H–2A (non-criteria) clearance orders, having analogous processes and requirements, where possible, is preferable, and the Department has revised 20 CFR 653.501(c)(1)(iv)(E) to require that intrastate and interstate clearance orders state both the hourly wage rate, if applicable, as well as any applicable piece rate or other non-hourly wage rate.

The Department has decided not to eliminate the requirement at 20 CFR 653.501(c)(2)(i) that an employer that pays by the piece, or other non-hourly unit, calculate and submit an estimated hourly wage rate with the job order. While some employers consider the inclusion of these estimated hourly wage rates in the job order to be burdensome or potentially confusing, these estimates provide additional information a potential job candidate may find relevant in evaluating whether to apply for a specific job opportunity.

Because the Department received no comments on whether corresponding changes to the recordkeeping requirements at § 655.122(j) and (k) or to the requirements for SWAs' review of job orders at part 653, subpart F, are needed, the Department declines to change these provisions at this time.

Finally, while the Department appreciates the suggestions from worker advocacy organizations that it address the wages owed to misclassified H–2A workers assigned to non-agricultural work for which higher prevailing wage rates should be paid, and limit the permissible number of working hours per day under the H–2A program, it declines to adopt either proposed change in this final rule as neither is within the scope of the current rulemaking.

3. Section 655.122, Contents of Job Offers

a. Paragraph (h)(4) Employer-provided Transportation

The NPRM proposed to revise § 655.122(h)(4) to require the provision, maintenance, and wearing of seat belts in most employer-provided transportation. Specifically, the NPRM proposed to prohibit an employer from operating any employer-provided transportation that is required by the U.S. DOT's FMVSS, including 49 CFR 571.208, to be manufactured with seat belts unless all passengers and the driver are properly restrained by seat belts meeting standards established by 49 CFR 571.209 and 571.210. In other words, the Department proposed that, if the vehicle was required by the U.S. DOT's FMVSS to be manufactured with seat belts, the employer would be required to retain and maintain those seat belts in good working order. The NPRM also proposed requiring that employers ensure that vehicles are not operated unless employees are wearing seat belts.

Additionally, the Department specifically sought comments in four areas: (1) whether there are any other factors or types of vehicles that it should consider when promulgating the regulations; (2) how this provision should interact with the limited exemption from the requirement under MSPA that vehicles have a seat securely fastened to the vehicle for each occupant found at 29 CFR 500.104(l),

which is also applicable to some H–2A employer-provided transportation; (3) whether employers ever retrofit vehicles with additional seats in such a way that complies with existing vehicle safety standards and how these vehicles should comply with proposed seat belt standards; and (4) whether it should require employers to enforce the wearing of seat belts.

The Department received numerous comments in support and in opposition to the proposal, and many commenters supported in part and opposed in part. Most opposition centered on the proposal that an employer should not operate the vehicle unless all passengers and the driver are properly restrained by a seat belt; this provision is discussed separately below. After consideration, the Department is adopting the proposal with minor modifications. Specifically, the Department has clarified that an employer must not allow any other person to operate employer-provided transportation unless seat belts are provided, maintained, and worn, and has replaced the word ''shall'' with ''must.'' Additionally, the Department has replaced the term ''DOT regulation'' with ''U.S. DOT's Federal Motor Vehicle Safety Standards,'' abbreviated as ''FMVSS,'' to use the same terminology as U.S. DOT does when referencing their regulations.

Some commenters submitted comments relating to transportation safety that are outside the scope of this rulemaking. Specifically, Farmworker Justice suggested that the Department not accept workers' compensation insurance as acceptable for an H–2A employer to meet their obligations under 20 CFR 655.122(h). MásLabor requested that the Department eliminate the requirement that the job offer include ''a description of the modes of transportation (*e.g.,* type of vehicle)'' from § 655.122(h)(4)(iii). Because the Department did not propose changes to these provisions in the NPRM, there are no such changes in this final rule.

Provision of Seat Belts in Vehicles Required by U.S. DOT's FMVSS to be Manufactured With Seat Belts

Worker rights advocacy organizations, unions, a couple of State government agencies, some Members of Congress, and some individual commenters expressed support for the proposal. Farmworker Justice and the Agricultural Justice Project stated that the requirement to provide seat belts was long overdue. Governmental commenters emphasized that the proposal was necessary due to the increased risks that agricultural workers face in transit. Specifically, a comment from Members of Congress cited reports from BLS that 271 of 589 fatal workplace injuries suffered by agricultural workers in 2022 were caused by transportation-related incidents, and the California LWDA stated that Cal/OSHA regularly cites employers for agricultural transportation-related violations.

Many employers, associations, and some individuals stated that they did not oppose the proposal that employers be expected to provide seat belts in vehicles required by U.S. DOT's FMVSS to be manufactured with seat belts. However, many of these commenters requested exemptions, as discussed further below. Mountain Plains Agricultural Service stated that seat belt ''use is important and should be available in the majority of vehicles and equipment during on-farm transportation. DOL's proposed change regarding this is redundant with OSHA regulations.'' Other employers and associations were silent on the proposal that employers provide and maintain seat belts in vehicles required to be manufactured with seat belts, expressing their opposition only to the proposed requirement that employers ensure that workers wear seat belts, which is discussed in more detail below.

The Wyoming Department of Agriculture and some agents and associations opposed the proposal to require the provision of seat belts. The Wyoming Department of Agriculture, Fuerza Consulting Solutions, and másLabor observed that employers commonly use older vehicles that do not have seat belts for on-the-farm transportation, and stated that compliance for these entities would be difficult. MásLabor and SRFA pointed out that the Department had previously opined that universal seat belt requirements would place an unreasonable economic burden on employers, and further said that the proposal may result in some employers completely forgoing the use of motor vehicles and turning to less regulated options such as all-terrain vehicles (ATVs), off-highway vehicles (OHVs), or motorcycles. MásLabor further urged the Department to defer to the judgment of State and local authorities to interpret existing laws, and to allow H–2A employers to use the same exemptions from seat belt usage as those that apply to non-H–2A employers under State law. The Wyoming Department of Agriculture also opposed the Department's reasoning for making the change. MásLabor and USA Farmers said that the proposal would result in enhanced safety standards for H–2A workers, but not for other agricultural workers. USA Farmers further stated that the more reasonable course of action would be to propose regulations applicable to all farmworkers, not simply to H–2A workers who represent a fraction of farmworkers in the United States.

Many commenters agreed with the proposal but requested that exemptions be included in the final rule. Many associations and employers requested the inclusion of an exemption for on-the-farm transportation, arguing that rural transportation is not inherently dangerous or, even if it is, on-the-farm transportation does not pose the same risks as off-farm transportation. Most of these commenters suggested that vehicles primarily operated on private farm roads when the distance traveled does not exceed 10 miles be exempt from seat belt requirements. SRFA suggested that small employers (*i.e.,* those employing 10 or fewer workers) be exempt, and an individual commenter and FFVA similarly suggested that vehicles already in use be exempt from the seat belt requirements, as such exemption, in the commenters' view, would cushion growers from the economic impacts of the proposal.

Some commenters misunderstood the proposal as requiring the retrofitting of vehicles not originally manufactured with seat belts. For example, Burley and Dark Tobacco Producer Association stated that many of the surplus buses acquired by employers to transport workers to and from job sites do not have seat belts, and that retrofitting these vehicles with seat belts would be expensive. One anonymous employer asked why seat belts would be required on buses when school systems do not require them, and stated that it would cost $750 per small bus and $1,050 per large bus to install seat belts, for a total cost to this employer of $14,100. Many commenters requested a grace period (many recommended 6–12 months) to retrofit vehicles with seat belts.

One commenter suggested that the proposal be expanded. Farmworker Justice suggested that employers be required to equip all vehicles with seat belts, not just those that are required by U.S. DOT's FMVSS to be manufactured with seat belts. They reasoned that employers frequently use old school buses to transport workers and excluding this larger vehicle category creates a meaningful gap in vehicle safety. Farmworker Justice also suggested that the Department clarify that the seat belt standard applies to all transportation of H–2A workers, including between worksites, inbound/outbound transportation, interstate and

intrastate transportation between job sites, and that provided by farm labor contractors or third-party transportation agents.

The Department received very few comments on how the proposal to require the provision of seat belts should interact with the limited exemption from MSPA's general requirement that vehicles have a seat for each occupant, as well as whether employers ever retrofit vehicles with seats. Farmworker Justice stated that the MSPA limited exemption from seats found at 29 CFR 500.104(l) [25] should be inapplicable to H–2A employers. SRFA stated that it appreciated the consideration of a 10-mile exemption for certain seatless vehicles under 29 CFR 500.104(l), but most farm vehicles have seats and producers in the Western States have worksites spanning a mile radius far exceeding 10 miles. Farmworker Justice also stated that the rule should expressly prohibit the retrofitting of any vehicles with additional seats but did not identify whether they had ever seen such a situation.

Upon consideration, the Department adopts the language as proposed in this final rule with minor modifications and does not modify the requirement that employers provide seat belts in vehicles required by U.S. DOT's FMVSS to be manufactured with seat belts.

The Department appreciates the suggestion that all vehicles be equipped with seat belts, not just those required by U.S. DOT's FMVSS to be manufactured with seat belts, and recognizes the commenter's concern that some workers will continue to be transported without seat belts, most commonly in school buses with a Gross Vehicle Weight Rating (GVWR) exceeding 10,000 pounds. However, as stated in the NPRM, the Department believes that it is appropriate to rely on U.S. DOT's considerable research and expertise and, at this point, U.S. DOT's FMVSS do not require school buses with a GVWR exceeding 10,000 pounds to be manufactured with seat belts because of the vehicles' safety features, among other factors. Specifically, school buses use ''compartmentalization'' to ensure that passengers are cushioned and contained by seats or padded restraining barriers in the event of a crash.[26] Additionally, U.S. DOT has stated that large school buses' greater weight and higher seating height than most other vehicles, high visibility to motorists, joint integrity of the bus body panels, and stringent fuel system integrity requirements contribute to the vehicles' safety record.[27] Furthermore, requiring seat belts in all employer-provided transportation, regardless of whether U.S. DOT's FMVSS required the vehicle to be manufactured with seat belts, would represent a substantial change from the proposal in the NPRM that would have significant economic impacts on some employers.[28] Therefore, the Department declines to adopt this proposal from Farmworker Justice's comment without providing the regulated community with a meaningful opportunity for notice and comment. The Department will continue to monitor vehicle safety conditions in the field and consult with U.S. DOT to consider whether the H–2A program should require seat belts in vehicles not manufactured with seat belts, including whether the conditions under which farmworkers are transported in large school buses are safe without seat belts. Also, as stated in the NPRM, if, at a later date, U.S. DOT were to amend the FMVSS to require school buses with a GVWR exceeding 10,000 pounds, or any other vehicle, to be manufactured with seat belts, § 655.122(h)(4) would automatically, and without further revision, similarly require the employer to provide and maintain seat belts in those vehicles. *See* 88 FR 63777–63778.

The Department also reminds employers that any bus exceeding 26,000 pounds GVWR that was not manufactured as a school bus or other category of bus explicitly excluded from seat belt requirements (transit bus, perimeter-seating bus, or prison bus) has been manufactured with seat belts pursuant to U.S. DOT's FMVSS if manufactured on or after November 28, 2016. *See* 78 FR 70416 (Nov. 25, 2013). Therefore, in these vehicles, the employer must provide and maintain seat belts.

Similarly, the Department declines to create exemptions from the seat belt standard for vehicles that U.S. DOT requires to be manufactured with seat belts. While many commenters sought the inclusion of an exemption from the seat belt requirement for on-the-farm transportation, sometimes suggesting using the same or similar parameters as found in the limited MSPA exemption from seats found in 29 CFR 500.104(l), the Department believes that it is inappropriate to universally exempt on-the-farm transportation from seat belt requirements. While the Department's enforcement experience demonstrates that many vehicle crashes occur on public roads, some crashes occur on property owned or leased by the grower. Additionally, it may be difficult for the Department to identify in an investigation which vehicles are solely used on the farm as opposed to being driven on public roads. The Department believes that it is similarly inappropriate to exempt small employers or vehicles currently in use from compliance with the seat belt requirements because the size of an employer or the current use of the vehicle has no bearing on the safety of the transportation provided.

MásLabor and SRFA correctly noted that the Department had previously opined that requiring employers to provide seat belts would place an unreasonable economic burden on employers. However, as previously explained in the NPRM, the Department made this statement while promulgating MSPA regulations in 1983.[29] In the last 40 years, every State except New Hampshire has passed seat belt laws [30] and national seat belt usage increased from 14% in 1983 to 91.6% in 2022.[31]

[25] Transportation subject to this exemption is limited to those vehicles that are subject to the vehicle safety standards in 29 CFR 500.104 when those vehicles are primarily operated on private farm roads when the total distance traveled does not exceed 10 miles, so long as the trip begins and ends on a farm owned or operated by the same employer. *See* 29 CFR 500.102; 29 CFR 500.104(l). *See also* DOL, *WHD Fact Sheet #50: Transportation Under the Migrant and Seasonal Agricultural Worker Protection Act* (June 2016), *https://www.dol.gov/agencies/whd/fact-sheets/50-mspa-transportation.*

[26] *See* 73 FR 62744, 62745–62746 (Oct. 21, 2008), and 76 FR 53102 (Aug. 25, 2011).

[27] *See* National Highway Traffic Safety Administration (NHTSA), *School Bus Safety: Crashworthiness Research* (Apr. 2002) (discussing school bus occupant safety), *https://www.nhtsa.gov/sites/nhtsa.gov/files/sbreportfinal.pdf.*

[28] As stated in the NPRM, NHTSA has provided guidance for retrofitting school buses with seat belts. *See Guideline for the Safe Transportation of Pre-school Age Children in School Buses,* NHTSA (Feb. 1999). Cost estimates for retrofitting a school bus with seat belts vary, but are generally around $15,000 per bus, with one estimate as high as $36,000 per bus. *See* Stephen Satterly, *School Bus Seat Belts: Opening a Dialogue,* Safe Havens Int'l (Dec. 5, 2016), *https://safehavensinternational.org/school-bus-seat-belts-opening-dialogue,* Matthew Simon, *Report: Adding Seatbelts Could Cost $15k per school bus,* WSAW–TV (Sept. 1, 2016), *https://www.wsaw.com/content/news/NewsChannel-7-Investigates-Report-Adding-seat-belts-could-cost-15K-per-school-bus-392104851.html;* Mike Chouinard, *Island District Holds Off School Bus Seatbelt Retrofits,* N. Island Gazette (Oct. 7, 2020), *https://www.northislandgazette.com/news/island-district-holds-off-school-bus-seatbelt-retrofits-1407935.*

[29] *See* 48 FR 36736, 36738 (Aug. 12, 1983); 88 FR 63750, 63777.

[30] *See* Governors' Highway Safety Ass'n., *Seat Belts, https://www.ghsa.org/issues/seat-belts (last accessed Feb. 8, 2024).*

[31] *Compare* NHTSA, *Seat Belts, https://www.nhtsa.gov/risky-driving/seat-belts#resources (last accessed Feb. 8, 2024)* (''*Seat Belts*'') (estimating that seat belt use by adult front-seat passengers was about 91.6 percent in 2022), *with*

Research has solidified the importance of the seat belt as an essential life-saving technology; NHTSA estimates that using a seat belt in the front seat of a passenger car can reduce fatal injury by 45 percent and reduce moderate to critical injury by 50 percent. The safety effect increases in a light truck, where seat belts reduce fatal injury by 60 percent and reduce moderate to critical injury by 65 percent.[32] Further, NHTSA estimates that 50 percent of those passenger vehicle occupants killed in crashes in 2021 were unrestrained.[33] Given the dramatic increase in use, expansions of State seat belt laws, and developments in safety research since 1983, the Department no longer believes that requiring employers to provide seat belts in 2024 places an unreasonable economic burden on employers. Even more, the Department's regulation requires seat belts only in vehicles that have been manufactured with seat belts and thus an employer's only expenses would be to fix any seat belts that have broken. In response to commenters who warned the Department that a seat belt requirement may motivate employers to provide transportation via less regulated modes of transport, such as ATVs, OHVs, and motorcycles, the Department believes that it is unlikely to be more cost effective for employers employing more than a few workers to purchase motorcycles or ATVs for workers in lieu of repairing seat belts in a 15-passenger van, for example. Additionally, the Department reminds employers that all employer-provided transportation must comply with all Federal, State, and local laws and regulations. *See* 20 CFR 655.122(h)(4).

Many commenters used the term ''retrofit'' when discussing seat belt installation, emphasizing the costs that would be passed onto growers, as well as the need for a grace period to permit sufficient time for such retrofitting. The Department clarifies that this final rule does not require employers to add seat belts to vehicles that were manufactured without them. The language adopted by the Department in this final rule references U.S. DOT's FMVSS, including those found at 49 CFR 571.208, which vary based on the type of vehicle and the year of manufacture. If an employer transports workers in an old vehicle that was not required, at the time of manufacture, to have seat belts, the Department will not require an employer to install seat belts in that vehicle. However, it should be noted that, because U.S. DOT has required passenger cars and light trucks and vans to be manufactured with seat belts since the 1970s,[34] buses (excluding school buses) with a GVWR under 10,000 pounds to be manufactured with seat belts since 1991,[35] and school buses with a GVWR under 10,000 pounds to be manufactured with seat belts since 1976,[36] the Department anticipates that relatively few vehicles originally manufactured without seat belts remain in use. Employers' costs to come into compliance will consist of repairing or replacing any broken or damaged seat belts, which the Department anticipates will be less expensive and take less time than retrofitting vehicles that were never engineered for seat belt installation. The Department also declines to institute a grace period for employers to retrofit their vehicles, as no retrofitting will be required. The Department similarly believes that many vehicles will already have functional seat belts to comply with existing State laws, and that those vehicles with broken seat belts may be fixed relatively quickly, and therefore declines to institute a grace period for employers to repair broken seat belts.

Some commenters identified that the proposal would implement more stringent safety requirements for H–2A workers and workers engaged in corresponding employment than for other farmworkers in the United States. The Department continues to believe that it is appropriate to amend the H–2A regulations given the significant growth of the program and its increasing importance in agriculture in the United States.[37] The Department is tasked with, among other things, ensuring that the employment of H–2A workers does not adversely affect the wages and working conditions of similarly employed workers in the United States. As discussed in greater detail below in Section VI.C.2.b, H–2A workers may have more limited recourse when placed in an inherently dangerous situation, such as being transported in a vehicle without seat belts, than workers in the United States similarly employed. As AIHA noted, H–2A workers are incentivized to continue employment even when presented with working conditions that are hazardous to their health and safety. Additionally, unbelted passengers in a vehicle pose significant risks to other passengers and the driver; studies have found that unrestrained occupants can become projectiles in a crash and increase the risk of death for other occupants.[38] An employer that only offers dangerous transportation (in this case, transportation without seat belts in a vehicle required by U.S. DOT's FMVSS to be manufactured with seat belts) has offered terms and working conditions below the minimum level at which a worker in the United States could be expected to accept. Given the accepted and established safety record of seat belts, the Department believes that it is appropriate to require seat belts in these vehicles as a baseline safety standard in the H–2A program to prevent adverse effect on similarly employed workers in the United States and to ensure that H–2A workers are employed only when there are not sufficient able, willing, and qualified workers available to perform the work.

In response to comments submitted by Farmworker Justice, the Department clarifies that vehicle safety standards found in § 655.122(h)(4), including the requirement that vehicles manufactured with seat belts have seat belts, apply to all employer-provided transportation of H–2A workers, including between worksites, inbound/outbound transportation, and interstate and intrastate transportation between job sites. If an employer contracts with

Transp. Research Bd. of the Nat'l. Acads., *Buckling Up: Technologies to Increase Seat Belt Use* (Oct. 2003), p. 5 (estimating that seat belt use was about 14 percent in 1984).

[32] *See* Kahane, C.J., NHTSA, *Lives Saved By Vehicle Safety Technologies and Associated Federal Motor Vehicle Safety Standards, 1960 to 2012—Passenger Cars and LTVs—With Reviews of 26 FMVSS and the Effectiveness of Their Associated Safety Technologies in Reducing Fatalities, Injuries, and Crashes* (2015), DOT HS–812–069, pp. 107–11, *https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812069.pdf* (2015 NHTSA Report). *See also Seat Belts.*

[33] *See Seat Belts.*

[34] 2015 NHTSA Report, p. 89, *https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812069.pdf;* 49 CFR 571.210 S4.1; and 49 CFR 571.210 S4.2.

[35] 54 FR 46257 (Nov. 2, 1989).

[36] 41 FR 4018 (Jan. 28, 1976).

[37] The number of H–2A jobs certified in FY 2022 was more than seven times the number of those certified in 2005, and double the amount of those certified in 2016. *See* Castillo, M., USDA Economic Research Service, *H–2A Temporary Agricultural Job Certifications Continued to Soar in 2022* (Mar. 13, 2023), *https://www.ers.usda.gov/amber-waves/2023/march/h-2a-temporary-agricultural-job-certifications-continued-to-soar-in-2022/.*

[38] *See* Mayrose J., et al., *Influence of the unbelted rear-seat passenger on driver mortality: ''the backseat bullet''* (Feb. 2005), Acad. Emerg. Med. 12(2), pp. 130–34, *https://pubmed.ncbi.nlm.nih.gov/15692133/* (finding that the risk of death for a belted driver in a head-on collision increased by 2.27 times if seated in front of an unbelted passenger instead of a belted passenger); Cummings P., Rivara F.P., *Car occupant death according to the restraint use of other occupants: a matched cohort study* (Jan. 21, 2004), J. Am. Med. Ass'n, 291(3), pp. 343–49, *https://pubmed.ncbi.nlm.nih.gov/14734597/* (finding that the risk ratio for death among belted occupants varied between 1.22 and 1.15 when exposed to an unbelted passenger in a vehicle crash, depending on the location of the belted and unbelted occupants; in other words, the restrained passenger was more likely to die when exposed to an unrestrained passenger in a vehicle crash).

another entity, such as a farm labor contractor, to provide transportation that is the employer's responsibility, such as transportation between the living quarters and worksite or inbound/outbound transportation, that transportation continues to be employer-provided and is subject to all the vehicle safety standards found in 20 CFR 655.122(h)(4), including the seat belt standards. To clarify that the employer cannot avoid responsibility for seat belt requirements by using a subcontractor to provide required transportation to workers, the Department has edited § 655.122(h)(4)(ii) in this final rule to prohibit an employer from allowing any other person to operate any employer-provided transportation required by U.S. DOT's FMVSS to be manufactured with seat belts unless workers are properly restrained by seat belts.

Upon consideration of the comments, the Department declines to modify the proposal to accommodate the limited MSPA exemption from seats found at 29 CFR 500.104(l). No commenter identified that they used the exemption, and SRFA confirmed that most vehicles have seats. Commenters who mentioned the exemption appeared to contemplate a blanket exemption from the seat belt requirement for on-the-farm transportation, which the Department declines to adopt and is discussed above. Based on the comments received, the Department concludes that employer usage of the limited exemption from seats found in 29 CFR 500.104(l) (for vehicles that are operated primarily on farm roads in trips not exceeding 10 miles, so long as the trip begins and ends on a farm owned or operated by the employer) is rare and therefore needs no accommodation in these regulations.

No commenters identified that they retrofitted vehicles with seats or saw such retrofitted vehicles. As such, the Department will not contemplate hypothetical compliance in that situation at this time.

Wearing of Seat Belts

The Department proposed to prohibit employers from operating vehicles manufactured with seat belts unless all passengers and the driver are properly restrained by seat belts. Associations, agents, and employers were unanimous in their opposition to the proposal that employers require the wearing of seat belts. These commenters stated that this requirement would be unreasonable, place an undue burden on employers, and infantilize workers. Commenters also stated that even if they checked for seat belt use before departure, they would have no way to ensure that workers not remove the seat belt in transit. An individual and wafla stated that often the drivers are H–2A workers with no supervisory authority and would be unable to require the wearing of seat belts. SRFA, wafla, AILA, and an individual employer emphasized that employers would need to invest heavily in surveillance technology, such as cameras, to ensure that workers wear seat belts at all times. AILA suggested that the Department accept an employer as being in compliance if it has a sign posted advising the workers to wear seat belts. NHC similarly suggested that this provision be replaced with a requirement that employers provide training on proper use of seat belts. The Wyoming Department of Agriculture stated that this provision would expose employers to labor organization audits of seat belt use.

Worker rights advocacy organizations, unions, a couple of State government agencies, some Members of Congress, and individual commenters supported the proposal in its entirety, including that the employer not operate vehicles manufactured with seat belts unless all passengers and the driver wear seat belts. A couple of advocacy organizations submitted specific feedback supporting the proposal that employers require the wearing of seat belts. AIHA noted that making seat belts available without a requirement to wear the seat belts leads to low adoption of the practice of wearing them and that ''if the goal of the [Department] is to decrease incidents of injury associated with transportation of [H–2A] workers, then required enforcement is one of the best ways to increase the use of seat belts.'' Farmworker Justice stated that oftentimes workers come from rural communities in Mexico where seat belt use may not be customary, and therefore employers should be required to verify that all passengers are wearing seat belts. The California LWDA noted that the proposed regulation aligned with the California regulation and that there are numerous OSHA decisions interpreting the regulations requiring the provision of personal protective equipment to also require use thereof.

The Department adopts the proposal without modification. The history of seat belt adoption shows that the provision of seat belts does not automatically result in their use; rather, enforcement and education is necessary for adoption. As previously explained in the NPRM, seat belt usage in the United States was very low before States required and national campaigns encouraged their use (compare 14% usage in 1983 to 86% usage in 2012,[39] and up to 90% in 2020).[40] Seat belts do not serve their designed purpose when not worn, and, as noted above, an unbelted passenger poses a significant safety risk to other passengers in the vehicle in the case of a crash. As the objective of this regulatory change is to avoid degrading worker safety conditions to prevent adverse effect on similarly employed workers in the United States and to ensure that H–2A workers are employed only when there are not sufficient able, willing, and qualified workers available to perform the work, the Department believes that employers requiring their workers to wear seat belts is necessary to achieve this objective.

With respect to employer concerns that it is not possible for employers to ensure their workers wear seat belts, the Department notes that numerous other workplace safety and health laws and regulations require employers to shape and influence the behavior of their workers so that the employer may be in compliance. Consider, for example, regulations promulgated by OSHA, many of which mandate specific behaviors or the use of safety equipment by their workers. For example, 29 CFR 1928.51(b)(2)(i) requires an employer to ensure that a worker required to use a Roll-Over Protective Structure (ROPS) on a tractor not only use a seat belt, but that the employee tighten the seat belt sufficiently to confine the worker to the protected area provided by the ROPS. The employer is expected to comply with the OSHA standard; however, the Department anticipates that the employer is not fastening the seat belt themselves nor are they watching the worker each moment to ensure that the seat belt is fastened. Rather, the employer creates and communicates operating procedures to shape worker behavior to comply with the standard, including by issuing work rules to prevent the violation, communicating those rules to workers, taking measures to discover violations, and taking action when violations are discovered. *See, e.g., Burford's Tree, Inc.,* 22 BNA OSHC 1948 (No. 07–1899, 2010), aff'd without opinion, 431 F. App'x. 222 (11th Cir. 2011).

Similarly, regulations promulgated by the Food and Drug Administration (FDA) at 21 CFR 117.10 require an employer to take reasonable measures and precautions to ensure that, for example, all persons working in direct

[39] 2015 NHTSA Report, at 103.

[40] NHTSA, *Seat Belt Use in 2020—Overall Results* (Feb. 2021), *https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813072.*

contact with food conform to hygienic practices while on duty, including: (1) maintaining adequate personal cleanliness; (2) washing hands thoroughly before starting work and after each absence from the work station; and (3) not eating food, chewing gum, drinking beverages, or using tobacco in areas where food may be exposed or where equipment or utensils are washed. As with OSHA regulations, compliance with these FDA regulations require employers to develop reasonable compliance plans to influence employee behavior.

Certainly, the Department does not expect employers to install expensive surveillance technology in vehicles to monitor compliance. However, it does expect employers to implement common-sense measures to ensure that workers are wearing seat belts while a vehicle is being operated. The Department expects that employers already have similar common-sense measures in place to comply with other regulatory safety requirements, such as those enforced by OSHA and the FDA.

With respect to the Wyoming Department of Agriculture's concern that this provision would expose employers to labor organization audits of seat belt use, this final rule does not grant the right to conduct audits to such organizations, but some organizations may conduct or attempt to conduct independent evaluations of employer compliance and make referrals when they encounter violations. However, the Department believes that this provision is no more likely than others in the H–2A regulations to result in organizations attempting to evaluate employer compliance. In all, the Department believes that the importance of mitigating unsafe working conditions far outweighs the inconvenience to an employer resulting from an outside organization surveying (or attempting to survey) an employer about compliance.

b. Paragraphs (i)(1)(i) and (ii) Shortened Work Contract Period

The Department proposed to remove the language at § 655.122(i)(1)(i) and (ii) that permitted the work contract period to be shortened by agreement of the parties with the approval of the CO, consistent with changes to the delayed start date procedure at § 655.175. The Department received one comment from a trade association that expressed general support for this minor change. The Department is adopting the proposal without revision in this final rule. These minor conforming changes will ensure these paragraphs are consistent with changes to delayed start of work requirements at new § 655.175(b), which permits only minor delays to the start of work and requires notice to workers and the SWA, but not CO approval, as discussed in the preamble explaining changes in that section.

The Department also received comments on this section that it has determined were beyond the scope of this rulemaking. A workers' rights advocacy organization expressed concern that providing workers the three-fourths guarantee at the end of the contract period results in financial hardship for workers and may incentivize employers to find pre-textual reasons to avoid fulfilling the obligation. The commenter urged the Department to revise the three-fourths guarantee at § 655.122(i) to require employers to guarantee and compensate workers for three-fourths of the work hours in each weekly or biweekly period. Alternatively, the commenter urged the Department to require employers provide a ''basic 'per diem' to cover food costs during work stoppages exceeding 3 days at any time'' during the employment period.

These suggestions would require amendments to § 655.122(i) or § 655.122(g) that would constitute major changes to the regulations that commenters and stakeholders could not have anticipated as an outcome of the proposed minor change to § 655.122(i)(1) or proposed changes to the delayed start date procedure at § 655.175(b), thus warranting additional public notice and opportunity for comment. As such, the Department declines to adopt the suggested changes. However, as the Department noted in the 2022 H–2A Final Rule, the three-fourths guarantee ''is intended to address the normal variability of weather, crop readiness, and other circumstances in agricultural work'' and ''is not intended to allow an employer to include periods without work'' for other reasons. 87 FR at 61774. The employer's job order must accurately reflect the actual hours that the employer intends to offer workers.[41]

c. Paragraph (l)(3) Productivity Standards as a Condition of Job Retention

The NPRM proposed that if the employer requires one or more productivity standards as a condition of job retention, such standards must be specified in the job offer and be no more than those required by the employer in 1977, unless the OFLC Administrator approves a higher minimum. Additionally, the NPRM proposed that if the employer first applied for temporary agricultural labor certification after 1977, such productivity standards must be no more than those normally required (at the time of the first *Application for Temporary Employment Certification*) by other employers for the activity in the AIE. Under the current regulations at § 655.122(l)(2)(iii), these conditions apply only to those employers paying a piece rate and requiring one or more productivity standards as a condition of job retention. The NPRM proposed to expand these conditions to all employers requiring one or more productivity standards as a condition of job retention, regardless of whether the workers are paid on a piece rate or hourly basis. The NPRM explained that this change was necessary so that all workers would be informed of the conditions that may serve as a basis for termination for cause, consistent with proposed changes to § 655.122(n), and to ensure that employers do not terminate workers for excessively high productivity standards.

Many individuals, public policy or other advocacy organizations, workers' rights advocacy organizations, unions, and State agencies, as well as some Members of Congress, unconditionally supported the proposal. These commenters agreed that the disclosure of this productivity-standard information would ensure that workers are informed of the material terms and working conditions of the job offer before accepting the job and noted the harm that increased productivity standards have on workers, regardless of whether workers are paid on an hourly or piece-rate basis. Specifically, Farmworker Justice noted that they have encountered workers who were required to work at such a rapid pace that the workers reasonably feared an increased incidence of accidents. Many commenters, including the North Carolina Justice Center, PCUN, and UMOS, also said that uncapped productivity standards would have the effect of dissuading U.S. workers from finding or keeping these jobs. A number of agricultural associations and employers, such as the Michigan Asparagus Advisory Board, TIPA, and NHC, agreed with the proposal on the condition that employers have the ability to adjust productivity standards if the crop or market conditions are different than anticipated at the time of the job offer.

Other employers and associations opposed the proposal. Some employers

[41] DOL, *WHD Fact Sheet #26E: Job Hours and the Three-Fourths Guarantee under the H–2A Program* (Nov. 2022), *https://www.dol.gov/agencies/whd/fact-sheets/26e-job-hours-three-fourths-guarantee-H-2A.*

opposed the proposal based on a mistaken perception that qualitative reasons for evaluation would not be acceptable. One anonymous employer misunderstood the proposal, believing that it would require employers to create productivity standards, and stated that creating a productivity standard would be impossible because of the needs of different crops and conditions (*e.g.,* fresh market versus juicing apples). AILA did not support or oppose the proposal but requested that the Department add a section for this information on the applicable forms. As explained more fully in the discussion below, this final rule will permit employers to consider qualitative reasons for discipline and termination and will not require employers to establish productivity standards if they choose not to do so.

Some commenters expressed concerns as to how the Department would determine whether a productivity standard is normal and accepted for the activity in the AIE. Wafla opposed the proposal, stating that the proposed guidelines for establishing productivity standards were unclear. Other commenters, including Titan Farms, LLC and NHC, characterized as problematic the requirement that productivity standards be frozen at the time an employer first used the program, stating that technological advancements have increased worker efficiency levels. While Farmworker Justice supported the proposal, they suggested that SWAs request documentation to substantiate the appropriateness of qualifications to ensure they do not approve arbitrary and inappropriate productivity standards.

This final rule adopts the language as proposed. After evaluating all comments, the Department continues to believe that the productivity standards that will be used as a basis for job retention are a core term and working condition that must be disclosed to workers in the job offer, regardless of whether those workers are paid on a piece-rate or hourly basis. Workers must know, before accepting a job, the criteria for which they may be later terminated, including any applicable productivity standards. As discussed further below and in the preamble corresponding with § 655.122(n), the employer may consider other applicable criteria for job retention, including an evaluation of work quality, but these criteria are not considered productivity standards. The Department also continues to believe that it is appropriate to require that productivity standards in the H–2A program not exceed the standards normally required by other employers for the activity in the AIE when the employer first used the program (unless otherwise permitted by the OFLC Administrator, or if the standards reflect the standards the employer used in 1977, for employers that first used the program before 1977). This requirement will prevent productivity standards from constantly increasing arbitrarily, thus preventing potential unsafe working conditions and exclusion of U.S. workers from the agricultural workforce, while at the same time permitting reasonable adjustments by the OFLC Administrator when appropriate.

As described above, some opposition to this proposal resulted from a misunderstanding that employers would not be permitted to evaluate work quality for purposes of job retention and would be required to use productivity standards alone to address any performance issues. In § 655.122(n)(2) of this final rule, the Department clarifies language to state that a worker may be terminated for cause for a failure to satisfactorily perform job duties in accordance with the employer's reasonable expectations based on criteria described in the job offer. These criteria for evaluation may include a productivity standard, qualitative criteria, or both. Therefore, the Department clarifies that it will not require employers to use productivity standards to evaluate their workers if they do not choose to do so. However, any employer that uses a productivity standard to evaluate job performance must disclose that productivity standard in the job offer, pursuant to § 655.122(l)(3).

The Department stated in the preamble to the NPRM that, consistent with current guidance, productivity standards must be static, objective, and specifically quantify the expected output per worker. The NPRM further stated that vague standards, such as requiring workers to ''perform work in a timely and proficient manner,'' ''perform work at a sustained, vigorous pace,'' or ''keep up with the crew'' would not be acceptable productivity standards as they lack objectivity, quantification, and clarity, and would not be accepted as valid reasons for termination for cause.[42] In light of the changes to § 655.122(n)(2) in this final rule, specifically the allowance for consideration of qualitative criteria as a reason for termination for cause, the Department believes that this statement requires further clarification. In this final rule, the Department maintains that productivity standards must be static, quantifiable, and specifically quantify the expected output per worker. Productivity standards must comply with § 655.122(l)(3) in this final rule, meaning they must be disclosed to the worker in the job offer and be no more than those required by the employer in 1977, unless the OFLC Administrator approves a higher minimum, or, if the employer first applied for temporary agricultural labor certification after 1977, no more than those normally required (at the time of the first *Application for Temporary Employment Certification)* by other employers for the activity in the AIE. As described above, qualitative criteria for evaluation are not productivity standards, as they are not quantifiable, and therefore will not fall within the scope of § 655.122(l)(3) in this final rule.

However, the Department will not permit the use of allegedly qualitative criteria for evaluation as a reason for termination for cause where they are exclusively a proxy for measures of quantitative output (*i.e.,* productivity standards) and, therefore, attempt to circumvent § 655.122(l)(3). For example, the standard ''failure to keep up with the crew'' exclusively measures quantitative output and thus would be an impermissible productivity standard because it is not static and does not quantify the expected output per worker. An employer using such a standard for evaluation would essentially be able to create different productivity standards at its discretion and without the knowledge of the worker, thus circumventing the purpose of § 655.122(l)(3). An employer wishing to evaluate the speed or quantity of work should disclose a productivity standard (or multiple productivity standards, if different standards apply to different crops or situations).

On the other hand, a genuinely qualitative or behavioral standard that incidentally affects productivity, such as a requirement that a worker know how to correctly use a tool or a prohibition on watching streaming video during work hours, would be permissible. While these standards may affect the speed and quantity of work performed (*e.g.,* a worker spending excessive time watching streaming video during work hours may harvest fewer apples than other workers), the underlying standard is not quantitative in nature and, therefore, would be acceptable. One anonymous employer identified that they often know ''when a worker is working slower than the

[42] *See* 88 FR 63779; and OFLC, *Frequently Asked Questions, H–2A Temporary Agricultural Foreign Labor Certification Program, 2010 Final Rule, Round 9* (Oct. 30, 2015), *https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_FAQ_Round9.pdf.*

other workers[,] or when he is on his cell phone while others working beside him are working hard[,] or when he is deliberately obstructing the work of others.'' The first standard (''working slower than other workers'') would be an impermissible productivity standard, whereas rules or policies governing the other two standards (excessive use of a phone during work hours and obstructing the work of others) would be acceptable bases for discipline, including termination when appropriate, if all procedures in § 655.122(n) are followed.

The Department declines to allow employers to change productivity standards during the work contract period, as doing so would undermine the purpose of this provision. If an employer were to be permitted to modify the productivity standards at its discretion, workers would not have adequate notice of the productivity standards that they must meet. If an employer wishes to use productivity standards and believes that different productivity standards will be applicable in different situations (*e.g.,* fruit for fresh market versus fruit for juicing), the employer should disclose the applicable productivity standards in each of those situations.

The Department will continue to use its established procedures to determine whether productivity standards were normally required (at the time of the first *Application for Temporary Employment Certification*) by other employers for the activity in the AIE. The Department has previously defined ''normal'' as ''not unusual,'' and has clarified that ''normal'' in this context differs from prevailing. In other words, the Department does not require that a majority of employers in the AIE use the same productivity standard, only that the use of that productivity standard not be unusual. *See* 73 FR 77110, 77153–77154 (Dec. 18, 2008).

The Department significantly relies on SWAs' expertise in determining whether productivity standards are no more than those normally required (at the time of the first *Application for Temporary Employment Certification)* by other employers for the activity in the AIE. SWAs are familiar with the specific agricultural and labor conditions in their respective geographic areas and serve an essential role in reviewing job orders for sufficiency. *See* 87 FR at 61706–61707.

Consistent with § 655.122(b), SWAs or the Department may, at their discretion, request documentation from the employer to substantiate the appropriateness of any job qualification (including productivity standards). The Department has previously stated that this documentation may include the names of other employers that can verify the adequacy of the employer's requirement, information from the Cooperative Extension System, university personnel with expertise in agricultural sciences, or a prevailing practice survey. *See* 53 FR 22076, 22096–22097 (June 13, 1988). Although a prevailing practice survey may be used to demonstrate the appropriateness of a productivity standard, it is not required because productivity standards need only be normal, not prevailing. *See* 53 FR 22076, 22096.

Additionally, regardless of the year that the employer first applied for temporary agricultural labor certification (whether before or after 1977), the Department will consider requests for a higher minimum productivity standard upon receiving substantive written documentation showing that an increase is justified by technological, horticultural, or other labor-saving means. For example, the Department stated in the 2010 final rule that apple growers had been allowed to raise productivity standards to reflect the introduction of dwarf trees. *See* 53 FR 22076, 22083 (June 13, 1988) and 2010 H–2A Final Rule, 75 FR 6884, 6914.

d. Paragraph (l)(4); § 655.210(g)(4) Disclosure of Available Overtime Pay

The Department proposed to add a new paragraph at § 655.122(l)(4) to explicitly clarify that the employer must specify in the job offer any applicable overtime premium wage rate(s) for overtime hours worked and the circumstances under which the wage rate(s) for such overtime hours would be paid. Under the Department's longstanding regulations, an H–2A employer must assure that it will comply with all applicable Federal, State, and local laws, including any applicable overtime laws, during the work contract period. *See* § 655.135(e). In addition, an H–2A employer must accurately disclose the actual, material terms and conditions of employment, including those related to wages, in the job order. *Id.* Sections 655.103(b), 655.121(a)(3), and 655.122(l).

Therefore, the Department proposed to revise the current wage disclosure requirements found at § 655.122(l) to expressly clarify in a new paragraph (4) that an employer must disclose in the job order any applicable overtime pay. Specifically, under proposed § 655.122(l)(4), whenever overtime pay is required by law or otherwise voluntarily offered by an employer, an employer would be required to disclose in the job order the availability of overtime hours, the wage rate to be paid for any overtime hours, and the circumstances under which overtime will be paid.[43] The proposed paragraph at § 655.122(l)(4)(iii) provided illustrative examples of circumstances that might apply, such as after how many hours in a day, week, or pay period the overtime premium wage rate will be paid, or if overtime premium wage rates will vary between worksites. However, an employer must accurately disclose the actual circumstances under which overtime would be paid. Similarly, the Department proposed to amend the pay disclosure requirements at § 655.210(g), governing the contents of job orders for herding and range livestock production occupations, to include a new paragraph (g)(3) that would require employers to disclose any available overtime pay, whether voluntarily offered by the employer or required by State or Federal law, and the details regarding such pay.

The Department largely received supportive comments regarding this proposal. Many of the comments, including those representing employers, employer associations, SWAs, State Attorneys General, U.S. Senators, U.S. House Members, and worker advocates, voiced support for the addition of this language to explicitly disclose to prospective workers the opportunity for overtime pay. One of these commenters, Marylanders for Food and Farmworker Protection, explained that ''[p]roviding workers with clear expectations promotes fairness and prevents exploitation.'' Another commenter, másLabor, who voiced general support for this provision, acknowledged that workers need to know when overtime payment is applicable, and how much they may expect to be paid.

The Department also received some comments in opposition to this specific proposal, stating that overtime payment is already a required data element of the job orders and the new provision is generally unnecessary. The two prevailing sentiments in opposition were: (1) payment of piece rates complicate the employers' ability to properly disclose what overtime rate will be applicable; and (2) the lawful reason for applicable overtime payment is irrelevant to workers. Related to the former, wafla suggested that the proposal is administratively overburdensome and that, ''[t]he proposed language is problematic for employers because requiring some

[43] *See, e.g.,* Cal. Indus. Welfare Comm'n Order No. 14–2001 (as amended), Cal. Code Regs., tit. 8, § 11140.

actual calculation of the wage is impossible and not accurate particularly when considering piece rate.'' Wafla provided an alternative, more simplified example of required language: ''Overtime will be paid at 1.5 times the weekly regular rate of pay for any hours exceeding 40 hours.''

The New York State Farm Bureau explained, ''these piece rates vary due to factors often outside of farmers' control such as the weather, equipment, and type of commodity. This creates additional paperwork for farmers that are often hard to predict in order to include in a job order.'' Another complexity cited by the New York State Farm Bureau is due to a newly effectuated New York State law in which overtime for agricultural workers will be phased in over a period of 8 years, with a lowering threshold every other year.

Another commenter, másLabor, did not object to the disclosure of overtime pay, if applicable, but opposed ''requir[ing] the employer to specify whether overtime is paid voluntarily by the employer or is required by law, and to cite the specific Federal, State, or local law requiring the payment of overtime pay.'' MásLabor said ''[i]t is unclear why such disclosures are necessary, as the reason for overtime pay is completely irrelevant to prospective workers.'' MásLabor also posited that explaining the legal requirements for applicable overtime pay would only serve to lengthen the job orders, confuse workers, and likely result in increased NOD findings from OFLC.

NCAE asserted that data compiled by the National Agricultural Worker Survey indicate that in jurisdictions where overtime pay is applicable, workers' net earnings have declined due to those overtime payment requirements.

With regard to the same proposal for the herding and range livestock production occupations, Colorado Legal Services submitted the only comment, which was a copy of the letter it and other organizations previously submitted in response to the 2015 herder rulemaking NPRM and generally supported increased worker protections.

After consideration of all the comments received, the Department adopts the proposal and finalizes the new provisions at §§ 655.122(l)(4) and 655.210(g)(4) of this final rule. As discussed in the NPRM, the H–2A program does not mandate the payment of an overtime premium wage rate for hours worked exceeding a certain number in the day, week, or pay period. However, the FLSA's overtime requirements, as well as various State and local laws that require overtime pay, apply independently of the H–2A program's wage requirements. Some H–2A workers and workers in corresponding employment may be entitled to overtime pay under one or more of these laws. Pursuant to these authorities, an H–2A employer already must disclose in the job order any available overtime pay, whether required under Federal, State, or local law, or otherwise voluntarily offered by the employer. As noted in the NPRM, despite these existing authorities, OFLC and WHD frequently encounter H–2A job orders that either omit disclosure of, or fail to accurately describe, applicable overtime pay. Accordingly, the Department believes these new provisions are necessary and will provide needed transparency to workers regarding the terms and conditions of the employer's job opportunity. Failure to clearly and fully disclose any available overtime pay in the job order harms prospective workers who may be more interested in the job opportunity if they are aware of the availability of overtime pay. Incomplete or nonexistent disclosures also hamper the Department's ability to effectively administer and enforce the H–2A program requirements.

The Department does not view this requirement as overly burdensome because the intent is to accurately disclose to the workers the availability of overtime pay, already a requirement under the existing regulations. However, the Department appreciates the opportunity to clarify that disclosure of the ''wage rate(s) to be paid'' under §§ 655.122(l)(ii) and 655.210(g)(4)(ii) may be in the form of a formula such as ''1.5 times the regular rate of pay'' and is not required to be a specific dollar amount. Of course, where the specific dollar amount of the premium rate is known, the employer is free to disclose this. For example, the Department agrees with wafla's comment suggesting that language such as ''[o]vertime will be paid at 1.5 times the weekly regular rate of pay for any hours exceeding 40 hours'' should be sufficient to satisfy the requirements of the §§ 655.122(l)(4)(i) through (iii) and 655.210(g)(4)(i) through (iii), as long as the language accurately describes the employer policy or the local, State, or Federal standard applicable.

Where the offer of overtime is pursuant to a Federal, State, or local law, the employer must explicitly disclose that as well, under §§ 655.122(l)(4)(iv) and 655.210(g)(4)(iv), for example by adding ''according to the Fair Labor Standards Act'' or ''as required under California Industrial Welfare Commission Order 14–2001.'' Lastly, as it is the employer's responsibility to be aware of all laws to which it is subject, the employer should not incur an undue burden by disclosing what the law requires of it, or that it plans to voluntarily make overtime pay available to the worker.

Further, the comment suggesting that the net earnings of the worker are decreased by the requirement to pay overtime when required by law is not relevant to the Department's proposal adopted here. This final rule does not newly mandate the payment of overtime pay, but rather furthers the Department's intent to increase transparency by requiring the disclosure of available overtime pay when otherwise required by law or voluntarily offered by the employer.

As noted in the NPRM, this provision will align the Department's administration of the H–2A and H–2B programs more closely. The disclosures required under §§ 655.122(l)(4) and 655.210(g)(4) in this final rule are similar to the overtime disclosure requirement under the H–2B program regulations at 20 CFR 655.18(b)(6).[44]

Finally, the NPRM also proposed corresponding amendments to Form ETA–790A and Form ETA–9142A to include dedicated spaces for disclosure of any applicable overtime pay. The Department believes these revisions will improve the consistency and accuracy of disclosures of available overtime pay, thereby providing greater notice to prospective workers of the actual terms and conditions of the job opportunity and improving the Department's enforcement of any applicable overtime pay requirements.

e. Paragraph (n) Termination for Cause or Abandonment of Employment

The NPRM proposed to revise § 655.122(n) to define termination for cause. The Department stated that this revision was necessary because a worker who is terminated for cause no longer is entitled to the three-fourths guarantee (including meals and housing until the worker departs for other H–2A employment or to the place outside the United States from which the worker came (§ 655.122(i)); outbound transportation (§ 655.122(h)(2)); and, if a U.S. worker, to be contacted for work in

[44] *See* WHD Field Assistance Bulletin 2021–3, *Overtime Obligations Pursuant to the H–2B Visa Program* (Dec. 7, 2021), *https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2021_3.pdf;* Form ETA–9142B, *H–2B Application for Temporary Employment Certification,* Sec. F(b), *https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Form-ETA-9142B-1205-0509.pdf.*

the next year (§ 655.153), each of which is an important protection that safeguards workers in the United States against adverse effect from the hiring of H–2A workers and ensures that H–2A workers are employed only when there are not sufficient able, willing, and qualified workers in the United States available to perform the work. Specifically, the NPRM proposed the creation of a new paragraph (n)(2) stating that a worker would be terminated for cause when the employer terminates the worker for failure to meet productivity standards or failure to comply with employer policies or rules. Further, the NPRM proposed that a worker would be terminated for cause only if six straightforward conditions—listed in in proposed paragraphs (n)(2)(i)(A) through (F)—were satisfied: the employee had been informed (in a language understood by the worker) of the policy, rule, or productivity standard, or reasonably should have known of the policy, rule, or productivity standard; if the termination is for failure to meet a productivity standard, such standard was disclosed on the job offer; compliance with the policy, rule, or productivity standard was within the worker's control; the policy, rule, or productivity standard was reasonable and applied consistently; the employer undertook a fair and objective investigation into the job performance or misconduct; and the employer engaged in progressive discipline to correct the worker's performance or behavior.

In 20 CFR 655.122(n)(2)(ii), the NPRM proposed to define progressive discipline as a system of graduated and reasonable responses to an employee's failure to meet productivity standards or failure to comply with employer policies or rules. The NPRM also clarified that disciplinary measures should be proportional to the failure but may increase in severity if the failure is repeated, and may include immediate termination for egregious misconduct. This paragraph further stated that, following each disciplinary measure, except where the appropriate disciplinary measure is termination, the employer must provide relevant and adequate instruction to the worker; must afford the worker reasonable time to correct the behavior or to meet the productivity standard following such instruction; and must clearly communicate to the worker that a disciplinary measure has been imposed.

In 20 CFR 655.122(n)(2)(iii), the NPRM proposed that termination for cause would not exist where the termination is contrary to a Federal, State, or local law; is for an employee's refusal to work under conditions that the employee reasonably believes will expose them or other employees to an unreasonable health or safety risk; is because of discrimination on the basis of race, color, national origin, age, sex (including sexual orientation or gender identity), religion, disability, or citizenship; or, where applicable, where the employer failed to comply with its obligations under § 655.135(m)(4) to permit workers to designate a representative to attend a meeting that contributed to the termination.

In 20 CFR 655.122(n)(2)(iv), the NPRM proposed that an employer would bear the burden of demonstrating that any termination for cause meets the requirements of paragraph (n)(2). The NPRM proposed to redesignate language in current § 655.122(n) as a new paragraph (n)(3). Proposed paragraph (n)(4) listed the recordkeeping obligations associated with any termination for cause, including recordkeeping obligations in current § 655.122(n) related to notification to the NPC and DHS, and new recordkeeping obligations if a worker were to be terminated for cause.

The Department received a significant number of comments both in support and in opposition to the proposal. After reviewing comments, this final rule adopts the proposal with modifications, discussed below. This section will first discuss general comments and responses, and then will go into greater detail about comments relating to specific language in the proposed regulations.

General Comments and Responses

Worker rights advocacy organizations, unions, commenters affiliated with academic institutions, workers, State labor and employment agencies, State Attorneys General representing 11 States, and some Members of Congress and individuals supported the proposal. An individual commented that this proposal would provide workers with an important safeguard against arbitrariness and injustice in the workplace, and another stated that the proposal would protect workers from being fired on a whim and would protect the livelihood of agricultural workers. Farmworker Justice stated that the proposal would make clear that arbitrary terminations, and terminations with no reasons given, are not for cause. Many of these commenters, including Farmworker Justice, the UFW Foundation, and a worker, echoed the Department's reasoning that clarification was necessary because of the serious consequences associated with a termination for cause, including that a worker terminated for cause is no longer entitled to payment for outbound transportation (including meals and housing until the worker departs for other H–2A employment or to the place outside the United States from which the worker came) under § 655.122(h)(2); the three-fourths guarantee under § 655.122(i); and, if the worker is a U.S. worker, the right to be contacted for employment in the subsequent year as required by § 655.153. Commenters also identified that there were additional consequences associated with unjust termination. Farmworker Justice said that workers accepting an H–2A job often invest substantial resources in that job, including travel expenses and illegal recruitment fees, which are lost investments if the worker is terminated, and workers may lose access to other job opportunities. Farmworker Justice also stated that unjustly terminated U.S. workers may struggle to obtain unemployment benefits and find a subsequent job. The California LWDA also said that terminated workers may lose access to employer-provided housing. Many commenters, including 15 U.S. Senators and 11 State Attorneys General, also stated that a clear definition of termination for cause may encourage workers to exercise their rights because pretextual terminations would become more apparent.

Conversely, employers, farm bureaus, agricultural associations, the Wyoming Department of Agriculture, employer representatives, State Attorneys General representing 22 States, one Senator, and some U.S. House Members and individuals opposed the proposed regulation. Many of these commenters, including AILA and Georgia Farm Bureau, questioned the Department's reasoning, stating that the Department only cited a few real-life examples of this issue that were insufficient to demonstrate that the problem warranted a regulatory change. Other commenters, including the New York and California Farm Bureaus, emphasized that workers are a valuable part of an employer's operations and that most employers terminate workers rarely, and only after careful consideration. Titan Farms, LLC stated that they have a 95-percent return rate of workers each year and Northern Family Farms, LLP stated they have a 98-percent return rate of workers each year and a waitlist of potential workers seeking work on their farm. Some commenters stated that, in their view, the proposal implied that most users of the H–2A program were seeking to evade regulatory obligations.

The Department recognizes that most employers using the H–2A program seek to comply with regulatory requirements

and treat their workers with dignity and respect. Employers invest significant resources in workers and most do not make termination decisions lightly. Further, the Department believes that many employers, prior to the publication of the NPRM, already operate under procedures that largely meet the standards finalized in this rule. Most of the criteria described in proposed § 655.122(n)(2) are common-sense criteria (*e.g.,* the worker knows the rule, the rule is reasonable, and compliance is within the worker's control) that many workplaces have already implemented to protect against liability under other laws (*e.g.,* anti-discrimination laws, anti-retaliation laws, and unemployment insurance laws), or simply to be fair and equitable in the workplace. Other criteria, such as the requirement that the employer engage in progressive discipline before terminating workers, ensure that workers are not terminated for minor, isolated infractions. Employers who terminate or discipline only after thoughtful consideration to ensure a fair and equitable process will be minimally affected by the final rule.

Furthermore, the Department did not intend to suggest that most employers are seeking to evade program obligations. However, through its enforcement efforts, WHD regularly finds such conduct from employers. Sometimes WHD finds terminations that are predicated on unreasonable grounds. In a recent example, an H–2A worker was terminated for seeing a doctor after being instructed to do so by a crew leader. Other times, WHD finds that rules are created for the purpose of terminating a worker. For example, WHD found that an employer terminated a corresponding worker for allegedly stealing a can of soda from the employer's truck after the worker had been informed that the soda was theirs to take. Sometimes the reason for termination is simply pretext. In this same example, the termination of the corresponding worker occurred on the same day that an H–2A worker arrived, and the investigation determined that the employer was searching for an excuse to terminate the corresponding worker and replace them with the H–2A worker.

Other times, WHD finds that employers inconsistently enforce rules and neglect to notify workers of minor transgressions that will ultimately result in termination. For example, an employer terminated six corresponding workers and provided most with no reason for their termination, but then presented WHD with evolving reasons, including an entire crew allegedly not performing well after weeks of training and workers taking unauthorized breaks. After settling on tardiness as the reason for termination, the employer could not provide any evidence of the tardiness, and the workers themselves did not recall that the employer counseled them for tardiness or informed them that tardiness was the reason for their termination. Although the employer eventually provided timecards documenting some tardiness, other workers similarly were tardy and were not terminated, suggesting that the reason for termination was pretextual.

Sometimes WHD finds that employers simply tell workers they are no longer needed for the season, or stop providing work so that the workers grow desperate and leave allegedly of their own volition (even though such a circumstance constitutes constructive discharge). Other times, employers may try to disguise the termination as job abandonment. On more than one occasion, WHD has found that employers have required workers to sign ''voluntary'' resignation forms when, in fact, the workers were terminated.

One commenter, the UFW Foundation, also provided examples of unjust terminations and discipline. For example, a Washington farmworker described that she and her husband were both terminated for ''abandoning [their] work'' after the supervisor told them to go home for a few hours, and a Georgia farmworker stated that her employer arbitrarily and selectively used productivity standards against new H–2A workers, inspecting the work of new H–2A workers and finding ''bad grapes'' to justify nonpayment of wages. The UFW Foundation also provided numerous examples of workers who were terminated because they asserted their rights. These types of schemes to evade program responsibilities are sufficiently common that the Department continues to believe that adoption of the proposal, with the modifications explained below, is warranted.

Many commenters, including the U.S. Chamber of Commerce, NCFC, and Willoway Nurseries, stated that the proposal would be too complex and burdensome to implement, particularly for small farms. Many of these commenters stated that the proposed regulations would require employers to maintain a large human resources (HR) team and contract with employment law attorneys to ensure compliance, thus increasing costs for growers. Wafla estimated that a small employer would need at least 80 hours to develop, train staff, and implement policies to comply with the proposal.

Commenters opposed the proposal for a variety of other reasons. NCFC, AmericanHort, Willoway Nurseries, Michigan Farm Bureau, and FSGA stated that the proposal was unworkable even for larger growers because corrections and instructions occur on the fly in the orchard or field. They asked if instructing someone on how to do their job was a disciplinary action or training.

U.S. Custom Harvesters, Inc. stated that the proposal was particularly difficult for custom harvesting operators because workers in that industry are often working without supervision in various locations. Some commenters, including USA Farmers, FFVA, and Seso, Inc., said that the parameters for termination were vague and subjective and would leave employers unsure as to whether they had complied with the proposed rule. MásLabor, USA Farmers, McCorkle Nurseries, Inc., and an individual questioned whether the Department had exceeded its statutory authority. Wafla stated that employers need the right to terminate workers if they are not a good fit with the work culture and environment. NCFC, FFVA, AmericanHort, Willoway Nurseries, Michigan Farm Bureau, and FSGA stated that the regulation would chill an employer's ability to terminate so-called ''toxic employees'' and thus could expose employers to allegations of a hostile work environment. MásLabor and an individual stated that the proposal stripped an employer of discretion on matters of worker misconduct. These commenters further provided the example of a worker who was openly insubordinate and obscene in the workplace, and they suggested that the employer would be required to coach the worker on how not to be insubordinate and obscene and only take further action if the behavior continued. MásLabor characterized the proposal as a ''get out of jail free'' card. USA Farmers stated that the proposal would override American common law traditions of at-will employment, and the Cato Institute similarly stated that the proposal would terminate at-will employment on H–2A farms.

First, the Department seeks to clarify a possible misunderstanding about employers' current obligations to H–2A and corresponding workers. The Department has long maintained that regulating the employment decisions made by an employer using the H–2A program is necessary to achieve statutory objectives—specifically, to ensure that H–2A workers are employed only when there are insufficient qualified, able, and available U.S. workers to complete the work, and to

ensure that the employment of H–2A workers does not adversely affect the wages and working conditions of workers in the United States similarly employed, *see* 8 U.S.C. 1188(a)(1)—and has a long history of regulating in this space. For example, the job opportunity must remain open to U.S. workers until 50 percent of the work contract has elapsed (20 CFR 655.135(d)); U.S. applicants can be rejected only for lawful, job-related reasons (20 CFR 655.135(c)(3)); and the employer may not lay off a similarly employed U.S. worker unless all H–2A workers are laid off first (and even then only for lawful, job-related reasons) (20 CFR 655.135(g)). Under both the regulations currently in effect and those adopted in this final rule, an H–2A worker or corresponding worker terminated without cause is entitled to the three-fourths guarantee (and other rights as well). These long-established obligations mean DOL has always required employers to comply with certain requirements relating to hiring and terminating workers while using the H–2A program. The regulations adopted in this final rule continue in this same vein.

Second, many aspects of this proposal are not new and many employers likely already have developed policies for compliance. Since the inception of the H–2A program, and in the H–2 program before that, the Department has been required to make determinations as to what constitutes a for-cause termination.[45] While there have not previously been regulatory factors outlining the requirements for a for-cause termination, the Department previously stated in *Field Assistance Bulletin 2012–1* that ''it is important to inquire into the circumstances surrounding the termination of the worker's employment . . . because of the potential for the employer to mischaracterize termination for cause, the underlying facts of any such assertion should be explored through interviews and any other relevant documentation that can be obtained.'' [46]

Historically, when determining whether a worker has been terminated for cause, the Department has reviewed all relevant factors, including, for example, the reasonableness of the rule, consistent application of a rule among employees, and whether the employer fairly reviewed the misconduct or job performance. The Department similarly reviews all facts of the case when investigating allegations of retaliatory termination or improper discharge of U.S. workers in the H–2A program, as well as alleged violations of other laws that the Department enforces (*e.g.,* if a worker is terminated for taking leave to which they are entitled under the Family and Medical Leave Act).

In the examples listed earlier in this section, WHD cited violations, computed back wages, and assessed civil money penalties because workers were terminated not-for-cause and the employer failed to provide the required remedies. Factors that alerted WHD that the terminations were not-for-cause included items such as the reasonableness of the termination (*e.g.,* an employer tells a worker to see a doctor and then terminates them for doing so, or a worker was specifically informed that he could take a soda and then terminated for doing so), and consistent application among employees (*e.g.,* all workers are late, but only some were terminated for lateness). In these enforcement efforts, WHD applied the Department's understanding of what criteria signify termination-not-for-cause, and in the final rule, the Department codifies many of these criteria in regulation. Codifying these criteria will aid WHD's enforcement efforts and will allow employers to more fully understand the scope of their obligations and to better manage their workplaces.

These criteria are not unique to laws that WHD enforces. Similar, albeit not identical, criteria exist in other laws as well. State unemployment compensation laws, which should be familiar to most employers, generally define eligible recipients as having separated from work through no fault of their own (among other criteria).[47] Therefore, an employer challenging an unemployment claim is accustomed to showing that, for example, a worker was terminated because of willful misconduct, as opposed to a termination that was no fault of the worker. Many State laws deny unemployment benefits to workers discharged because they were in ''knowing violation of a reasonable and uniformly enforced rule,'' [48] and, in interpreting their own laws, State courts may review factors such as whether a rule or policy was consistently enforced, whether the worker knew or should have known about the policy or rule, and whether the rule was reasonable. See, *e.g., Coahoma Cty.* v. *Miss. Emp. Sec. Comm'n,* 761 So. 2d 846, 849–50 (Miss. 2000) (finding that a worker was not engaged in misconduct because the rule was not fair and consistently enforced); *Rios Moreno* v. *Ariz. Dep't of Econ. Sec.,* 873 P.2d 703, 705 (Ariz. Ct. App. 1994) (finding that the worker was not engaged in misconduct because there was no evidence that he should have known of the rule he was claimed to have violated); *Caterpillar, Inc.* v. *Unemployment Comp. Bd. of Rev.,* 703 A.2d 452, 456–57 (Pa. 1997) (finding that a violation of a rule cannot be considered willful misconduct if the rule was applied in an unreasonable manner). There are significant parallels between unemployment insurance laws and the H–2A termination for cause provision. Under both, the employer may terminate workers for any lawful reason, but may have financial or other obligations to workers who are terminated for reasons outside of the worker's control, whether not-for-cause (under H–2A), or through no fault of the worker (under unemployment insurance laws). Additionally, in the context of Federal and State anti-retaliation and anti-discrimination protections, courts routinely cite inconsistent or disparate discipline as evidence of pretext for an unlawful termination. *See, e.g., Chattman* v. *Toho Tenax Am., Inc.,* 686 F.3d 339, 348–49 (6th Cir. 2012); *Gordon* v. *United Airlines, Inc.,* 246 F.3d 878, 8992–93 (7th Cir. 2001); *Graham* v. *Long Island R.R.,* 230 F.3d 34, 43 (2d Cir. 2000).

The Department acknowledges that some aspects of this final rule as adopted—specifically, the requirements that an employer engage in progressive discipline and maintain particular records (§ 655.122(n)(2)(i)(E) and (n)(4)(ii)–(iii))—may require some employers to develop new procedures for compliance. However, the Department believes that these aspects of the proposal complement the other provisions to ensure that any for-cause termination is sufficiently warranted by the disciplinary circumstances and that a record of those circumstances exists.

As explained in the NPRM, progressive discipline ensures that

[45] *See, e.g.,* Final Rule, *Temporary Employment of Alien Agricultural And Logging Workers in the United States,* 43 FR 10306, 10315 (Mar. 10, 1978) (1978 Final Rule) (employer need not pay outbound transportation for workers terminated for cause); 1987 H–2A IFR, 52 FR 20496, 20501, 20515 (where a worker is terminated for cause, the worker is not entitled to the three-fourths guarantee and the employer need not pay outbound transportation).

[46] WHD, Field Assistance Bulletin No. 2012–1, H–2A ''Abandonment or Termination for Cause'' Enforcement of 20 CFR 655. 122(n) (Feb. 28, 2012), *https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2012_1.pdf.*

[47] *See* ETA, *Unemployment Insurance Fact Sheet, https://oui.doleta.gov/unemploy/docs/factsheet/UI_Program_FactSheet.pdf* (last accessed Feb. 8, 2024); ETA, *The Comparison of State Unemployment Insurance Laws* (2023), *https://oui.doleta.gov/unemploy/pdf/uilawcompar/2023/complete.pdf* (last accessed April 4, 2024).

[48] *See, e.g.,* Conn. Gen. Stat. Ann. § 31–236(a)(16)(B) (2022); Iowa Code § 96.5(2)(d)(2) (2023); Mass. Gen. Laws ch. 151A § 25(e) (2018).

workers are not harshly punished for minor, first-time infractions and reinforces the conditions for termination found in § 655.122(n)(2)(i), specifically that rules, policies, and productivity standards are communicated to the workers and are reasonable. *See* 88 FR 63783. A for-cause termination nullifies a worker's entitlement to important protections (§§ 655.122(h)(2), 655.122(i), and 655.153) that serve the statutory purpose of preventing adverse effect on the wages and working conditions of similarly employed workers in the United States, and ensuring that an employer only hires H–2A workers when there are insufficient able, willing, and qualified workers in the United States.[49]

The Department therefore has a responsibility pursuant to 8 U.S.C. 1188(a)(1) to ensure that an employer is relieved of these obligations only in situations where the employer has sufficient justification to terminate a worker for cause. The protections afforded by §§ 655.122(h)(2) (outbound transportation), 655.122(i) (three-fourths guarantee, including meals and housing until the worker departs for other H–2A employment or to the place outside the United States from which the worker came), and 655.153 (the right of a U.S. worker to be contacted for work in the next year) lose all meaning if any infraction or failure to meet performance standards, no matter how minor or occasional, results in the loss of those protections. A progressive discipline process applied in a rational and consistent manner to all employees with similar infractions ensures that consequences are commensurate with the severity of the infraction and that the most serious consequences (*i.e.,* termination) are reserved for the most serious offenses. However, a progressive discipline process also acknowledges that frequent minor infractions may compound the severity of misconduct and provides employers with the tools to manage their workforce, up to and including termination for a frequent violator of a relatively non-serious rule (*e.g.,* arriving late for work) if all the proposed criteria for for-cause termination have been met.

In response to criticisms both that the proposal was too complex and too vague, the Department recognizes that the complexity of administrative and management procedures will vary among employers. Procedures developed by a small family farm with two employees will look very different than those developed by a corporation with thousands of workers. Owing to these differences, as well as to the unique circumstances in different regions and industries, the Department opts to maintain flexibility in the regulations for employers to develop their own progressive discipline system and maintain supporting records. While many commenters interpreted this flexibility as being too vague, the Department continues to believe that this flexibility allows employers to develop and implement the systems that work best for their businesses. A progressive discipline system need not be overly complex to comply with the Department's definition. In its enforcement, the Department will accept progressive discipline and recordkeeping systems as compliant so long as they conform with the regulatory requirements described in § 655.122(n)(2)(ii) and 655.122(n)(4). Similarly, the Department declines to identify certain behaviors as being worthy of termination or not as it believes that the circumstances surrounding these behaviors is crucial to determine the appropriate action and this final rule provides the employer with the appropriate framework to make these determinations, including by allowing for immediate termination for egregious misconduct, discussed in greater detail below.

The Department disagrees with commenters who stated that the proposal, and particularly progressive discipline, is inappropriate for use in agricultural settings or by small growers. Use of progressive discipline, and maintenance of the associated records, permeates the employment landscape in the United States, including in agricultural industries. Some organizations supporting the agricultural industry writ large or specific agricultural sectors provide resources and guidance to assist agricultural employers to implement progressive discipline systems that may be adaptable to H–2A program requirements. Some employers already disclose progressive discipline policies in their job orders[50] and one anonymous employer commented that they already had a progressive discipline system. Similarly, a Departmental ALJ has previously held an employer liable for the three-fourths guarantee and transportation costs after finding that the employer terminated a worker without following the progressive discipline process that it disclosed in the job order.[51]

Some commenters characterized the recordkeeping provisions (especially pertaining to records of discipline that do not ultimately result in termination) as a significant portion of the perceived burden of the progressive discipline system. The Department emphasizes that recordkeeping need not be complex or take any particular format (although it should be understandable to the worker and to outside parties, such as WHD investigators). Therefore, the Department will accept recordkeeping in any format (*e.g.,* handwritten notes, computer spreadsheet, notation in worker file), so long as the content complies with the regulations. That is, the records must document each infraction and step of progressive discipline, any evidence the worker presented in their defense, any investigation related to the discipline, and any subsequent instruction afforded the worker, in compliance with § 655.122(n)(4)(ii). Additionally, the employer must provide a copy of this documentation (except for a record of any investigation related to the discipline) to the worker in a language understood by the worker within 1 week of the implementation of the disciplinary measure, in compliance with § 655.122(n)(4)(i)(E).

These records form an important part of the progressive discipline process; without the records, the employer would be unable to show the record of misconduct or failure to comply with

[49] *See* the NPRM for a more extensive analysis as to how the protections afforded by § 655.122(h)(2), § 655.122(i), and § 655.153 protect against adverse effect to the wages and working conditions of similarly employed workers in the United States and ensure that H–2A workers are only hired if there are insufficient workers who are able, willing, qualified, and available to do the work. *See* 88 FR 63781.

[50] See, *e.g.,* H–300–23035–750680: ''Violation of these rules will be disciplined as follows First offense: Oral warning and correction. Second offense: Written warning and unpaid leave for balance of day. Third/Final Offense: immediate job termination.'' H–300–22333–610058: ''The employer generally uses a 3-step disciplinary process: (1) verbal warning for first violation; (2) written warning for second violation; and (3) termination upon third violation. Certain violations are so severe that they may result in termination without prior warning.''

[51] *See In re John Peroulis & Sons Sheep, Inc.,* ARB Case No. 2013–0083, 2015 WL 4071576 (June 15, 2015), at *2, n. 5 (quoting the work contract as disclosing that ''[t]ermination may be carried out by the employer but only after *two written warnings* (not necessarily for the same offense). The warnings will be written in a language understandable to the worker and the worker will be given an opportunity to sign the warning. Termination may be carried out without first having issued any warning if the employee's offense is of a severe or emergency nature such as a threat to the life, safety and/or health of the worker, livestock, or others; or, is the intentional destruction of property.'') *See also In re John Peroulis & Sons Sheep, Inc.,* ALJ Case No. 2012–TAE–00006 (ALJ Mar. 19, 2013) (Order on Cross-Motions for Summary Decision); (ALJ June 27, 2013) (Decision and Order); re-issued on different grounds after remand (ALJ May 24, 2017) (Order on Remand).

performance expectations that ultimately resulted in the termination. While the Department recognizes many employers will be required to maintain disciplinary records even when workers are not terminated, these records are relevant for two reasons: (1) in case the misconduct or failure to meet performance standards eventually rises to the level or the frequency at which termination is necessary; and (2), to show consistent application of disciplinary procedures amongst the employer's agricultural workforce. These records may also provide the employer with exculpatory evidence if under investigation for illegally terminating a U.S. worker in violation of § 655.135(g), retaliating against a worker for engaging in a protected right in violation of § 655.135(h), or engaging in discriminatory behavior in violation of Federal or State anti-discrimination laws.

Comments on Specific Provisions

The paragraphs below describe and discuss the comments on specific provisions. In the NPRM, the Department did not propose substantive changes to language in § 655.122(n)(1) (which outlines the process for notifying authorities about the abandonment or termination for cause of a worker and the obligations of which the employer is relieved upon proper notification), but received one comment, and ultimately does not adopt changes to that paragraph in this final rule. The NPRM proposed in § 655.122(n)(2) to define termination for cause, establish six conditions to be satisfied in order for a termination for cause to exist, list reasons for termination that would not constitute termination for cause, and require the employer to bear the burden of demonstrating that any termination for cause meets these requirements. The Department received comments on these provisions, and this final rule clarifies the definition of termination for cause; finalizes five conditions, not six, that must be satisfied in order for a termination for cause to exist; clarifies among whom a policy, rule, or performance expectation must be consistently applied; adds a definition of egregious misconduct; lists additional reasons for termination that would not constitute termination for cause; and makes other minor edits as described in more detail below. The NPRM did not propose substantive changes to language in § 655.122(n)(3) (regarding when job abandonment begins), received one comment, and does not adopt changes in this final rule. The NPRM proposed some changes to recordkeeping obligations in § 655.122(n)(4) and received comments, and this final rule adopts the proposed language with a minor clarification.

Consequences for a Worker Terminated for Cause or Who Voluntarily Abandons Employment, § 655.122(n)(1)

The NPRM did not propose substantive changes to the language in this paragraph, which outlines the consequences for a worker who is terminated for cause or voluntarily abandons employment—namely, loss of access to the three-fourths guarantee; payment for outbound transportation; and, if a U.S. worker, the right to be called back for work the next year. Farmworker Justice suggested that the provision be expanded to require employers to ''call-back'' any H–2A workers who were not terminated for cause for the next year's contract. The Department declines to make this change as it did not propose any such revisions in the NPRM.

Definition of Termination for Cause, § 655.122(n)(2)

As described earlier in this section, the NPRM proposed that a worker would be terminated for cause when the employer terminates the worker for failure to meet productivity standards or for failure to comply with employer policies or rules. This final rule adopts the proposed regulation with modifications. Specifically, in this final rule, the Department removes the specific reference to ''productivity standards'' and defines termination for cause as occurring when the employer terminates the worker for failure to comply with employer policies or rules or satisfactorily perform job duties in accordance with reasonable expectations based on criteria described in the job offer.

Some commenters, including Northern Family Farms, LLP, McCorkle Nurseries, Inc., and NCAE, stated that the definition as proposed was too narrow because it did not allow for terminations for qualitative reasons. Commenters stated that qualitative evaluations are essential for an employer's ability to manage its workforce and hold workers to appropriate standards, and that growers producing fresh market produce (*i.e.,* produce for sale in the grocery store) are likely to emphasize quality of work over quantity produced, which would be measured by a productivity standard. MásLabor stated that the NPRM was ambiguous as to whether a failure to comply with employer policies or rules would allow for qualitative criteria.

The Department agrees with commenters that an employer's ability to manage their workforce by assessing work quality is essential. Not all work is quantifiable and, even when quantifiable, the quality of work performed may be of equal or greater importance than the speed at which it is performed. For example, a worker who harvests peaches such that every peach is bruised may not be performing up to the employer's standards, even if meeting outlined productivity standards. In the NPRM, the Department intended the term ''employer policies and procedures'' to include qualitative criteria for evaluation. However, commenters stated that the proposed regulatory language was unclear on this point. As such, the Department modifies the proposal to explicitly include qualitative criteria for evaluation, as explained more fully below. MásLabor also stated that it was reasonable for the Department to require employers to articulate in the job offer the standards by which workers are measured, including the level of skill and care exhibited in the performance of duties (*e.g.,* performing duties in a careful manner that protects the marketability of the crop). The Department agrees and has incorporated the agent's feedback into this final rule as described below.

The Department modifies the definition to allow for termination for cause if a worker fails to ''satisfactorily perform job duties in accordance with reasonable expectations based on criteria listed in the job offer.'' The Department intends for the term ''criteria'' to be broad and encompass the components of a job offer, including job qualifications and requirements as described in § 655.122(b), and job duties. If terminating a worker for failure to satisfactorily perform job duties, the employer must be able to identify the specific criteria described in the job offer upon which they are basing the termination. If a job duty is not included in the job offer, failure to satisfactorily perform that job duty is not a valid reason for termination for cause. The Department includes the term ''reasonable expectations'' in the regulatory text to allow for some flexibility in applying broad or general criteria. The Department uses the same definition of ''reasonable'' as discussed in the preamble corresponding with proposed § 655.122(n)(2)(i)(D).[52]

After consideration of these comments, the Department removes the explicit reference to productivity standards in the adopted regulatory language. However, if an employer uses productivity standards to evaluate employees or as a condition of job

[52] Proposed § 655.122(n)(2)(i)(C).

retention or both, that employer would be required to describe this standard as one of the criteria in the job offer to comply with both this section and § 655.122(l)(3).

MásLabor also suggested that the Department require that employers disclose behavioral attributes (such as not taking excessive breaks during productive hours, no loafing or recalcitrance, and an ability to maintain respectful and positive relations with supervisors and other workers) in the job offer when those attributes may serve as a basis for termination. The Department declines to make this change. The Department believes that such behavioral attributes better fit within the realm of policies and rules, and previously stated in the NPRM that policies and rules need not be disclosed in the job offer (although they must be clearly communicated to the workers). *See* 88 FR 63782. The Department continues to believe that it should not require all policies and procedures to be disclosed in the job offer, as policies and rules may be extensive and fill an entire sizable employee handbook. However, while the Department will not require it, an employer may include whatever policies and rules in the job offer that it deems appropriate, as long as they do not conflict with applicable law or regulation. As § 655.122(n)(2)(i)(A) requires that the worker be informed of the policy or rule, and § 655.122(n)(iv) states that the employer has the burden of showing that any termination for cause meets the requirements of paragraph (n)(2), inclusion of the policy or rule in the job offer will document to the Department's satisfaction that the worker was informed of the policy or rule, so long as the job offer was accurately communicated to the worker (usually via a copy of the work contract provided in compliance with § 655.122(q)). The Department notes that many job orders currently include policies and rules, such as policies pertaining to cell phone usage.

Conditions for Termination for Cause: Worker Knowledge, § 655.122(n)(2)(i)(A)

The first of these conditions is that the employee has been informed (in a language understood by the worker) of the policy, rule, or productivity standard, or reasonably should have known of the policy, rule, or productivity standard. The Department adopts the proposal with minor modifications for readability and conformance with changes to § 655.122(n)(2) as explained below.

There were no comments explicitly in opposition to this first criterion. Farmworker Justice emphasized that this criterion is critical to any termination for cause provision and provided numerous suggestions as to how to strengthen this provision. These suggestions included requiring employers to inform workers in a variety of formats to ensure accessibility—including using images to communicate to workers with low literacy skills and large font size and easy-to-read fonts for workers with visual impairments—and they stated that workers need the opportunity to ask questions. Farmworker Justice also suggested that all policies and rules be individually provided in writing to the workers, that policies and rules not be permitted to be communicated solely in meetings or via posters, and that the employer has the burden to show that it has a policy and that any union received a copy of the policy. Farmworker Justice also urged the Department to interpret ''reasonably should have known'' narrowly and place the burden on the employer to show why a worker reasonably should have known about any rules or policies that were not explicitly communicated. The Department declines to make further changes to the regulation as it believes that this final rule addresses many of the commenter's concerns as discussed below.

The regulation as proposed and as finalized requires that the worker be informed (in a language understood by the worker), or reasonably should have known, of the policy, rule, or performance expectation. If an employer informs a worker of a policy or rule in such a way that the worker could not reasonably be expected to understand, the Department will not consider that worker to be informed of the policy or rule. The Department will review on a case-by-case basis whether the worker reasonably could be expected to understand the policy or rule in the way that it was communicated. The Department declines to require employers to provide all policies and rules in writing and individually to workers. The Department appreciates the commenter's concerns that information provided in meetings may be unclear and that workers may be reluctant to review posters and expects that many employers will provide many policies and rules in writing (*e.g.,* in an employee handbook or a list of rules). However, the Department believes that verbal notices, meetings, and posters may be effective avenues for employers to communicate important information to workers, and sometimes may be more effective than dissemination of a written policy that the worker may not read. The Department will not consider a worker to be informed of a policy or rule if the communication occurs in a meeting where the worker is unable to hear or understand, or via a poster that workers are discouraged from reviewing or placed in a location that workers do not frequent. Additionally, the Department reminds employers that, in an investigation by the Department, WHD will confirm that the worker has been informed, or reasonably should have known, of the rule or policy—*i.e.,* the meeting or verbal notice occurred, the employer disseminated the written notification, or the employer posted the poster.

Additionally, the Department revises § 655.122(n)(2) to require that employers disclose in the job offer all criteria for evaluation, not just productivity standards. The work contract, which must be provided in writing no later than when an H–2A worker applies for the visa or the first day that a corresponding worker begins work, § 655.122(q), discloses the terms of the job offer and thus should include these criteria. The provision of this document while the H–2A worker remains in their home country allows them to review terms and conditions with trusted family, friends, or advisors. The Department believes that this will alleviate some of the commenter's concerns.

As stated in the preamble to the NPRM, if the employer does not explicitly communicate the policy or rule, the Department will review, in the event of a termination, on a case-by-case basis, whether a reasonable person would know that the policy or rule exists. For example, a reasonable person would know that conduct that is obviously illegal, such as unlawful sexual harassment or assault, can be a basis for discipline or termination. Similarly, a reasonable person would know that purposefully damaging the crop would be a basis for discipline or termination. *See* 88 FR 63782.

With respect to the suggestion that the regulation clarify that the employer has the burden of proof that it has informed workers of policies and rules, or that workers reasonably should have known of the policy or rule, § 655.122(n)(2)(iv), both in the NPRM and as adopted in this final rule, already communicates this. The Department declines to require an employer to provide any union with a copy of rules and policies as the Department believes that this would be a significant policy proposal warranting greater development and public feedback via the rulemaking process. However, a worker may share

documents related to their employment with whomever they wish, including unions, and an employer may not retaliate against a worker for having done so when such sharing constitutes protected activity under § 655.135(h) or is in furtherance of such protected activity. For example, if a worker seeks advice from a legal services provider or other representative regarding a proposed disciplinary action or deduction from wages, or consults with other workers regarding whether they are being paid the proper piece rate as required by the job order, such activity would be protected.

Conditions for Termination for Cause: Compliance Is Within the Worker's Control, § 655.122(n)(2)(i)(B) [53]

The Department proposed that the third criterion for termination for cause (second as adopted in this final rule) would require that compliance with the policy, rule, or productivity standard is within the worker's control. The Department adopts this proposal with a minor edit to change ''productivity standard'' to ''performance expectations'' to conform with edits to § 655.122(n)(2), and redesignates the paragraph as (n)(2)(i)(B).

No commenters explicitly opposed this criterion. Farmworker Justice asked the Department to provide additional details, examples, or both as to what would be evaluated to determine if compliance was within the worker's control. The Department will consider the following examples as illustrative of situations where compliance with a policy, rule, or performance standard may fall outside the worker's control: the appropriate tools or equipment are broken, faulty, or not provided; the crop is immature and not fully ready for harvest, but the worker is held to a productivity standard for a fully mature crop; workers are unable to meet productivity standards because of waiting time (*e.g.,* for fields to dry, or for the product to be weighed and measured); performance is evaluated on a per-crew basis instead of a per-worker basis, and a worker has no control over their coworkers' performances; and all residents of a housing unit are held responsible for housing policy violations committed by one worker. These examples are intended to be illustrative, not exhaustive.

Farmworker Justice also suggested that any disclosure of a productivity standard include a notice that workers with disabilities may request reasonable accommodation. The Department declines to make this change but will make referrals to the Equal Opportunity Employment Commission as appropriate. Additionally, the Department notes that employers must comply with all applicable Federal, State, and local laws and regulations during the period of employment that is the subject of the *Application for Temporary Employment Certification.* 20 CFR 655.135(e).

Conditions for Termination for Cause: Reasonableness and Consistent Application, § 655.122(n)(2)(i)(C) [54]

The Department proposed that the fourth criterion (third as adopted in this final rule) would require that the policy, rule, or productivity standard is reasonable and applied consistently. This final rule adopts this proposal with minor edits to change ''productivity'' to ''performance'' to conform with edits to § 655.122(n)(2), to confirm that consistent application must occur amongst the employer's H–2A workers and workers in corresponding employment, and to redesignate the paragraph as § 655.122(n)(2)(i)(C).

MásLabor stated that the term ''applied consistently'' left no room for consideration of degrees of severity in making termination decisions. MásLabor stated that true congruency in employment decisions is impossible because the contributing factors are so varied. They suggested that the Department strike the term ''applied consistently'' and add qualifiers that expressly allow for discretion, such as degree of severity, whether the infraction is a first offense or a repeat violation, and whether termination considered other infractions or performance issues.

The Department believes that it is reasonable to require an employer to apply rules, policies, and performance standards (both qualitative and quantitative) consistently among its workforce. It is fundamentally unjust to hold some workers to a standard or rule with which other workers are not required to meet or comply. However, the consequences of failure to comply with rules or standards may vary depending on the employer's progressive discipline policy as required by § 655.122(n)(2)(ii). The Department believes that the language as adopted affords employers the flexibility to consider these additional qualifiers that másLabor suggested, such as degree of severity and frequency of the offense, when determining the appropriate disciplinary measure. Two workers with equivalent disciplinary records who both are equally tardy, or who both have equally failed to meet performance standards, should be subject to the same or equivalent discipline (or no discipline), depending on the employer's procedures. On the other hand, a worker who is 45 minutes tardy may face different consequences than a worker who is 3 minutes tardy. Similarly, as long as any disciplinary actions are undertaken as part of progressive discipline, a worker who is tardy every day may face different consequences than a worker who is tardy for the first time, and a worker with a legitimate excuse for tardiness may face different consequences than a worker without an excuse. In these examples, the employer has consistently enforced a rule (that workers should not be tardy) but is considering legitimate factors (such as severity of the violations, frequency of the infraction, and explanation from the worker) when determining appropriate disciplinary consequences. A progressive discipline system of the type that the Department proposed and adopts here, where discipline involves graduated and reasonable responses to worker misconduct or failure to meet performance standards and where disciplinary measures are proportional to the misconduct or failure but may increase in severity if the misconduct or failure is repeated, actually requires the employer to make determinations of the type the commenter suggested. The Department believes that this comment demonstrates the importance of a progressive discipline system as well as recordkeeping; an employer may impose a severe disciplinary measure after a relatively minor infraction because of a history of other offenses, but must be able to produce a record of those offenses.

AILA, másLabor, wafla, and USA Farmers disagreed with the use of the term ''reasonable,'' saying that the term is too subjective. Farmworker Justice supported the provision, but recommended that the Department define how a rule, policy, or standard is reasonable. Farmworker Justice also suggested that the Department define housing rules as being reasonable only when the purpose is to preserve the safety and health of the workers. The Department believes that the term ''reasonable'' is appropriate and sufficient in this provision and therefore declines to modify the regulation, and provides additional explanation in this section.

The Department will consider a policy, rule, or performance expectation to be reasonable where it clearly represents the employer's permissible interests, meaning that the rule has a

[53] Proposed § 655.122(n)(2)(i)(C).

[54] Proposed § 655.122(n)(2)(i)(D).

clear relationship to the employer's legitimate business needs. This definition is consistent with how some State courts have interpreted the term ''reasonable'' in the context of unemployment benefits. *See, e.g., Best Lock Corp.* v. *Review Bd. of Ind. Dep't of Emp. & Training Servs.,* 572 NE2.d 520 (Ind. Ct. App. 1991); *Snyder Indus., Inc.* v. *Otto,* 321 NW2d 77 (Neb. 1982). For example, the Department will not consider housing rules to be reasonable if they are unrelated to safety, health, legal, or other legitimate interests of the employer. Farmworker Justice stated that some workers have been terminated for ''having too many cars at the labor camp''; the Department would not consider such a rule to be reasonable unless the employer can show that the number of cars at the labor camp affects the employer's legitimate interests.

An employer's interest will not be considered legitimate where it is contrary to Federal, State, or local law. For example, the Department will not consider rules to be reasonable if they unduly restrict workers' movement or communication in off-work time (*e.g.,* no cell phones permitted in the housing, or workers may only leave if escorted by a supervisor) or are discriminatory (*e.g.,* women—but not men—residing in housing must ensure that the residence is maintained in a clean and tidy manner). To be considered reasonable, it must also be possible to comply with a policy, rule, or performance expectation, meaning that a worker can feasibly follow the rule or policy, or meet the performance expectation, in the context of the specific circumstances. The Department will consider all facts of the situation when determining whether compliance with the rule, policy, or performance expectation is possible.

As stated earlier in this section, a requirement that rules and policies be reasonable and enforced consistently is not novel or unique to this final rule. Many State adjudicators examine the reasonableness and consistent enforcement of rules when determining when to award unemployment compensation, and selective enforcement of rules may also result in disparate treatment of similarly situated employees, thus indicating illegal discrimination. Even in the Department's H–2A enforcement, in the examples described earlier, lack of consistent application of rules or policies sometimes is used as evidence that the employer had terminated a worker not-for-cause. In other words, employers must already ensure that their rules are reasonable and consistently enforced.

Farmworker Justice encouraged the Department to codify in regulations that productivity standards must be static, quantifiable, and objective. The Department believes that clarification in the preamble is sufficient, and notes that productivity standards no longer appear in § 655.122(n) in this final rule (although they continue to appear in § 655.122(l)(3) and this topic is discussed further in the corresponding preamble). Some commenters, including IFPA, TIPA, GFVGA, NHC, Titan Farms, LLC, and an individual, commented that the term ''applied consistently'' was unclear in terms of the comparators (*i.e.,* among whom the rule should be consistently applied). Farmworker Justice suggested that the employer be required to show consistent applicability of a rule, policy, or standard across its corporate structure. This final rule clarifies that the rule, policy, or performance expectation must be applied consistently amongst the employer's H–2A workers and workers in corresponding employment. The Department believes that this is the appropriate class of comparators because these workers will be engaged in the same job duties at the same time. Policy and rule changes from year to year may occur, and therefore the Department does not think it necessary to require consistency over a longer period of time than that covered by an *Application for Temporary Employment Certification.* However, to the extent that workers do return year after year and encounter different policies, rules, and performance expectations, the employer should ensure the workers are aware of any changes to comply with § 655.122(n)(2)(i)(A). Where an employer has multiple *Applications for Temporary Employment Certification* and corresponding job orders covering different scopes of work at the same time, these groups of workers may be held to policies or performance expectations unique to the criteria listed in the job order (*e.g.,* a supervisor employed under one job order may be held to a different standard of conduct than a non-supervisor employed under a different job order, or a truck driver employed under one job order may be required to maintain a Commercial Driver's License whereas a harvester employed under a different job order may not). While the Department understands Farmworker Justice's desire for consistency in all levels of a corporate structure, such a requirement may require an employer to hold workers in very different positions to the same standard, potentially resulting in illogical outcomes and contradicting the requirement found in § 655.122(n)(2) of this final rule that performance expectations be based on criteria listed in the job order.

Finally, Farmworker Justice stated that the employer should bear the burden of showing that policies, rules, and standards are applied consistently. The Department believes that this requirement is already incorporated in the regulations in § 655.122(n)(2)(iii), which provides that ''the burden of demonstrating that any termination for cause meets the requirements'' in § 655.122(n)(2) falls on the employer.

Conditions for Termination for Cause: Fair and Objective Investigation, § 655.122(n)(2)(i)(D) [55]

The Department proposed that the fifth criterion (fourth as adopted in this final rule) would require that the employer undertake a fair and objective investigation into the job performance or misconduct. In this final rule, the Department adopts the language as proposed but redesignates the paragraph as (n)(2)(i)(D).

MásLabor stated that the terms ''fair'' and ''objective'' were unclear and subjective. MásLabor requested that, absent a clear, unambiguous, and easily enforced and understood definition, this provision should be removed. Farmworker Justice supported the Department's proposal, but similarly requested clarification on what constituted a fair and objective investigation. The Department believes that these terms are clear given their common meanings and are often used in law without definition. *See, e.g., O'Rourke* v. *City of Lambertville,* 963 A.2d 339 (N.J. Super. Ct. App. Div. 2008); *Adamovich* v. *Pa. Dep't of Pub. Welfare,* 504 A.2d 952 (Pa. Commw. Ct. 1986). A fair and objective investigation means that an employer will evaluate the job performance or misconduct impartially and without favoritism, and that it will not assume that the worker engaged in misconduct or failed to meet performance expectations before reviewing relevant facts.

Farmworker Justice also requested that the Department require specific steps in a fair and objective investigation, including informing the worker of the process; giving written notice of the allegations; and providing the worker an opportunity to provide information in response. The Department declines to make this edit, as these steps are covered in this final rule at § 655.122(n)(2)(i)(E), which provides a definition of progressive discipline that includes components

[55] Proposed § 655.122(n)(2)(i)(E) in the NPRM.

such as, among other things, notification, instruction by the employer, and opportunity to correct conduct. Finally, Farmworker Justice suggested that any fair and objective investigation include a worker interview with a competent interpreter, if necessary. Farmworker Justice noted that sometimes a supervisor with a biased viewpoint serves as interpreter in investigatory interviews. The Department does not believe that a worker interview will always be a necessary component of a fair and objective investigation, and therefore declines to expressly incorporate this requirement into the regulation. However, the Department cautions employers that, if it determines a supervisor acted in bad faith when interpreting (*e.g.,* by deliberately mistranslating a worker's explanation to paint the supervisor in a better light), the Department may conclude that the employer did not conduct a fair and objective investigation. Additionally, this final rule requires an employer to permit any worker engaged in agriculture as defined and applied in 29 U.S.C. 203(f) to designate a representative to attend any investigatory interview that the worker reasonably believes might result in disciplinary action (*see* § 655.135(m)), and this representative may serve as an interpreter.

Conditions for Termination for Cause: Progressive Discipline, § 655.122(n)(2)(i)(E) [56]

The Department proposed that the sixth criterion (fifth in this final rule) would require that the employer correct the worker's performance or behavior using progressive discipline. Additionally, the Department proposed to define progressive discipline as a system of graduated and reasonable responses to an employee's failure to meet productivity standards or failure to comply with employer policies or rules. The Department further proposed that disciplinary measures should be proportional to the infraction, but may increase in severity if the infraction is repeated, and may include immediate termination for egregious misconduct.

The NPRM also proposed that, prior to each disciplinary measure, the employer must notify the worker of the infraction and allow the worker to present evidence in their defense. Following each disciplinary measure, except where the appropriate disciplinary measure is termination, the employer must provide relevant and adequate instruction to the worker and afford the worker reasonable time to correct the behavior or meet the productivity standard following such instruction. The employer must document each disciplinary measure, the evidence the worker presented in their defense, and the resulting instruction, and must clearly communicate to the worker that a disciplinary measure has been imposed.

This final rule adopts this proposal with minor edits. Specifically, the Department edits ''productivity standard'' to ''performance expectation'' to conform with edits to § 655.122(n)(2), defines egregious misconduct in the regulation, clarifies that the infraction must be documented, and requires that the employer must provide a copy of documentation to the worker within one week of the disciplinary measure. Also, this final rule combines two separate paragraphs in the NPRM into one paragraph at § 655.122(n)(2)(i)(E). The Department received a substantial number of general comments, summarized above, both in support and in opposition to the inclusion of a progressive discipline condition. Comments on the regulatory language and specific components of a progressive discipline system are discussed in this section.

Farmworker Justice stated that an employer's progressive discipline policies should articulate steps with specific examples of proportionality regarding common rule violations, such as tardiness. Farmworker Justice also stated that the Department's regulations should require consideration of mitigating and extenuating circumstances and list out the types of egregious behavior that could lead to immediate termination and the mitigating factors that must be considered. The Department declines to incorporate additional requirements for an employer's progressive discipline system into the regulation. As previously mentioned, the Department opts to maintain flexibility in the regulations for employers to develop their own progressive discipline system that may include consideration of mitigating and aggravating factors and maintain supporting records. The Department believes that this flexibility protects workers while allowing employers to develop and implement the systems that work best for their businesses.

Farmworker Justice also suggested specific steps for a progressive discipline policy, including the requirements that an employer document each step in writing; prepare all documents contemporaneously; provide all documents to the worker within a short period of time; provide documentation to a worker union; communicate the consequences of any future misconduct or failure to meet performance standards; and provide a contemporaneously created written notice to the worker. Sections 655.122(n)(2)(i)(E) and (n)(4) in this final rule already require an employer to document each disciplinary measure. The Department modifies § 655.122(n)(2)(i)(E) in this final rule to require an employer to provide a copy of the resulting documentation to the worker, in a language understood by the worker, within 1 week of the implementation of the disciplinary measure. Even if the disciplinary measure is a verbal warning (which is often the first step of a progressive discipline system), the regulations (both as proposed and as adopted) require the employer to later document that verbal warning. Therefore, it should not be overly burdensome to provide a copy of that documentation to the worker, although additional time may be required to translate the documentation. Additionally, the Department believes that 1 week is sufficient time for any relevant instruction to be provided or planned. Because of this change, the Department removes the regulatory requirement that the employer must ''clearly communicate to the worker that a disciplinary measure has been imposed,'' as the provision of such documentation will communicate this concept.

The Department declines to modify the regulations to require that documentation be maintained contemporaneously. Some corrections in the field will be verbal and, therefore, may not be documented until a manager or foreperson returns to the office that evening or the next day. Therefore, these records would not be created ''contemporaneously'' in the strictest definition of the term. However, the requirement that documentation be provided to the worker within 1 week means that documentation must be created within 1 week. The Department will view with great skepticism any documentation of disciplinary records that occurs significantly after the infraction occurs.

The Department declines to require an employer to provide any union with a copy of disciplinary documentation as this would be a significant policy proposal warranting greater development and public feedback via the rulemaking process. However, the worker may share their own disciplinary records with whomever they wish, and an employer may not retaliate against the worker when such

[56] Proposed § 655.122(n)(2)(i)(F) and (n)(2)(ii).

sharing constitutes protected activity under § 655.135(h) or is in furtherance of such protected activity, as described above. The Department also declines to require that the employer communicate the consequences of any future rule or policy violation. The consequences for a future rule or policy violation may vary depending on, for example, the severity of the future infraction. Therefore, an employer may not be able to communicate with certainty the appropriate next step in the progressive discipline process until the infraction or failure to meet performance standards occurs. However, the Department encourages employers to maintain as transparent a process as possible, and notes that employers may communicate to workers what the consequences would be for any future infraction if it has already determined what those consequences would be (*e.g.,* if behavioral issues are so extensive and well documented that any future infraction, regardless of severity, will result in termination). This communication would constitute instruction to the worker as required by § 655.122(n)(2)(i)(E).

In the preamble to the NPRM, the Department identified egregious misconduct as ''behavior that is plainly illegal or that a reasonable person would understand as being offensive, such as violence, drug or alcohol use on the job, or unlawful assault, as opposed to failure to meet performance expectations or productivity standards.'' 88 FR 63783. However, the Department did not include a definition of egregious misconduct in the proposed regulatory text of the NPRM. FLOC suggested that the Department define egregious misconduct in the regulations so that it is ''limited to instances of serious or gross misconduct, such as those involving violence, threats of violence or willful destruction of property.'' The Department agrees that a regulatory definition of egregious misconduct is useful and has added a definition to § 655.122(n)(2)(i)(E) in this final rule. This definition included in this final rule is similar to what the Department included in the preamble to the NPRM, but provides additional detail. Specifically, the Department defines egregious misconduct as intentional or reckless conduct that is plainly illegal, poses imminent danger to physical safety, or that a reasonable person would understand as being outrageous. The Department believes that this definition is sufficiently broad so that it will encompass all circumstances for which the appropriate discipline for a first-time offense is termination, but narrow enough that workers who commit minor infractions, or who commit infractions unintentionally and in a manner that cannot be considered reckless, will continue to be entitled to the progressive discipline protections in § 655.122(n)(2)(i)(E). Importantly, failure to meet performance expectations will never constitute egregious misconduct. The Department also emphasizes that an employer terminating a worker for cause for egregious misconduct must meet all other conditions outlined in § 655.122(n)(2)(i)(A) through (D) of this final rule.

As with the description of egregious misconduct in the preamble to the NPRM, the definition in § 655.122(n)(2)(i)(E) of this final rule includes conduct that is plainly illegal. Examples of plainly illegal conduct include battery and sexual assault.

The description of egregious misconduct in the NPRM preamble included conduct that a reasonable person would understand as being grossly offensive. In § 655.122(n)(2)(i)(E) of this final rule, the Department has clarified this definition by breaking it into two parts: conduct that poses imminent danger to physical safety, and conduct that a reasonable person would understand as being outrageous. Conduct that poses imminent danger to physical safety is behavior that could reasonably be expected to cause death or serious physical harm either to the worker or to others if not immediately stopped. An example of conduct that poses imminent danger to physical safety is a worker operating heavy machinery while drunk. Conduct that a reasonable person would understand as being outrageous is conduct that a reasonable person would understand as going beyond all possible bounds of decency to be regarded as atrocious and utterly intolerable. Examples of conduct that is outrageous include severe sexual harassment and racial harassment, and intentional destruction of property.

This definition of egregious misconduct also includes a requirement that the conduct be intentional or reckless. This aspect of the definition is important to ensure that workers are not penalized with immediate termination for cause for unintentional errors, unless those errors are so careless and without regard for safety, decency, or the law that the worker's judgment cannot be trusted in the future.

The Department also makes minor changes to this section for readability and to clarify that any documentation of the disciplinary measure must also record the infraction.

Conditions for Termination for Cause: Disclosure of Productivity Standards in the Job Order, Proposed § 655.122(n)(2)(i)(A).

The NPRM proposed that the second criterion for termination for cause would require that where termination is for failure to meet a productivity standard, such standard must be disclosed in the job offer. The Department does not adopt this proposal as it is now substantively included in the definition of termination for cause found in § 655.122(n)(2). Any comments are discussed in the preamble corresponding with that section and with § 655.122(l)(3).

Termination for Reasons That Are Not For-Cause, § 655.122(n)(2)(iii)

The NPRM proposed four different reasons that could never be considered termination for cause, including where the termination is contrary to law; for an employee's refusal to work under conditions that the employee reasonably believes will expose them or other employees to an unreasonable health or safety risk; because of discriminatory reasons; or where the employer failed to comply with its obligations under proposed § 655.135(m)(4) (finalized as § 655.135(m)) in an investigatory interview that contributed to the termination. This final rule adopts the proposal with minor modifications. Specifically, the Department adds ''familial status'' and changes ''citizenship'' to ''citizenship status'' as reasons for which an employer may not discriminate. The Department also changes ''meeting'' to ''investigatory interview'' to conform with changes to § 655.135(m).

Farmworker Justice suggested that the Department provide further clarifying examples as to where the termination is contrary to a Federal, State, or local law. The Department would consider terminations to be contrary to applicable law where, for example, the termination is in retaliation for the worker filing for workers' compensation benefits; in retaliation for a worker taking leave to which they are entitled by law; and for refusal to take a lie detector test. Farmworker Justice also recommended that ''citizenship'' be replaced with ''citizenship status,'' and that ''family status'' be added. This final rule uses the term ''citizenship status'' because this term is used in 8 U.S.C. 1324b(a) prohibiting discrimination. This final rule also adds that discriminatory termination based on familial status will not be considered for cause; this change is consistent with State law in many

States [57] and the Department believes that workers should not be penalized for (or for not) being married or having children. Moreover, discriminatory termination based on familial status would not constitute a for-cause termination because it would not have a clear relationship to the employer's legitimate business needs. The Department also reminds employers that any termination that does not meet the standards in § 655.122(n)(2)(i) of this final rule will not be considered a for-cause termination, even if that termination is not for a reason explicitly prohibited in § 655.122(n)(2)(ii).

Farmworker Justice made a few suggestions that the Department declines to adopt for various reasons. Specifically, Farmworker Justice recommended that the Department clarify that termination is not for cause when done in retaliation against workers seeking improvements in worker housing. The Department declines to make this edit because this right exists under H–2A anti-retaliation regulations at § 655.135(h). Farmworker Justice also suggested that termination would not be for cause where the employer failed to comply with progressive discipline process. The Department believes that this final rule is already clear that termination for cause does not exist without progressive discipline (*see* finalized § 655.122(n)(2)(i)(E)). Farmworker Justice additionally suggested that the Department clarify that termination is not for cause where the employer has failed to provide reasonable accommodations required by the ADA and other State and Federal laws. The Department declines to make this edit because this final rule already states that a termination that is contrary to a Federal, State, or local law will not be considered for-cause.

Finally, Farmworker Justice suggested that the Department clarify, either in regulations or in other guidance, that refusing to lift excessive weight cannot be the basis for termination for cause because OSHA guidance recommends that workers not lift more than 50 pounds without assistance. The Department declines to make this edit because OSHA does not have a standard limiting how much a person may lift or carry; rather, the National Institute for Occupational Safety and Health (NIOSH) has a mathematical equation for calculating a recommended weight limit for one person, which is a maximum of 51 pounds.[58] Given that this is a recommendation, not a requirement, and because agriculture often involves heavy lifting, the Department declines to explicitly state that refusing to lift weight in excess of 50 pounds cannot be the basis for termination for cause. However, WHD may still review, in the course of an investigation, whether a worker has refused to lift weight because they reasonably believed that doing so would expose them to an unreasonable health and safety risk.

The Employer Bears the Burden of Demonstrating That any Termination for Cause Meets Requirements, § 655.122(n)(2)(iv)

The Department proposed that the employer bear the burden of demonstrating that any termination for cause meets the requirements of § 655.122(n)(2). No comments necessitated changes to the regulatory language, but the Department makes one non-substantive edit for readability, specifically replacing ''of this'' with ''in.'' Many agents, associations, and employers, including IFPA and GFVGA, opposed this provision, but did not provide a reason other than stating that employers did not terminate their employees to evade regulatory requirements. The California LWDA supported this provision because it aligned with their State policy and because the employer is the entity that drafts and implements the rules underlying the factors for termination.

Abandonment, § 655.122(n)(3)

The NPRM did not propose changes to regulatory language but proposed to redesignate the language describing abandonment in current paragraph § 655.122(n) to a new paragraph § 655.122(n)(3). The Texas Cotton Ginners' Association submitted comments suggesting that abandonment occur sooner than 5 days without reporting to work, but as the Department did not propose changes beyond renumbering, it did not consider this comment. The Department adopts the proposed redesignation in this final rule.

Recordkeeping, § 655.122(n)(4)(i)–(iii)

The NPRM proposed that, in addition to the records of notification of termination for cause or abandonment, the employer maintain disciplinary and termination records. This final rule adopts the proposal with minor edits for clarity. Specifically, in paragraph § 655.122(n)(4)(i), the Department clarifies that the employer must document the infraction in addition to each step of progressive discipline. All comments on this provision are covered in the section describing general comments.

C. Application for Temporary Employment Certification Filing Procedures

1. Section 655.130, Application Filing Requirements

a. The Department Proposes To Require Enhanced Disclosure of Information About Employers: Owners, Operators, Managers, and Supervisors

The Department proposed to expand its collection of information about employers and the managers and supervisors of workers at places of employment by collecting additional information about the owner(s) of agricultural businesses that employ workers under the H–2A Application, the operators of the place(s) of employment identified in the job order, and the managers and supervisors of the workers performing labor or services at those place(s) of employment. OFLC currently requires an employer to disclose information about the identity of the employer and its agent or attorney; the places where work will be performed; and, when requested by the CO, the employer's use of a foreign labor recruiter. *See* § 655.135(k); Form ETA–9142A; Form ETA–790A; Form ETA–790A, *Addendum B.* Obtaining this information is necessary for the Department to assess the nature of the employer's job opportunity, monitor program compliance, and protect program integrity. For example, employers must identify in the H–2A Application and job order all places of employment and provide identifying information like the FEIN and DBA name on the Form ETA–9142A, Form ETA–790A, and Form ETA–790A, *Addendum B.*

In the NPRM, the Department proposed to require that each prospective H–2A employer, as defined at 20 CFR 655.103(b), provide the following information in relation to the owner(s) of each employer, any person or entity (if different than the employer(s)) who is an operator of the place(s) of employment, including an H–2ALC's fixed-site agricultural business client(s), and any person who manages or supervises the H–2A workers and workers in corresponding

[57] *See, e.g.,* 775 Ill. Comp. Stat. 5/1–102(A), 5/1–103(Q) (prohibiting employment discrimination based on marital status); Minn. Stat. § 363A.08 (prohibiting employment discrimination based on marital status and familial status).

[58] OSHA, *OSHA procedures for safe weight limits when manually lifting, https://www.osha.gov/laws-regs/standardinterpretations/2013-06-04-0* (last accessed Feb. 8, 2024), and NIOSH, *NIOSH Lifting Equation App: NLE Calc, https://www.cdc.gov/niosh/topics/ergonomics/nlecalc.html* (last accessed Feb. 21, 2024).

employment under the H–2A Application: full name, date of birth, address, telephone number, and email address.

The Department also proposed to revise the Form ETA–9142A to require that the employer provide additional information about prior trade or DBA names the employer used in the 3 years preceding its filing of the H–2A Application, if any, rather than collecting only the DBA name the employer currently uses. Accordingly, the Department proposed to revise and restructure § 655.130 by adding four new paragraphs, (a)(1) through (4), to specify the information employers must provide at the time of filing an H–2A Application.

In a new paragraph (a)(1), the Department proposed to retain the first sentence currently in § 655.130(a), which addresses the H–2A Application and supporting documentation the employer must submit. The Department proposed to move the second sentence of § 655.130(a), which contains language regarding collection of the employer's information—*i.e.,* FEIN, valid physical location in the United States, and means of contact for recruitment—to proposed paragraph (a)(2). In paragraph (a)(2), the Department proposed to explicitly require disclosure of the employer's name and the additional employer information collection the Department proposed to require (*i.e.,* the identity, location, and means of contact for each owner). Proposed paragraph (a)(3) required the employer to provide the identity, location, and contact information of all persons or entities who are operators of the place(s) of employment listed in the job order, if different from the employer(s) identified under paragraph (a)(2), including an H–2ALC's fixed-site agricultural business client(s) who operate the place(s) of employment where the workers employed under the H–2A Application will perform labor or services. In addition, proposed paragraph (a)(3) required the employer to provide the identity, location, and contact information of all persons who will manage or supervise H–2A workers and workers in corresponding employment under the H–2A Application at each place of employment.

Proposed paragraph (a)(4) required the employer to continue to update the information required by the above paragraphs until the end of the work contract period, including extensions thereto, and retain this information post-certification and produce it upon request by the Department. To effectuate proposed § 655.130(a)(4), the Department proposed a new record retention paragraph at § 655.167(c)(9) that would require the employer to retain the information specified in paragraphs (a)(2) and (3) of § 655.130 for the 3-year period specified in § 655.167(b).

The Department received comments both in support of and opposed to the proposed information collections from Federal elected officials, labor unions, workers' rights advocacy organizations, individuals, employers, trade associations, farm bureaus, and agents. After consideration of all comments, the Department is finalizing the proposals with minor changes, as explained below.

The Department received comments in support of the proposal from elected officials, workers' rights advocacy organizations, and labor unions. A joint comment from 15 U.S. Senators supported the proposed information collection as a way to ''strengthen protections against abusive third parties by enhancing DOL's enforcement capabilities against supervisors, contractors, joint employers, successors in interest, and others who coordinate so closely with employers that they should be considered a single employer.'' Some workers' rights advocacy organizations, UFW Foundation, CAUSE, UMOS, and PCUN, and a couple of other advocacy organizations, Green America and the North Carolina Justice Center, asserted the proposal would provide the Department ''more understanding of [an employer's] operation and seasonality of it, and ultimately, the ability to take enforcement actions against more people who are taking part in abusive and unlawful activities, including successors in interest.'' UFW included worker accounts of various abuses by agents, crew leaders, and foremen, including sexual assault, retaliatory pretextual terminations, withholding of food and water, and various types of threats against workers, and believed the proposed information collection would aid enforcement related to these egregious violations.

Farmworker Justice supported the proposed information collections as a necessary means to carry out vital program integrity and worker protection responsibilities. They cited numerous examples of debarred employers reconstituting with owners and managers switching roles to avoid enforcement, including cases in which family members have applied for certification for the benefit of another family member and owner of a debarred employer. They supported the collection of owner information, asserting it would be ''obviously useful in detecting fraud in the H–2A program, as it would allow the Department to more easily detect instances in which a single owner/operator uses multiple business entities in an attempt to skirt H–2A regulations or to continue seeking H–2A workers despite having been debarred.'' They believed the proposed information collections would assist in identifying employer reconstitution to subvert the law because ''[o]verlapping management with the debarred employer is a giveaway'' that the employer has ''attempt[ed] to evade debarment by rebranding'' and ''obfuscat[ing] management structure.'' Farmworker Justice and the Agricultural Worker Project of Southern Minnesota Regional Legal Services commented that the manager and supervisor information would permit the Department to ''scrutinize whether the principals or managers of those entities [filing for labor certification] are family members of recently debarred entities.'' Farmworker Justice also believed the proposals would assist the Department in conducting the single employer test at the filing stage because, they asserted, employers ''often use overlapping job orders from two separate but jointly-owned and operated entities, so that the employer can keep H–2A workers at their place of employment year-round on alternating job orders.'' Finally, Farmworker Justice supported the collection of fixed-site grower information, asserting it is ''useful in preventing the displacement of US workers by H–2A workers, particularly when a grower that employs domestic workers begins outsourcing its labor to an H–2ALC,'' in which case ''it is impossible for the workers (or worker advocates) to determine whether the fixed-site grower is using H–2A workers because the grower's name never appears at all on the job order or supporting documentation.'' The Department values and appreciates these commenters' support and their informed perspectives on the need for and potential impact of the proposal.

In contrast, the Department received many comments from employers, trade associations, agents, a public policy organization, and an immigration lawyers' association expressing opposition to the proposal as an unnecessary breach of privacy that would expose employers to litigation risk, potentially expose the private information of employees to the public, and impose an unreasonable and unjustified information production burden at the filing stage.

Many comments from employers, agents, and trade associations asserted the Department failed to provide a

''rational basis'' to conclude it needed the additional information, showing only that the information is helpful, not necessary. USA Farmers asserted the Department provided ''no statutory authority for this extreme invasion of personal privacy and dramatic departure from the decades of operation of the H–2A program,'' the information is ''not necessary or reasonable to further any legitimate purpose,'' and the Department ''fail[ed] to provide any data whatsoever that describes the magnitude of the supposed problem it claims to be addressing.'' An employer, Willoway Nurseries, and several trade associations, including AmericanHort, Michigan Farm Bureau, and USApple, more specifically asserted the info collection proposal is ''onerous and unnecessary to catch the 32 employers debarred from the H–2A program from reconstituting as another employer.'' USA Farmers asserted the Department need not collect this information at the filing stage because ''during an investigation of an H–2A employer, the Department already routinely . . . collects information on any other businesses the employer operates.''

Similarly, másLabor asserted that the Department did not ''offer any compelling reason why this information ought to be disclosed on the H–2A application itself, rather than merely as a document retention requirement on par with payroll and earnings records.'' Several trade associations—including AmericanHort, NCFC, FSGA, and FFVA—and Willoway Nurseries objected to collection of ''information of all managers and supervisors'' specifically, asserting it ''is unnecessary at the application stage of the H–2A program and is easily and regularly attainable at the enforcement stage of the H–2A program.'' NHC added that employers who refuse to produce the information during a later investigation face consequences and this should be sufficient incentive.

While the Department appreciates the comments, the Department disagrees with employer, trade association, and agent assertions that the NPRM failed to explain the Department's need for this information generally or, specifically, its need for the information at the time the employer files the H–2A Application. As discussed above, as part of its review of an application, OFLC assesses whether the employer has a temporary or seasonal need for workers, including whether two facially distinct employers are a single employer, and the Department is authorized to enforce ''employer compliance with terms and conditions of employment'' in the H–2A program. 8 U.S.C. 1188(g)(2). The Secretary has delegated the responsibility of issuing temporary agricultural labor certifications to OFLC [59] and has delegated responsibility for enforcement of the worker protections to the WHD Administrator.[60] The information the Department collects through the Form ETA–9142A, *H–2A Application for Temporary Employment Certification,* and all required supporting documentation, constitutes the information necessary for the Department to assess an employer's need and whether there is an insufficient number of qualified U.S. workers who are available to fill the employer's job opportunity, and that the wages and working conditions of workers in the United States similarly employed will not be adversely affected by the employment of H–2A workers. The Department also may use this information in post-adjudication audit examinations or in program integrity proceedings (*e.g.,* revocation or debarment actions) or in both, and WHD or other enforcement agencies may request this information from OFLC during an investigation or enforcement proceedings.

The NPRM explained that the new collections of information about owners, operators, managers, and supervisors would allow the Department to gain a more accurate and detailed understanding of the scope and structure of the employer's agricultural operation, which is essential to the Department's fulfillment of various obligations in the administration and enforcement of the H–2A program. The Department noted the additional information would enhance its enforcement capabilities by helping the Department identify, investigate, and pursue remedies from program violators; ensure that sanctions, such as debarment or civil money penalties, are appropriately assessed and applied to responsible entities, including individuals and successors in interest when appropriate; and determine whether an H–2A employer subject to investigation has prior investigative history under a different name. For example, contact information for owners, operators, and supervisors will assist the Department in locating the employer and workers for the purposes of conducting an investigation, presenting findings (either verbally or in a written determination) and obtaining payment for back wages and civil money penalties following a final order of the Secretary. OFLC also may use this information in post-adjudication audit examinations or in program integrity proceedings (*e.g.,* revocation or debarment actions) or in both. The information will help OFLC verify that persons representing employers both in the labor certification process and in the process of recruiting, managing, or supervising workers are acting on behalf of the employers within the scope of the terms and conditions of the labor certification and any contracts or agreements with employers, and in compliance with the revised regulations and all employment-related laws, such as laws prohibiting discrimination, retaliation, or the imposition of unlawful recruitment or visa-related fees. The new information collections will also facilitate interagency information sharing and permit OFLC and WHD to share relevant identifying information with other agencies when necessary to aid an investigation or enforcement action.

The NPRM also explained the Department's need to collect the information at the time the employer files the H–2A Application, rather than require production of this information only in the event of an investigation or audit, and the Department will expand on those reasons here. During the application process, the new information collections will assist the Department in determining whether the employer has demonstrated a bona fide temporary or seasonal need, or, conversely, whether an employer has, through multiple related entities, sought to obtain a year-round H–2A labor force. As the Department noted in more detail above in the preamble to § 655.103(e) *Definition of single employer for purposes of temporary or seasonal need and contractual obligations,* some employers divide their business such that it appears two separate entities are each requesting a temporary agricultural labor certification when, in fact, the workers are in the same AIE engaged in the same job opportunity for longer than the attested period of need on any one application. Having information about the owners, operators, and managers at the filing stage will assist the Department in detecting potential nominally distinct employers who are acting as a single employer. It will also greatly assist the Department in discovering if an employer is acting as a single employer with a debarred non-petitioning entity, as the Department will already have the debarred entity's

[59] *See* Secretary's Order 06–2010, *Delegation of Authority and Assignment of Responsibility,* 75 FR 66268 (Oct. 27. 2010).

[60] *See* Secretary's Order 01–2014, *Delegation of Authority and Assignment of Responsibility to the Administrator, Wage and Hour Division,* 79 FR 77527 (Dec. 24, 2014).

data on record. As stated above in the preamble to § 655.103(e), the Department considers the totality of the circumstances surrounding the relationship among the entities, and no one singular detail—such as having the same owner—is determinative in the analysis.

The NPRM further noted that collection of prior DBA names and identifying information for people other than the employer at the time of filing would make it easier for OFLC and WHD to search across applications within a filing system database to identify instances in which employers have changed names, or roles, to avoid complying with program regulations or avoid monetary penalties or serious sanctions such as program debarment. The Department noted the information collected about owners, operators, and supervisors provided at the application stage may assist the Department to identify whether an individual or successor in interest should be named on any determination and therefore subject to any sanctions or remedies assessed. Although the NPRM did not provide ready data, it explained that in the experience of the Department, some H–2A employers have sought to avoid penalties and continue participating in the program despite having been debarred by reconstituting as a new legal entity while ultimately retaining the underlying business that was debarred from the H–2A program. Commenters including Farmworker Justice and the Agricultural Worker Project of Southern Minnesota Regional Legal Services also provided specific examples of entities that have evaded debarment under the current regulations through reconstituting under a different corporate entity with reshuffled ownership, as noted above and in the preamble discussing the Department's revisions to the successor-in-interest provision. In an audit or investigation of an employer, this information will allow the Department to better identify those persons with a financial stake in the certified H–2A employer. Collecting this information from all applicants at the time of filing, rather than only collecting this information during an audit or investigation, can be useful for other similar purposes as well, such as identifying instances when an H–2ALC Application indicates it is supplying an H–2A workforce to a debarred employer during the debarment period.

As previously mentioned, some trade association commenters supported collection of owner data as a means to prevent debarred employers from reconstituting to evade the law, but TIPA, McCorkle Nurseries, Inc., Titan Farms, LLC, and IFPA asserted the Department failed to provide a sufficient definition of owner and expressed concern that the ''complex ownership structure'' common to many agricultural operations due to high capital costs would make it difficult to provide information on owners and operators. Titan Farms, LLC, IFPA, and NHC asserted the Department's ''failure to provide an adequate definition of what operator, manager, and supervisor would include'' prevented ''meaningful comment'' on the proposal. Commenters including Titan Farms, LLC, IFPA, TIPA, U.S. Custom Harvesters, Inc., and Demaray Harvesting and Trucking, LLC similarly opposed collecting information about owners because it would place an ''extensive administrative burden on employers'' due to the imprecise definition of owner, complex ownership structure of many operations, and a potential requirement to include even landowners, rather than business owners.

NHC, Titan Farms, LLC, and IFPA expressed concern that the Department would require employers to collect information on leaseholders, shareholders and other investors, and other types of ''owners'' in various ownership situations, for which the Department has no need. AmericanHort and NCFC similarly expressed concern they would have to disclose information about silent partners and minority shareholders. Commenter including Titan Farms, LLC, IFPA, and NHC expressed concern that the Department would require disclosure of information on owners who ''do not have a controlling interest or are [not] involved in any way with business decisions, including workforce decisions.'' USA Farmers similarly asserted collection of ownership information would be particularly burdensome if the collection includes ''an owner who may have no involvement in the operation of the company'' and USApple added that ''[m]inority owners and other investment groups will have very little knowledge of the day-to-day business practices, and some invest in multiple entities.'' USApple expressed concern the Department would require disclosure of landlords if an association member rented land on which the business operates, which would be unnecessary because the landlord has no ''information or authority over the operation.'' MásLabor urged the Department to clarify how it expects employers to disclose owner information if the place of employment is ''owned by a consortium of investors and entities, including multinational corporations and conglomerates with complicated business structures.'' MásLabor also asked the Department to clarify how it expects employers to disclose this information if the place of employment is ''owned by a private equity group'' or ''[a] multinational conglomerate with layers of holding companies and subsidiaries.''

U.S. Custom Harvesters, Inc. and Demaray Harvesting and Trucking, LLC asserted the ownership disclosure requirement would be particularly burdensome for custom combine employers who only have information for a client's point of contact and ''do not have access to additional information about that farm's ownership structure'' because these employers ''provide services for multiple farm owners and operators'' while ''operat[ing] on a disclosed itinerary.'' Demaray Harvesting and Trucking, LLC asserted the disclosure requirement would be particularly burdensome for farm labor contractors, because they do not have information about the full ownership structure of every employer to which they provide labor.

Some commenters, including Michigan Asparagus Advisory Board and an individual commenter, expressed similar concerns about the Department proposal to collect the name, date of birth, and contact information for managers and supervisors of H–2A workers. Titan Farms, LLC, IFPA, NHC, and TIPA expressed concern the proposal would require employers to disclose information on ''potentially hundreds'' of employees, ''depending on the size of the operation.'' Western Range Association asserted the disclosure requirement would be particularly burdensome for employers of workers in herding and production of livestock on the range because many of these employers ''operate on publicly-owned ground'' and a requirement to ''collect and track the names of every manager of the [Bureau of Land Management], Forest Service, State Government, or municipality would be difficult if not impossible. The records the employers would need to retain would be abundant and unreasonable to keep up to date.''

Titan Farms, LLC, IFPA, NHC, and TIPA expressed concern that the duty to update this information would impose a substantial burden due to high ''turnover rate within agriculture.'' USApple expressed concern about potential enforcement or other ''ramifications for not having listed an individual due to employment changes

during processing'' of the H–2A Application.

Willoway Nurseries and several trade associations, including Michigan Farm Bureau, FSGA, FFVA, and NCFC, also expressed concern about the Department's burden estimate calculations. Specifically, AmericanHort expressed concerns that the Department's ''analysis under both of those acts of impact and burden is drastically low'' and a ''gross underestimation,'' which it asserted ''is evidenced by the Department's claim that small businesses will be faced with a mere one-time cost of $54.00 to familiarize themselves with this rulemaking, and only $108.00 to complete the new application with all owner, manager, and supervisor information.''

The Department also received a comment from Farmworker Justice that suggested several changes to strengthen the proposed provisions in this final rule. Farmworker Justice expressed concern that the NPRM did not propose to ''collect information for fixed-site growers who may not be joint employers of the H–2A workers'' and did ''not require the applicant to list the actual business name of the operator of the fixed-site location, their trade names, or the names of owners.'' Farmworker Justice urged the Department to require employers ''provide information for all owners and operators of fixed-site locations at which workers will perform work'' to collect the DBA, business name, and owner name for all fixed-site places of employment, which Farmworker Justice asserted would be ''obviously useful in detecting fraud in the H–2A program, as it would allow the Department to more easily detect instances in which a single owner/operator uses multiple business entities in an attempt to skirt H–2A regulations or to continue seeking H–2A workers despite having been debarred.'' Farmworker Justice also suggested the Department should require employers to ''submit information detailing exactly what workers performed the work at the fixed-site in the previous year, how they were recruited for those jobs, and what efforts have been undertaken to pursue those recruitment avenues in the current year,'' which they asserted would prevent employers from using an H–2ALC to avoid the requirement to contact its former U.S. workers.

Farmworker Justice further urged the Department to revise paragraph § 655.130(a)(2) to ''provide that the applicant must include information for *all* employers.'' Farmworker Justice also urged the Department to collect additional information, including information about: (1) transportation providers, to better ensure they are properly licensed; (2) workers' compensation policyholders, so the Department knows whether the policyholder is a professional employer organization, in which case DOL should ''follow up with the employer to ensure that coverage extends to workers in transit during the entire period of the clearance order''; (3) information about owners and operators of housing, to ''allow workers and worker advocates to better understand whether the housing is in compliance''; and (4) ''additional information from first-time employers and fixed-site growers'' about their positive recruitment efforts prior to using the program, to ensure the employer does not alter this recruitment to avoid hiring U.S. workers in favor of H–2A workers. Finally, Farmworker Justice emphasized the need for the Department to collect and analyze information indicating family relationships in multiple filings for program integrity and enforcement purposes.

The Department appreciates and agrees with comments indicating a need for the Department to more clearly define the type of owner information sought and to clarify the level of due diligence expected of employers when providing this information, and the information related to supervisors and managers. The definitions of the terms ''owner'' and ''operator,'' as well as the terms ''supervisor'' and ''manager,'' are included in the Paperwork Reduction Act (PRA) information collection request (ICR) package that accompanies this final rule. Specifically, definitions for both ''owner'' and ''operator'' were proposed in the draft instructions for completing Form ETA–9142A and its appendices, which were published along with the NPRM and for which the Department also requested public comment. The proposed form instructions not only included proposed definitions of both terms but also provided an explanation of how the Department determined each proposed definition. After review of the public comments, the Department has revised the definitions to clarify that, for purposes of § 655.130, ''owner'' or ''operator'' means any person who owns or has a controlling operational role in the employer(s) and place(s) of employment. With respect to owners specifically, the Department will consider a person or entity an owner if the person or entity legally owns or is an owner with a controlling operational role in the employer's business. The Department will require the employer to disclose the majority owners, defined as an owner with ownership of more than 50 percent of a business, and any owner who owns less than 50 percent of an organization, but exercises any decision-making responsibilities over the business. If the owner or operator of the place(s) of employment is a branch, subsidiary, or affiliate of a parent corporate or joint venture, the employer must list the owners and operators of the parent entity. As noted in the PRA package and form instructions for the NPRM and this final rule, the Department also expects the employer to provide information about operators of the place(s) of employment, defined as any person or entity who runs the agricultural business, making day-to-day management decisions. Finally, as explained in the NPRM and above, the Department is collecting this information to enhance the Department's ability to identify, investigate, and pursue remedies from program violators, including entities debarred from the H–2A program, and to that end, the Department also expects the employer to provide this information for any owner or operator of a business that is currently debarred from the H–2A program by OFLC, by WHD, or by a court of law, regardless of ownership stake or level of control.

The Department considers the totality of the circumstances surrounding the business formation and conduct of the owner in determining ownership of an entity. No one factor would be determinative in the analysis. Some examples that demonstrate ownership are official State, local, or Federal documentation (*e.g.,* articles of incorporation, business license, deed) of the ownership of an entity. Another example demonstrating entity ownership is whether a judicial or administrative decision or action makes a definitive determination about ownership of an entity.

If an individual or entity is listed as an owner or operator of the places of employment, or as the employing entity, on an official Federal, State, or local document, like incorporation documents, or judicial or administrative records like those that indicate transfer of ownership, the Department expects the employer to provide identifying information for these individuals or entities. In many cases, this information will be publicly available on State or local websites.

This final rule requires the employer to exercise due diligence when determining and disclosing primary owners and owners that exercise control over the entity that operates the place(s) of employment for the integrity and

enforcement purposes noted in the NPRM and this preamble. This final rule does not seek to take enforcement action against employers for failing to disclose every person or entity that may have an indirect or marginal stake in a complex organization and does not require the employer to disclose owner or operator information for any person or entity that does not fall into the above definitions, such as individual shareholders of corporate, cooperative, or joint arrangements that do not have a majority stake in or exercise control over the entity. Similarly, this final rule requires the employer to exercise due diligence, and demonstrate a good-faith effort, in gathering, disclosing, and updating as necessary the identity, location, and contact information of owners, operators, managers, and supervisors.

In response to comments specifically about disclosure of landlord information, the Department expects the employer to disclose this information if the landlord is an owner of the employer(s) or is an operator of the place(s) of employment who runs the agricultural business, making day-to-day management decisions. In response to the comments specifically expressing concern about disclosure of the required information where land is owned or operated by Federal, State, or local government, the Department expects the employer to provide the name of the Federal, State, or local agency or government entity that owns or operates the land or employs the managers or supervisors of workers employed under the H–2A Application.

The Department is not revising the proposed definitions of ''manager'' and ''supervisor'' in this final rule. As defined in the instructions and PRA package accompanying Form ETA–9142A, Appendix C, and in the preamble to this final rule, a manager is a person whose duties and responsibilities include formulating policies, managing daily operations, and planning the use of materials and HR with respect to the employment of H–2A workers. A supervisor is the person(s) who supervises and coordinates the activities of H–2A and corresponding agricultural, range, aquacultural, and related workers. The Department based these definitions on the O*NET definitions used for related occupational codes and believes these definitions are sufficient to ensure employers understand and comply with the requirement to disclose information about the managers and supervisors of H–2A and corresponding workers. In response to comments about the burden of production and the Department's estimates, the Department has addressed these two issues in the supporting documentation in the PRA package the Department has prepared for this rulemaking under OMB Control Number 1205–0466, available at *https://www.reginfo.gov.*

While the Department appreciates the Farmworker Justice suggestion to expand the proposed information collection to include transportation providers, workers' compensation policy holders, owners and operators of housing, recruitment information from first-time employers and fixed-site growers, as well the collection of family relationships, the Department declines to adopt these suggestions. The Department has determined that the collection of additional information items exceeds the scope of the proposed collections, which focus on the enhanced disclosure of information about employers, and if adopted, would deprive the full regulated community of its opportunity to comment. Even if the additional collections items did not exceed the scope of the proposed collections, the Department has determined that the collections, as proposed, are sufficient to accomplish the purpose as noted above and in the NPRM. The Department appreciates Farmworker Justice's concern regarding the use of family members in varying roles to avoid regulatory requirements and enforcement. However, the Department has determined that collection of information on the owners, operators, managers, and supervisors, in addition to information the Department already collects like point of contact, agent, and various other potential identifying information, is sufficient to ensure employers do not utilize family members to evade compliance with the law.

More specifically, the Department agrees with Farmworker Justice that family relationships in various roles across multiple applications can indicate potential noncompliance and attempts to evade the law or sanctions. However, the Department does not believe it is necessary for this final rule to more explicitly require the employer to disclose any potential owners, supervisors, managers, or operators with a family relationship to any owner or operator of the employer. The disclosure requirements in this final rule, combined with the existing requirement to disclose information like the identity of the agent and point of contact, address(es), occupation, and period of need, will be sufficient to assist the Department in identifying family relationships in filings that may indicate fraud or other intentional failures to comply with the law.

In response to Farmworker Justice, the Department is clarifying language at § 655.130(a)(2) to specify that this provision applies to all employers of any worker employed under the *Application for Temporary Employment Certification.* The Department is not adopting the commenter's suggestions to collect additional information about fixed-site employers. Currently, on the Form ETA–790A, H–2ALCs must identify the name(s) and location(s) of each fixed-site agricultural business where the H–2A worker(s) will perform labor or services, and provide fully executed work contract(s) with each fixed-site agricultural business, which assists OFLC in determining compliance with all application filing requirements for H–2ALCs under § 655.132. This information is collected on the job order. As proposed in the NPRM, this final rule requires that each prospective H–2A employer, as defined at § 655.103(b), provide the following information in relation to the owner(s) of each employer, any person or entity (if different than the employer(s)) who is an operator of the place(s) of employment, including an H–2ALC's fixed-site agricultural business client(s), and any person who manages or supervises the H–2A workers and workers in corresponding employment under the H–2A Application: full name, date of birth, address, telephone number, and email address. The Department is adopting as proposed paragraph (a)(3), which requires the employer to provide the identity, location, and contact information of all persons or entities that are operators of the place(s) of employment listed in the job order, if different from the employer(s) identified under paragraph (a)(2), including an H–2ALC's fixed-site agricultural business client(s) that operate the place(s) of employment, and of all persons who manage or supervise any H–2A worker sponsored under the H–2A Application or any worker in corresponding employment. As noted above, employers must exercise due diligence when gathering, disclosing, and updating this information and be able to demonstrate good faith in their efforts to do so. The Department believes the additional information collected under this final rule will bolster the Department's enforcement capabilities with respect to H–2ALCs and fixed-site employers and will ensure the Department is able to accomplish the objectives explained above and in the NPRM.

The Department also received many comments from trade associations,

employers, and agents expressing concern about disclosure of personally identifiable information (PII) and the Department's assurances that it would protect this information from unauthorized disclosure. MásLabor asserted that the proposed information collection was ''morally and ethically objectionable,'' that it ''raises major questions of compliance with privacy and data protection laws,'' and that the NPRM failed to adequately address ''the implications of this disclosure requirement under the Privacy Act of 1974.'' Citing 5 U.S.C. 552a(e)(1), IFPA, TIPA, GFVGA, NHC, and Titan Farms, LLC noted that the Privacy Act permits Federal agencies to ''maintain in their records only information about an individual 'relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President.''' USA Farmers generally asserted the proposed collections would violate ''various state laws on the collection and dissemination of [PII]'' and másLabor stated the Department failed to consider the implications of State privacy laws in States like California, Colorado, Connecticut, Utah, and Virginia.

Many commenters, including Willoway Nurseries, FFVA, and NCFC, asserted that requiring an employer to provide ''such an onerous amount of information just to file an application is unnecessary and starkly against the requirements of the Paperwork Reduction Act and the Small Business Regulatory Enforcement Fairness Act.'' USApple expressed concern that the Department did not explain how it would protect this information from ''unlawful disclosure under [FOIA].'' Finally, SRFA expressed concern that the Department provided only a general assertion that it would disclose information only according to the law and information sharing agreements and that was not sufficient to ''assuage concerns the information would be subject to data breaches.''

Some commenters expressed concern that the proposed information collections would violate the privacy of owners, operators, and employees, expose them to data breaches and potential harassment or security threats, and expose the employer to liability for non-consensual disclosure of their information or to potential immigration enforcement if the manager and supervisor is not authorized to work in the United States. Titan Farms, LLC, IFPA, TIPA, U.S. Custom Harvesters, Inc., and Demaray Harvesting and Trucking, LLC opposed the collection of owner information for similar reasons, expressing concerns the collection would ''infring[e] on owners' privacy rights,'' potentially ''disclos[e] confidential business information,'' and ''pose an extensive administrative burden on employers, without any documented regulatory value or authority.'' MásLabor asserted ''there may be compelling financial or public relations reasons for not disclosing ownership interests'' and noted ''[i]nstitutional or other passive investors may insist on anonymity as a strict contractual condition.''

New York State Farm Bureau, Labor Services International, an individual commenter, TIPA, SRFA, and másLabor opposed the proposal to collect information about managers and supervisors, asserting this disclosure would be a ''direct violation,'' ''serious invasion,'' and ''egregious breach'' of employee privacy and would constitute a ''routine . . . unjustified disclosure of employee information.'' MásLabor asserted the proposal would risk effectively ''doxing'' employees and putting them at risk of ''potential harassment and threats from online sources, increasing the likelihood [they] will be the target of junk mail/spam, commercial solicitations, phishing emails'' and other potential dangers. TIPA and SRFA asserted the proposal would expose employees to ''retaliatory targeting'' and would be ''abjectly dangerous.'' AmericanHort, NCFC, and USApple expressed concern, specifically, that the Department would publish employees' PII on the public disclosure data on the OFLC website or on *Seasonaljobs.dol.gov* because entries in the disclosure data and the Seasonaljobs website are produced using scans of information in the employer's Form ETA–9142A and Form ETA–790A. Similarly, an individual commenter expressed concern that the proposal would ''forc[e] employers to disclose the private information of their employees on the internet'' because ''any information provided on the face of the H–2A application is subject to public disclosure'' and the commenter asserted this public disclosure would ''endanger[ ] so many people.''

Several commenters specifically expressed concern about disclosing PII about an employee without obtaining the employee's consent. Some commenters, including IFPA, Titan Farms, LLC, and TIPA, noted ''employees have not chosen to participate in the H–2A program and should not be required to have their information disclosed to the government.'' Similarly, másLabor asserted the proposed collection of manager and supervisor information violated ''a fundamental tenet of the employer-employee relationship that employees have a right to keep their personal information private and to require their consent before their employers disclose personal information.'' These commenters also expressed concern that disclosure may require some employers to breach employment or union contracts if they contain provisions prohibiting disclosure of an employee's information. USA Farmers asserted the Department lacks any reasonable basis to subject an employee to having their personal information delivered to the government and then made public merely because an employee works for an employer that participates in the H–2A program. An individual commenter expressed concern it would be unable to retain managers and supervisors if the Department required disclosure of their identifying information. Commenters including Titan Farms, LLC, IFPA, NHC, and TIPA expressed concern that non-consensual disclosures or disclosures in data breaches could expose employers to ''risk of employment-based litigation'' for the disclosure, though the commenters did not elaborate on what employment-based litigation might result. These commenters also expressed concern disclosing manager and supervisor information may expose employers or their employees to immigration enforcement, citing a high number of agricultural employees who are not authorized to work in the United States.

The Department is not requesting the disclosure of immigration status and therefore does not anticipate increased immigration enforcement by DHS as a direct result of this information collection. Also, as noted in the NPRM, the Department will collect, store, and disseminate all information and records in accordance with the Department's information sharing agreements and System of Records Notice (SORN), principles set forth by OMB, and all applicable laws, including the Privacy Act of 1974 (Pub. L. 93–579, sec. 7, 88 Stat. 1909 (1974)), Federal Records Act of 1950 (Pub. L. 81–754, 64 Stat. 585 [codified as amended in chapters 21, 29, 31, and 33 of 44 U.S.C.] (1950)), the PRA (44 U.S.C. 3501 *et seq.*), and the E-Government Act of 2002 (Pub. L. 107–347 (2002)).

As noted by commenters, the Privacy Act of 1974 requires the Department ''maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President.'' 5 U.S.C.

552a(e)(1). The Privacy Act also requires the Department ''collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs.'' 5 U.S.C. 552a(e)(2). In the NPRM and above, the Department explained at length the need for this information to accomplish its statutory mandates under the INA. Collection of this information directly from each owner, operator, manager, and supervisor for each H–2A Application would not be practicable because the Department will not know the identity of these persons or entities until the employer provides the information required under new § 655.130, and even assuming the Department knew these identities, it would be administratively infeasible for the Department alone to obtain this information directly from each person and entity while continuing to effectively review and process H–2A Applications within the relevant statutory deadlines.

Pursuant to Department policies, all PII collected on the H–2A Application is extended Privacy Act protections to the maximum extent practicable. In accordance with the Privacy Act, the Department publishes a SORN in the **Federal Register** when the Department creates or substantively modifies a system of records. The SORN addresses the authority underpinning the system of records, the measures the Department takes to safeguard information, the Department's record access and retention procedures, and the Department's routine uses for the records.[61] For the purposes of this rulemaking, the Department will modify the existing SORN, DOL/ETA–7, Foreign Labor Certification System and Employer Application Case Files. All PII the Department collects is protected by administrative, technical, procedural, and physical safeguards against unauthorized access and disclosure, and all PII the Department maintains is stored in a manner that is safe from access by unauthorized persons at all times. When the collected information is no longer needed, all electronic or paper information is erased or destroyed in accordance with applicable National Archives and Records Administration (NARA) approved record retention schedules.

The Department appreciates commenters' concerns that the collection and retention of this information could require an employer to violate State-level privacy laws. However, commenters failed to note specific State law provisions that would prohibit the employer's production or retention of this information. Without this information, it is difficult to assess the commenters' concerns more closely, including whether the State laws apply to the proposed collection here. However, as discussed above and in the NPRM, the Department will collect, store, and disseminate all information and records in accordance with the Department's information sharing agreements and SORN, principles set forth by OMB, and all applicable laws. In addition, the Department has explained the critical need for this information and will collect and store this information in the same manner it collects and stores other information necessary to process H–2A Applications and administer the H–2A program. The Department expects the employer to fulfill its retention obligations with respect to this information the same way the employer is expected to retain information specified in § 655.167 and records required under § 655.122.

In response to concerns about potential disclosures of this information, the Department reiterates that it may release this information if authorized under FOIA or may share the information with other agencies when authorized and necessary for criminal, civil, or administrative law enforcement and investigative purposes. The Department will only be required to provide PII under limited circumstances when authorized by law. Similarly, the Department will only provide this information in response to a FOIA request when there is no applicable FOIA exemption to permit the Department to withhold the information in full or in part, and the Department routinely processes incoming FOIA requests. The Privacy Act strictly limits the information that may be disclosed, but has several potentially relevant disclosure exemptions, such as those at 5 U.S.C. 552a, paragraphs (b)(2), (b)(7), and (b)(9)–(11).

As noted in the PRA package accompanying the NPRM, the Department may release this information when authorized in connection with appeals of denials before the Department's Office of Administrative Law Judges (OALJ) and Federal courts, in which case records may be released to the employers that filed such applications, their representatives, or to named foreign workers or their representatives. The Department also may release this information in connection with the administration and enforcement of immigration laws and regulations, in which case the records may be released to such agencies as the Department's OIG or WHD, the Department of Justice (DOJ), DHS, or the Department of State. As noted above, more information about the Department's proposed changes to the H–2A information collection instruments, the Department's collection and use of this information, and the Department's estimate of the corresponding burden is available in supporting documentation in the PRA package the Department has prepared for this rulemaking under OMB Control Number 1205–0466, available at *https://www.reginfo.gov.* In addition, please refer to the Administrative Information section below for the Department's responses to comments regarding the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

The Department appreciates and takes seriously the comments related to privacy concerns, including comments regarding how the proposed collection would affect both the retention of managers and supervisors and immigration enforcement, but reiterates that pursuant to policy, all PII collected on the H–2A Application is extended Privacy Act protections to the maximum extent practicable. All PII the Department collects is protected by administrative, technical, procedural, and physical safeguards against unauthorized access and disclosure, and all PII the Department maintains is stored in a manner that is safe from access by unauthorized persons at all times. When the collected information is no longer needed, all electronic or paper information is erased or destroyed in accordance with applicable NARA approved record retention schedules.

Additionally, the Department will only provide PII under limited circumstances when authorized by law. The Department will not publish PII as part of its regular disclosure data. The Department will redact this information as it currently does for information such as Employer's FEIN, Attorney's FEIN, and Attorney's State Bar Number. Similarly, the Department will not publish this information on the Seasonaljobs websites, which is primarily used for the dissemination of information about agricultural job opportunities to job seekers.

Finally, the Department explained above and in the NPRM why there is a vital need to collect this information. The Department expects that employers will provide this information completely and accurately at the time of filing. As with information regarding

[61] *See* DOL/ETA–7, *Foreign Labor Certification System and Employer Application Case Files, https://www.dol.gov/agencies/sol/privacy/eta-7* (last accessed Apr. 9, 2024).

anticipated worksites or use of foreign labor recruiters, for example, the Department expects employers to make a good-faith effort in obtaining this vital information about the persons or entities that will manage or supervise the agricultural workers and those who own or operate places where those workers will be employed.

2. Section 655.135, Assurances and Obligations of H–2A Employers

a. Section 655.135, Introductory Language, WHD Authority

In the NPRM, the Department proposed a minor clarifying revision to the introductory language to § 655.135 to include explicit reference to compliance with 29 CFR part 501 as part of an H–2A employer's obligations. Previously, the introductory language in the regulations specified only that an employer seeking to employ H–2A workers must agree as part of the job order and Application that it will comply with all requirements under 20 CFR part 655, subpart B. Those requirements included compliance with WHD's investigative and enforcement authority under 29 CFR part 501, as specified in 20 CFR 655.101(b). The Department proposed revisions in the NPRM to make these obligations more explicit in § 655.135 and on the job order, to better ensure that both workers and employers are fully aware of WHD's authorities. The Department did not receive any comments on this proposed revision. Therefore, for the reasons set forth in the NPRM, the Department adopts the language as proposed.

b. Sections 655.135(h), (m), and (n), 655.103(b), Worker Voice and Empowerment

Before an employer may hire H–2A workers, it must apply for and obtain from the Department a certification that: (1) there are insufficient available U.S. workers who are able, willing, and qualified to perform the employer's job opportunity; and (2) the employment of H–2A workers in the job opportunity ''will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' 8 U.S.C. 1188(a)(1). Courts have long recognized that Congress delegated to the Department broad authority to implement the INA's prohibition on adverse effect at 8 U.S.C. 1188(a)(1)(B). *See, e.g., Overdevest,* 2 F.4th at 982–83; *AFL–CIO* v. *Dole,* 923 F.2d 182, 184–85 (D.C. Cir. 1991) (citing *AFL–CIO* v. *Brock,* 835 F.2d 912, 917 (D.C. Cir. 1987)); *see also Nat'l Council of Agric. Emps.* v. *U.S. Dep't of Lab.,* No. 22–3569, 2024 WL 324235, at *2 (D.D.C. Jan. 29, 2024) (discussing the Department's regulatory authority under the H–2A program). The Department has historically understood the INA's adverse effect requirement both as requiring parity between the terms and conditions of employment provided to H–2A workers and other workers employed by an H–2A employer, and as establishing a baseline ''acceptable'' standard for working conditions below which workers in the United States would be adversely affected. *See, e.g.,* 1978 Final Rule, 43 FR at 10312, 10314; 1987 H–2A IFR, 52 FR at 20508, 20513; *see also Garcia-Celestino* v. *Ruiz Harvesting, Inc.,* 843 F.3d 1276, 1285 (11th Cir. 2016) (explaining that the regulations' provision of minimum ''baseline benefits'' to H–2A workers, including sound working conditions, ''ensure[s] that foreign workers will not appear more attractive to the 'employer' than domestic workers, thus avoiding any adverse effects for domestic workers'') (citations omitted). As courts have observed, the Department cannot seek to make jobs more attractive to U.S. workers, but instead must ''neutralize any 'adverse effect' resultant from the influx of temporary foreign workers.'' *Williams* v. *Usery,* 531 F.2d 305, 307 (5th Cir. 1976).

As explained in the NPRM, the Department recognizes that some of the characteristics of the H–2A program, including the temporary nature of the work, frequent geographic isolation of the workers, and dependency on a single employer, create a vulnerable population of workers for whom it is uniquely difficult to advocate or organize regarding the terms and conditions of employment or to seek access to certain service providers. The Department also has significant enforcement experience with H–2A workers who have faced retaliation for asserting or advocating for their rights. The Department explained in the NPRM that it believed that this vulnerability of the H–2A workforce, and the ability of employers to hire this vulnerable workforce, may suppress or undermine the ability of farmworkers in the United States to negotiate with employers and advocate on their own behalf regarding working conditions in their shared workplaces, in light of the availability of the H–2A workforce. In other words, even if workers in the United States were to raise concerns regarding their terms and conditions of employment, under the current H–2A regulatory framework, employers may turn to the H–2A program for an alternative workforce that faces significant barriers to similar advocacy, thus undermining advocacy efforts by or on behalf of similarly employed workers in the United States. In addition, in light of the barriers they face, H–2A workers are less able and less likely to advocate on behalf of themselves or their coworkers to seek compliance with the terms and conditions of employment set forth in the Department's regulations, employment below which will adversely affect workers in the United States.[62]

In the NPRM, the Department expressed its concern that the H–2A program currently does not provide sufficient protections for H–2A and corresponding workers to advocate on behalf of themselves or their coworkers regarding working conditions without fear of reprisal. Therefore, in the NPRM, the Department proposed changes to its regulations that would expand the H–2A anti-retaliation provision and include new employer obligations that would reduce or remove these barriers to worker empowerment.

In addition to seeking comment on the specific proposed revisions, discussed further below, the Department sought comment on whether H–2A workers are more vulnerable to labor exploitation than similarly employed workers in the United States, whether the existing worker protections are sufficient to prevent violations of the H–2A program, and whether agricultural workers in the United States have greater voice and empowerment to advocate regarding the terms and conditions of their employment. The Department received significant comments on these issues.

Those commenters that agreed that H–2A workers are a more vulnerable workforce than their counterparts in the United States cited a range of evidence in support of this conclusion, including

[62] 88 FR at 63787–88; *see also* CDM, *Ripe for Reform: Abuses of Agricultural Workers in the H–2A Visa Program* 4, 6 (2020) (CDM Report), *https://cdmigrante.org/ripe-for-reform;* Farmworker Justice, *No Way to Treat a Guest: Why the H–2A Visa Program Fails U.S. and Foreign Workers* 7, 11, 17, 21–31 (2012) (Farmworker Justice Report), *https://www.farmworkerjustice.org/wp-content/uploads/2012/05/7.2.a.6-No-Way-To-Treat-A-Guest-H-2A-Report.pdf* (Farmworker Justice Report); Jordan, M., *Black Farmworkers Say They Lost Jobs to Foreigners Who Were Paid More,* N.Y. Times (Nov. 12, 2021), *https://www.nytimes.com/2021/11/12/us/black-farmworkers-mississippi-lawsuit.html;* Polaris, *Labor Trafficking on Specific Temporary Work Visas, A Data Analysis 2018–2020* 13–18 (May 2022) (Polaris 2018–2020 Report), *https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf;* Daniel Costa et al., EPI, *Federal Labor Standards Enforcement in Agriculture* 3–6 (Dec. 2020) (EPI 2020 Report), *https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/.*

specific examples of worker experiences, data, and studies on the H–2A program. These comments reflect that the nature of the H–2A program makes these workers particularly vulnerable to retaliation and threats of retaliation, and that the existing worker protections are insufficient to ensure program compliance. For example, CCUSA and USCCB stated that several Catholic Charities agencies that serve migrant farmworkers across the country ''report the regular and widespread occurrence of illicit and unjust practices'' among H–2A workforces, including restrictions on mobility, worker isolation, and insufficient health care. The California LWDA, a State labor agency, stated that it has seen that ''[f]armworkers experience a range of abusive labor practices, including underpayment of wages, inadequate implementation and enforcement of workplace safety measures, and substandard employer-provided housing conditions.'' With respect to H–2A workers in particular, the agency stated that in its experience ''H–2A workers appear to be even more fearful to seek assistance or otherwise exercise their legal rights because they are more vulnerable to employer misconduct'' than other farmworkers, citing a ''grave imbalance of power between employers and H–2A workers because their visas, encompassing both their authorization for employment and right to remain in the United States, are tied to a single employer.''

AIHA, an association committed to occupational health and safety, noted that, as compared to H–2A workers, similarly employed agricultural workers do not face threats of deportation, are not tied to a single employer, and ''[t]hey are also more likely to be English-speaking, less likely to depend on the employer for housing, and less likely to lose future job opportunities.'' The National Women's Law Center echoed these same concerns, commenting that H–2A workers are dependent upon their employers to work and to remain in the United States: ''If workers lose their H–2A employment, they must leave the country unless they can find another employer to sponsor them. As a result, H–2A workers will work to the limits of human endurance in an effort to please their employers, keep their jobs, and have the chance of being rehired in future years.'' CAUSE, which advocates on behalf of H–2A workers and other working-class and immigrant communities in California's Central Coast, stated that ''H–2A workers who wish to stand up to unfair or illegal conduct have reason to fear retaliation in the form of discharge and deportation as well as denial of a job and visa in a future season.''

Many commenters also stated that greater worker protections are needed to empower workers to advocate regarding working conditions without fear of retaliation and to prevent H–2A program violations. The UFW Foundation gathered and submitted with their comment the first-hand experiences of numerous farmworkers to demonstrate these needs. For example, the comment quoted an H–2A worker as saying that ''most workers stay silent because of fear of not being allowed to come back'' and another H–2A worker explaining that he didn't advocate for himself because ''I know the consequences if I speak and I don't want to lose my job.'' Yet another H–2A worker stated that ''we cannot ask for better treatment because they will simply return us to our country.'' A former H–2A worker reported that colleagues who complained about wages, housing, or other working conditions were punished.

Many commenters also cited a 2020 report from EPI which reflects a similar conclusion, noting that farmworkers' fear of retaliation and deportation can contribute to an underreporting of violations.[63] The GAO 2015 Report reflects this potential for underreporting as well, explaining that the dependency of H–2A workers on the employer for a visa and employment authorization creates disincentives for workers to report program abuses, leading to an underreporting of violations.[64]

The EPI 2020 Report also set forth that 70 percent of WHD investigations of farms found violations and that a farm employer's probability of being investigated in any year is 1.1 percent.[65] The National Women's Law Center stated, ''less than one percent of agricultural employers are investigated per year, yet when WHD does investigate . . . it detects wage and hour violations 70 percent of the time, indicating that wage theft by employers is grossly undetected.'' In fact, in the previous 5 fiscal years, in 88 percent of WHD's H–2A investigations, WHD found employers in violation of the law. In H–2A cases where back wages are owed, the average worker is owed $746.[66] In its 2020 report, among other recommendations to address its findings, EPI encouraged the Department to ''build on the good work done by advocates and unions to educate farmworkers about their rights and the process of reporting violations.'' [67] In its comment on the NPRM, EPI reiterated its conclusion from its 2020 report and also cited a more recent EPI study from 2023 that ''found that violations of H–2A rules account for much higher shares of back wages owed and civil money penalties assessed than violations of other laws on farms, and now account for an overwhelming share of the back wages owed and civil money penalties assessed in agriculture that are the result of closed investigations.'' [68]

An individual commenter also noted that the recruitment of H–2A workers ''is tainted by rampant abuses,'' including trafficking and labor exploitation. A group of 15 U.S. Senators identified labor trafficking as a major concern in the H–2A program, citing the Polaris 2018–2020 Report finding that the Human Trafficking Hotline identified 2,841 victims of labor trafficking who held an H–2A visa from 2018 to 2020, that 58 percent of those reported they had worked excessive hours, and that 41 percent reported their wages had been withheld or taken. The Alliance to End Human Trafficking noted that, in its experience, ''traffickers thrive where vulnerability is high.''

Commenters also observed that agricultural labor is dangerous, and these risks are compounded for H–2A workers who may be less likely to report safety concerns out of fear of reprisal. The California LWDA reported that ''Cal/OSHA considers the agricultural industry a high hazard industry, an industry with the highest incidence of preventable occupational injuries and illnesses and workers' compensation losses.'' A group of State Attorneys General cited a report from Union of Concerned Scientists outlining the dangers of farmwork and how these dangers are likely to be increasing, particularly dangers related to climate change.[69] These State Attorneys General also cited to a NIOSH website that observed, based on BLS data, that agricultural workers report one of the highest fatal injury rates and also that there is ''well-known underreporting of

[63] EPI 2020 Report at 13.

[64] GAO 2015 Report at 37.

[65] EPI 2020 Report at 18–19, 56.

[66] DOL, *Enforcement Data, https://enforcedata.dol.gov/homePage.php* (last accessed Apr. 1, 2024).

[67] EPI 2020 Report at 8.

[68] Daniel Costa & Philip Martin, EPI, *Record-low Number of Federal Wage and Hour Investigations of Farms in 2022* 12 (Aug. 22, 2023), *https://www.epi.org/publication/record-low-farm-investigations/.*

[69] Union of Concerned Scientists, *Farmworkers at Risk* (2019), *https://www.ucsusa.org/sites/default/files/2019-12/farmworkers-at-risk-report-2019-web.pdf.*

injury'' in the industry.[70] Specifically, according to NIOSH, in 2021, workers in the agriculture, forestry, fishing, and hunting industry experienced one of the highest fatal injury rates at 20 deaths per 100,000 full-time workers, compared to a rate of 3.6 deaths per 100,000 workers for all U.S. industries. The State Attorneys General comment also pointed out that ''workers trapped in abusive or coercive environments are less likely to take rests or complain about lack of adequate environmental protections, which enables dangerous health and safety violations to persist.'' Citing a study from the *Annual Review of Public Health,* AIHA noted that H–2A workers ''are incentivized to continue employment even when presented with working conditions and labor standards violations that are hazardous to their health and safety.'' [71]

Some commenters also noted that the proposed rule would benefit employers as well as workers. As one individual commenter noted, ''[a]n employer may be economically disadvantage[d] if it prefers not to cut wage and safety corners but its competitors do.'' Another individual commenter explained that ''consistent and fair treatment of workers across the country not only helps the worker, but helps the farmers who do the right thing in the first place.''

On the other hand, many commenters refuted that H–2A workers are a vulnerable workforce or that greater worker protections are needed to ensure program compliance. Several commenters, including IFPA, U.S. Custom Harvesters, Inc., TIPA, and Titan Farms, LLC, opined that the conditions the Department cited in the NPRM as underpinning the perceived vulnerability of H–2A workers—including the workers' dependence on one employer for employment, housing, food, water, and transportation—are conditions the Department ''itself has created'' through regulations and that it is ''unfathomable that the Department is utilizing its own extensive regulatory requirements as its rationale for more regulatory requirements on U.S. businesses.'' Several commenters, including Western Growers, AmericanHort, and Willoway Nurseries, cited a number from a report of the Cato Institute observing that there are over 200 regulatory requirements in the H–2A program.[72] Several commenters suggested that ''[i]f the Department is concerned with the impact its regulation has on the workforce,'' the Department should consider ''revisions to the existing regulations to provide more flexibilities for the workers'' to make workers less vulnerable.

The Department disagrees that its regulations have created the conditions giving rise to the vulnerability of H–2A workers, such as the statutory dependency on a single employer for a visa, frequent geographic isolation, and language barriers described above. The Department's existing regulations and those included in this final rule are intended to empower workers to voice concerns regarding their terms and conditions of employment without fear of reprisal by employers, agents, recruiters, and other persons who may seek to exploit this dependence. In addition, the Department's regulations do not reduce worker flexibilities related to housing, transportation, meals, and other needs, but instead establish the minimum terms and conditions of employment under this unique program that are necessary to prevent adverse effect on similarly employed workers in the United States.

Several commenters also asserted that the H–2A program ''provides a significant financial opportunity for this critical workforce and their families, which is not accounted for by the Department within this proposal.'' For example, GFVGA observed that many workers return to the same employer year after year, and ''are eager to recruit friends and family members into the program.'' USA Farmers stated that H–2A workers are not more vulnerable but instead have ''more legal protections and benefits'' than U.S. farmworkers. In addition, many commenters felt that the Department's statements in the NPRM regarding the vulnerability of H–2A workers exhibited bias against agricultural employers. Several commenters, including NCFC and FFVA, noted that the ''vast majority of employers who use the [H–2A program] do so with an eye towards compliance.'' IFPA explained that over the years many ''employers have developed a deeper understanding of the program and as a result continue to adopt protocols to ensure compliance, more transparent and efficient recruiting practices, as well as incentive packages for workers to return.'' In support of this point, IFPA, NCAE, the U.S. Chamber of Commerce, and several other commenters cited a blog post from the Rural Migration News at the University of California-Davis. According to the commenters, that blog post—relying on the 2020 EPI report discussed above—stated that between 2005 and 2019, ''71 percent of all violations found on vegetable farms occurred on only 5 percent of all the U.S. vegetable farms.'' [73] These commenters asserted that this data suggests that the proposed regulations are unnecessary and the Department should instead focus on targeted enforcement against the ''bad apples.'' Similarly, citing the House Committee on Agriculture's Agricultural Labor Working Group Interim Report, wafla commented that the Department and SWAs should better utilize existing regulatory and enforcement tools rather than adopt the proposed worker voice and empowerment regulations.[74]

The Department appreciates the opportunity to state clearly that its mission is to promote and achieve compliance with labor standards to protect and enhance the welfare of the nation's workforce. The Department respects that the majority of H–2A employers seek to comply with the law. Unfortunately, despite these good intentions and as explained above, violations of the H–2A program requirements remain pervasive. Although the so-called ''bad apple'' employers may commit a large share of the violations WHD encounters in its investigations, the fact remains that when WHD investigates H–2A employers, it typically does not find full compliance with the law, with back wages averaging several hundred dollars owed per worker. But WHD cannot investigate every farm on which H–2A workers are employed. WHD's enforcement initiatives are data-driven and seek to target the agency's limited

[70] NIOSH, Agricultural Safety, *https://www.cdc.gov/niosh/topics/aginjury/default.html* (last accessed Apr. 2, 2024).

[71] Sally M. Moyce & Marc Schenker, *Migrant Workers and Their Occupational Health and Safety,* 39 Annual Rev. of Public Health 351 (2018), *https://www.annualreviews.org/docserver/fulltext/publhealth/39/1/annurev-publhealth-040617-013714.pdf; See also* Federico Castillo et al., *Environmental Health Threats to Latino Migrant Farmworkers,* 42 Annual Rev. of Public Health 257–276 (2021), *https://www.annualreviews.org/docserver/fulltext/publhealth/42/1/annurev-publhealth-012420-105014.pdf.*

[72] David J. Bier, Cato Institute, Immigr. Rsch. & Pol'y Br. No. 17, *H–2A Visas for Agriculture: The Complex Process for Farmers to Hire Agricultural Guest Workers* 17–30 (Mar. 2020) (counting 209 unique regulatory requirements for the H–2A program between DOL, DHS, and Department of State regulations), *https://www.cato.org/publications/immigration-research-policy-brief/h-2a-visas-agriculture-complex-process-farmers-hire.*

[73] Rural Migration News, *The H–2A Program in 2022* (May 16, 2022), *https://migration.ucdavis.edu/rmn/blog/post/?id=2720.*

[74] House Comm. On Agric., Agric. Lab. Working Grp., Interim Report (Nov. 7, 2023), *https://agriculture.house.gov/uploadedfiles/house_committee_on_agriculture_-_alwg_interim_report_-_final_-_11.7.23.pdf.* Notably, this report also includes findings from a Labor Perspectives roundtable that reflect many of the same concerns identified in the comments on the NPRM regarding the barriers H–2A workers face to reporting program violations. *Id.* at 28–30.

resources where needed most. WHD also supplements its enforcement efforts through employer and worker outreach programs, understanding that it may reach a larger audience by leveraging advocacy organizations, employer associations, community-based organizations, and State and Federal agencies. For example, WHD partnered with the North Carolina Department of Labor's Agriculture Safety and Health Bureau to reach farmworkers in the Southeast. In recent years, WHD has also hosted regional multi-day virtual agricultural seminars educating hundreds of stakeholders—including employers, associations, agents, workers, and advocates—about their rights and obligations under the H–2A provisions of the INA and other laws enforced by the agency. In addition, the Department has developed websites in both English and Spanish, *www.MigrantWorker.gov* and *www.TrabajadorMigrante.gov,* that aim to educate workers about their rights, increase WHD's visibility, and streamline workers' ability to contact WHD with questions, concerns, or complaints.[75] Even so, as many commenters pointed out and as discussed above, a farm employer's probability of being investigated by WHD in any year is small. This final rule seeks to supplement these data-driven enforcement and outreach efforts by giving workers the tools they need to ensure that they are being properly paid and to advocate on their own behalf regarding working conditions, without fear of reprisal. And, as one individual commenter stated, ''consistent and fair treatment of workers across the country not only helps the worker but helps farmers who do the right thing in the first place.''

The Department also recognizes that the H–2A program benefits H–2A workers in many ways and that the program provides many workers with a financial opportunity that may not exist in their home communities. Many workers do return to the same employer year after year. But, as several commenters pointed out, this dynamic can lead to significant vulnerability for these workers—the fact that workers rely upon the same employer for such an important economic opportunity makes them less likely to speak up about working conditions or noncompliance; workers may not feel empowered to raise concerns with their employer for fear of retaliation, not only by their current employer, but by labor recruiters and other H–2A employers as well, and may lack resources to find other H–2A employment. The Department seeks, in this final rule, to empower workers to seek compliance and protection of their rights.

In addition, a number of commenters, including NCAE and IFPA, took issue with the Department's statement that the dangers and hardships inherent in agricultural labor and the lack of protections for worker organizing have contributed to worsening working conditions and led to a decreasing number of agricultural workers in the United States willing to accept such work. Citing data from USDA, IFPA asserted that the growth in the H–2A program is ''more likely a result of an aging domestic agricultural work force and a decrease in the number of migratory farmworkers.'' The Department acknowledges these trends in the agricultural workforce but notes that regardless of the root cause, use of the H–2A program has grown dramatically over the past decade while overall agricultural employment in the United States has remained stable, meaning that fewer workers in the United States are employed as farmworkers.[76] This increasing reliance upon the H–2A program makes the entire agricultural workforce as a whole more vulnerable to abuse and exploitation for the reasons discussed above, and therefore greater worker protections are needed to ensure that workers feel safe and have the ability to ensure that their rights are being protected.

As several commenters noted, the Department's H–2A regulations already include numerous and substantial protections for workers, including various minimum terms and conditions of employment under the H–2A program that are necessary to prevent adverse effects on similarly employed workers. However, as the Department's enforcement experience and the above comments, data, and studies reflect, greater protections are needed to empower workers to speak up on their own behalf to enforce these terms and conditions of employment. As the American Federation of Labor & Congress of Industrial Organizations (AFL–CIO) stated in its comment, ''[g]uaranteeing such wages and working conditions on paper means nothing if the H–2A workers are unable or unwilling because of fear and intimidation to take action if they are not paid the required wages or are otherwise abused.'' Workers' rights cannot be secured unless they are protected from all forms of discrimination resulting from any worker's attempt to advocate on behalf of themselves or their coworkers. The Department and courts have long recognized that such protections are necessary and essential to the effective functioning of a complaint-based enforcement system. *See, e.g.,* 88 FR at 63790; *Mitchell* v. *Robert DeMario Jewelry, Inc.,* 361 U.S. 288, 292 (1960) (agreeing with the Department's interpretation of the FLSA's anti-retaliation provision that ''effective enforcement could . . . only be expected if employees felt free to approach officials with their grievances''). As the comments and the Department's enforcement experience make clear, the current protections are not enough to prevent adverse effect. Therefore, after consideration of the comments received, the Department concludes that the H–2A workforce is uniquely vulnerable, and as a result, H–2A workers are less able and less likely to advocate on behalf of themselves or their coworkers to seek compliance with the terms and conditions of H–2A employment that the Department has determined are necessary to prevent adverse effect on the wages and working conditions of workers in the United States similarly employed. Additionally, the ability of employers to hire this uniquely vulnerable workforce may suppress the ability of agricultural workers in the United States to negotiate with employers and advocate on their own behalf regarding their terms and conditions of employment.

The Department proposed in the NPRM to prevent such adverse effect by revising the assurances and obligations of H–2A employers to include stronger protections for workers who advocate regarding their working conditions on behalf of themselves and their coworkers. Specifically, the Department proposed to broaden the provision at § 655.135(h), which prohibits unfair treatment, by adding a number of protected activities that the Department considered would play a significant role in safeguarding collective action—activities that workers must be able to

[75] *See www.MigrantWorker.gov* (English language version) and *www.TrabajadorMigrante.gov* (Spanish language version), at *https://www.dol.gov/general/migrantworker* and *https://www.dol.gov/general/trabajadormigrante. See also https://www.dol.gov/agencies/whd/espanol* and *https://www.worker.gov/es* for additional Spanish language Department resources for workers.

[76] According to USDA's Economic Research Service, employment of farmworkers in the United States has remained stable since the 1990s, but the number of positions certified in the H–2A program has increased sevenfold from 2005 to 2022. *See USDA, Farm Labor, https://www.ers.usda.gov/topics/farm-economy/farm-labor* (last visited Apr. 2, 2024); USDA, *H–2A Seasonal Worker Program Has Expanded Over Time, https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=104874* (last visited Apr. 2, 2024).

engage in without fear of intimidation, threats, and other forms of retaliation. The Department also proposed several new employer obligations at § 655.135(m) that would ensure H–2A employers do not interfere with workers' efforts to advocate regarding their working conditions, including a number of requirements that would advance worker voice and empowerment and further protect the rights proposed under § 655.135(h). The Department also proposed a new employer obligation at § 655.135(n) that would explicitly allow H–2A workers and workers in corresponding employment the right to invite or accept guests to worker housing and also would provide a narrow right of access to worker housing to labor organizations. Some of these provisions were limited to those workers who are engaged in agriculture as defined and applied in 29 U.S.C. 203(f)—that is, those who are exempt from the protections of the NLRA.

As detailed below in the section-by-section analysis, the Department is adopting several of its proposals relating to worker voice and empowerment in this final rule, modified as discussed in response to the comments received. The Department concludes that these provisions, which safeguard worker voice and empowerment, will prevent adverse effect on similarly employed workers in the United States by alleviating some of the barriers H–2A workers face when raising complaints about violations of their rights under the program and advocating regarding working conditions.

Many commenters opposing the proposed rule argued that the Department failed to provide a ''rational basis'' for its conclusion that the proposed worker voice and empowerment provisions will prevent the identified adverse effect on similarly employed workers in the United States. As IFPA phrased the issue, ''[w]hat remains unanswered throughout the entire Department proposal is how greater access for labor organizations to foreign-citizen workers in the [H–2A] program will improve conditions for U.S. workers elsewhere.'' Similarly, wafla posited that the Department ''assumes that unionization is the answer to additional worker protections.'' Commenters also observed that many employees may not wish to join a union and should not be forced to do so.

The Department welcomes the opportunity to clarify this point. This final rule does not provide for collective bargaining rights nor does the rule compel a worker to join a union. As finalized, the rule does not grant any rights to labor organizations. Rather, as detailed below, the final rule does the following: clarifies and expands protections for engaging in protected activities, including exercising rights under State and local laws; offers new protections for workers engaged in FLSA agriculture to engage in concerted activity; provides limited access to representation in disciplinary proceedings; and ensures greater access for workers to key service providers and to information about workers' rights. The Department believes that each of these provisions, taken individually, will reduce the fear of retaliation and other barriers currently faced by the H–2A workforce when seeking to advocate on behalf of themselves and their coworkers regarding their working conditions or violations of their rights, if they so choose. Empowering workers in this way thus can improve compliance with the various terms and conditions of H–2A employment that the Department has separately determined are necessary to prevent adverse effect on similarly employed workers. The Department believes that these improved protections also will help place the H–2A workforce on more equal footing with similarly employed workers and thus reduce the potential for this workforce's vulnerability to undermine the advocacy efforts of similarly employed workers.

The right to engage in concerted activity specifically, as described in greater detail in Section VI.C.2.b.viii below, is a demonstrated and powerful tool to empower worker voice to address working conditions, whether or not the workers' concerted activity results in formal representation by a labor union or other organized group. For example, in its comment, the AFL–CIO pointed to evidence that worker engagement in concerted activity ''significantly increases the enforcement of a broad range of employment laws and thus prevents the exploitation of workers.'' It particularly noted the role that representation by labor unions has played in increasing the likelihood that workers will voice complaints and increasing the likelihood of inspections under the Occupational Safety and Health Act.[77] In its comment, FLOC also provided evidence that collective action by workers can help prevent adverse effect, particularly through improving employer compliance with the terms and conditions of employment under the H–2A program. For example, FLOC noted that it has negotiated CBAs covering about 10,000 farmworkers in North Carolina, including many H–2A workers as well as non-H–2A workers. It also noted that although the H–2A regulations prohibit workers from paying recruitment fees, many H–2A workers are still illegally required by unscrupulous recruiters to pay such fees. FLOC stated that it ''has to a large extent eliminated these fees for workers employed under its [CBA] . . . due to the extensive provisions in the [CBA] providing job protection for those H–2A workers who file complaints regarding their U.S. employment, including complaints concerning recruitment fees.'' FLOC explained that its CBA indirectly assists in enforcing the regulatory provision by barring the blacklisting of union members who complain about illegal recruitment fees. FLOC also noted that its negotiated CBA with the North Carolina Growers Association also requires that all disciplinary actions and terminations be subject to a ''just cause'' standard, and provides union staff with access to all employer housing facilities and work sites, in order to inspect working conditions and assist workers in enforcing compliance. The UFW also quoted one H–2A worker stating that having representation would be helpful because the employers ''would stop threatening us all the time with returning us to our country and not giving us more work.'' It also cited evidence that many farmworkers regularly experience wage theft, especially regarding piece rates, and that concerted activity helps ensure that workers are paid the wages as promised in the job order. For example, one worker stated that after she worked on a piece rate basis for a month picking tangerines, the contractor refused to pay the workers because they did not have proof of how many tangerine bins they had picked. After the workers sought help from the UFW, the contractor finally paid the workers the wages they had earned. As reflected in the comments received, concerted activity by farmworkers can result in significantly fewer violations and improved compliance with laws even in non-union settings. As further detailed below, workers in several States have joined together to seek better enforcement of laws against sexual harassment, retaliation, and discrimination on farms, either by campaigning for voluntary agreements or by working with legal aid groups and/or government agencies to file complaints under applicable State laws and/or Federal anti-discrimination, minimum wage, and anti-human

[77] *See* David Weil, *Enforcing OSHA: The Role of Labor Unions,* 30 Indus. Rel. 20 (1991).

trafficking laws. Indeed, workers can engage in advocacy and concerted activities for the purpose of mutual aid and protection without engaging with or being represented by a labor organization. For example, although farmworkers in some States have been able to enforce their rights by joining unions, in other States they have chosen instead to band together in worker centers to campaign for voluntary agreements. *See, e.g.,* comments by FLOC, the UFW Foundation, the Farmworker Association of Florida, and CDM; *see also* the Campaign for Fair Food supported by the Coalition of Immokalee Workers in Florida. Farmworkers also have engaged in concerted, collective action through litigation to enforce their rights. *See, e.g., Garcia-Celestino,* 843 F.3d at 1285 (class action filed by H–2A workers in Florida bringing claims against labor contractor and fruit grower under FLSA, State minimum wage law, and State breach of contract law for failure to pay required wages); *Gonzalez-Rodriguez* v. *Gracia,* No. 5:21–CV–406, 2023 WL 2450170 (E.D.N.C. Feb. 6, 2023) (collective action filed under FLSA by H–2A workers who worked as both cooks and field workers in North Carolina alleging that employer failed to pay them, physically and sexually abused them, took possession of their passports and threatened violent retaliation if they attempted to escape); *Reyes-Trujillo* v. *Four Star Greenhouse, Inc.,* 513 F. Supp. 3d 761, 773–74 (E.D. Mich. 2021) (complaint filed by H–2A workers against grower under Federal and State laws alleging that employer and its labor contractor did not pay them properly and retaliated against workers who raised concerns by having them jailed and removed from the United States).

And as detailed in the NPRM and below, concerted activity under this rule need not include any formal organization of workers, as it includes employee activity ''engaged in with or on the authority of other employees, and not solely by and [on] behalf of the employee himself,'' and can consist of two or more workers presenting joint requests or grievances to their employer, among other activities. 88 FR at 63793 (citations omitted). Concerted activity also encompasses workers' individual actions when they seek to initiate, induce, or prepare for group action, or when workers bring shared complaints to the attention of management or an enforcement agency. *Id.* As stated in the NPRM, activity for ''mutual aid or protection'' encompasses activities for which ''there is a link between the activity and matters concerning the workplace or employees' interests as employees.'' *Id.* (citations omitted). For example, as further detailed below, ''concerted activity for mutual aid and protection'' can be as simple as one worker speaking up for another, or two workers approaching their employer jointly, to complain about a lack of clean drinking water or inadequate or unsanitary toilet facilities in violation of OSHA field sanitation standards.[78] The Department also recognizes that there are many ways that workers can seek to advocate on behalf of their working conditions and seeks in this final rule to protect all such activities. Therefore, after consideration of the comments, the Department has modified the worker voice and empowerment provisions from those proposed in the NPRM. As described in greater detail below, in response to concerns raised by commenters, the Department will not finalize the proposals to require employers to provide a requesting labor organization with a list of employee contact information, nor the requirement that an employer disclose whether it will bargain in good faith over a neutrality agreement with a labor organization, nor the right of access to employer-furnished housing for labor organizations. The Department will finalize, with the modifications described below, the worker protections against unfair treatment at § 655.135(h) and the right to a representative in certain disciplinary proceedings at § 655.135(m). The Department also adopts a significantly modified version of the ''captive audience meetings'' provision at proposed § 655.135(m)(3). Finally, the Department will finalize the explicit right of H–2A or corresponding workers to invite or accept guests to worker housing.

A number of commenters argued that the Department lacks statutory authority to promulgate its proposed worker voice and empowerment regulations. Several trade associations, including FFVA and IFPA, commented that the Department's proposal unlawfully sought to make jobs more attractive to U.S. workers. These commenters also argued the Department lacks authority to establish a ''baseline'' of acceptable standards for working conditions below which workers in the United States would be adversely affected. Other commenters stated that the Department's proposals could not prevent adverse effect when many agricultural workers in the United States lack collective bargaining rights. For example, wafla commented that the baseline of working conditions is ''the absence of collective bargaining rights in agriculture'' and that the Department therefore lacked authority to attempt to expand collective bargaining rights for H–2A workers. Commenters also asserted that the Department failed to properly consider the needs and rights of employers in developing these worker voice and empowerment proposals, noting that the H–2A statute requires the Department to balance the competing goals of providing U.S. employers with a needed workforce while preventing adverse effect on similarly employed workers in the United States. Relatedly, commenters stated that the Department selectively proposed to adopt only certain provisions of the NLRA, excluding protections built into the NLRA for employers to challenge unfair labor practices by unions.

The Department does not intend with this final rule to make jobs more attractive to U.S. workers. *See Williams,* 531 F.2d at 306–07 (Department may not set AEWR based on ''attractiveness to workers''). Neither is the Department granting collective bargaining rights to H–2A and corresponding workers, nor regulating the conduct of unions. Instead, as described above, the Department seeks to prevent adverse effect on similarly employed workers by ensuring that workers have the tools to ensure that their rights under the H–2A program are not violated and to advocate regarding the terms and conditions of their employment, on more equal footing with similarly employed workers in the United States. Though such similarly employed workers may be excluded from the NLRA's protections, they may be less likely to face the unique vulnerabilities and forms of retaliation experienced by H–2A workers described above. The tools adopted in this final rule include the right for workers to engage in protected, concerted activity without fear of retaliation and additional worker protections to empower workers in order to engage in advocacy regarding the terms and conditions of employment. In adopting these provisions, the Department is exercising its long-recognized authority to establish the minimum terms and conditions of employment (*i.e.,* the ''baseline'' of working conditions) necessary to ''neutralize any 'adverse effect' resultant from the influx of temporary foreign workers.'' *Id.; see also Garcia-Celestino,* 843 F.3d at 1285. As

[78] *See, e.g.,* DOL, *OSHA Fact Sheet #51: Field Sanitation Standards under the Occupational Safety and Health Act* (2008), *https://www.dol.gov/agencies/whd/fact-sheets/51-osh-act-field-sanitation.*

detailed below in the section-by-section analysis, the Department has determined that the worker voice and empowerment provisions adopted in this final rule are necessary to address a demonstrated imbalance of power between employers and H–2A workers and prevent adverse effect on similarly employed workers. The Department has considered the burden imposed on employers for each proposal and has determined that the provisions adopted in this final rule strike the necessary balance, such that the Department can satisfy its statutory mandate under 8 U.S.C. 1188(a)(1) when granting a labor certification to a prospective H–2A employer.

Many commenters also asserted that the Department's proposals would be preempted by the NLRA if finalized. As the Department explained in the NPRM, some of the provisions of the proposal, including some of those adopted in this final rule, are limited to persons who are engaged in FLSA agriculture (*i.e.,* as defined and applied in 29 U.S.C. 203(f)). This final rule provides, as described more fully below, certain protections for these workers to engage in concerted activity and provides certain rights necessary to safeguard collective action. The Department explained in the preamble of the NPRM that these provisions are not preempted by the NLRA because the NLRA's coverage extends only to workers who qualify as ''employee[s]'' under sec. 2(3) of that Act, and the NLRA's definition of employee expressly excludes ''any individual employed as an agricultural laborer.'' 29 U.S.C. 152(3). Congress has provided that the definition of ''agriculture'' in sec. 3(f) of the FLSA also applies to the NLRA. *See, e.g., Holly Farms Corp.* v. *NLRB,* 517 U.S. 392, 397–98 (1996). Following the plain text of the statute, both Federal courts and the NLRB have long held that the NLRA does not apply to agricultural workers, worker organizing by agricultural workers, or unions ''composed exclusively of agricultural laborers.'' *Di Giorgio Fruit Corp.* v. *NLRB,* 191 F.2d 642, 647 (D.C. Cir. 1951); *see also, e.g., Villegas* v. *Princeton Farms, Inc.,* 893 F.2d 919, 921 (7th Cir. 1990). Because the rights and protections relating to concerted activity in this final rule apply only to workers who fall within the NLRA and FLSA definitions of ''agriculture,'' these provisions apply exclusively to workers who are exempt from the NLRA.

As the Supreme Court explained in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959), the NLRA preempts regulation of activities that either are or arguably are ''protected by § 7 of the [NLRA], or . . . an unfair labor practice under § 8.'' *Id.* at 244; *see also UAW-Labor Emp. & Training Corp.* v. *Chao,* 325 F.3d 360, 363 (D.C. Cir. 2003). Conduct may be ''arguably'' governed by sec. 7 or 8 of the NLRA when there is a plausible argument for preemption ''that is not plainly contrary to [the Act's] language and that has not been authoritatively rejected by the courts or the Board.'' *Int'l Longshoremen's Ass'n* v. *Davis,* 476 U.S. 380, 395 (1986) (citations omitted). Because agricultural workers are expressly excluded from the NLRA by the plain text of the statute, agricultural worker concerted activity is neither protected by sec. 7 of the Act nor subject to sec. 8's limitations on unfair labor practices. *See* 29 U.S.C. 152(3); *see also Bud Antle, Inc.* v. *Barbosa,* 45 F.3d 1261, 1274 (9th Cir. 1994) (''If Bud's employees are 'agricultural laborers,' then the NLRA does not apply, and the company's conduct is not arguably prohibited under the Act.''); *Villegas,* 893 F.2d at 921 (agricultural workers' retaliation claim not preempted by NLRA because they are excluded from the NLRA's protections); *Di Giorgio,* 191 F.2d at 647–49 (holding that NLRA sec. 8's prohibition on secondary boycotts did not apply to a farm union, because an organization composed exclusively of agricultural workers is not governed by the NLRA). Therefore, because this final rule's provisions relating to concerted activity apply only to agricultural workers, the conduct that is protected under those provisions is not even arguably governed by the NLRA and thus not preempted under *Garmon. Id.*

The NLRA also preempts regulation of employer or worker conduct that Congress intended to leave unregulated ''to be controlled by the free play of economic forces.'' *Int'l Ass'n of Machinists & Aerospace Workers* v. *Wis. Emp't Relations Comm'n,* 427 U.S. 132, 140 (1976) (citation omitted). *Machinists* preemption applies to State or Federal regulation of ''economic weapons'' that would ''frustrate effective implementation of the [NLRA's] processes.'' *Id.* at 147–48 (citations omitted). However, Federal courts have held repeatedly that Congress' exclusion of agricultural employees from the NLRA's protection indicates that Congress did not intend to occupy the field of agricultural labor relations and that labor regulations covering agricultural employees do not frustrate effective implementation of the NLRA. *See United Farm Workers of Am.* v. *Ariz. Agric. Emp't Rels. Bd.,* 669 F.2d 1249, 1257 (9th Cir. 1982) (NLRA does not preempt State regulation of agricultural laborers); *Willmar Poultry Co.* v. *Jones,* 430 F. Supp. 573, 577–78 (D. Minn. 1977) (same). Similarly, courts have held that *Machinists* preemption does not bar labor relations regulations that apply to other workers excluded from the NLRA. *See, e.g., Davenport* v. *Wash. Educ. Ass'n,* 551 U.S. 177, 181 (2007) (public employees); *Chamber of Commerce* v. *City of Seattle,* 890 F.3d 769, 793 (9th Cir. 2018) (independent contractors); *Greene* v. *Dayton,* 806 F.3d 1146, 1149 (8th Cir. 2015) (domestic service workers). Accordingly, the provisions of this final rule applicable only to agricultural employees excluded from the NLRA are not prohibited under *Machinists* preemption.

Many commenters attempted to distinguish *Garmon* and *Machinists,* and related cases, from the Department's proposed rule, opining that because the Department is a Federal agency, rather than a State, a different preemption analysis must apply. For example, Willoway Nurseries stated that the Department's preemption analysis ''negates the point that Congress spoke as to what the Executive could do when it comes to agricultural workers, and they are exempt from the provisions of the NLRA.'' FFVA similarly opined that, ''[w]hile states may be able to legislate where Congress has not 'occupied the field,' the U.S. Department of Labor, importantly, is not a state.'' The comment continued, ''[r]egarding labor policy for agricultural workers, Congress was in no way silent as to a policy. The NLRA expressly excluded agriculture laborers from the provisions of the Act.''

These commenters fail to recognize that, as the Supreme Court and circuit courts have made clear, both the *Machinists* and *Garmon* analyses apply to consideration of whether the NLRA preempts any laws or regulations, whether promulgated by the Federal government or by State governments. Over 30 years ago, the Supreme Court observed that ''[t]he *Machinists* rule creates a free zone from which all regulation, whether federal or State, is excluded.'' *Golden State Transit Corp.* v. *City of Los Angeles,* 493 U.S. 103, 111 (1989) (citations omitted). The lower courts have recognized this as well. *See, e.g., Chamber of Commerce* v. *Reich,* 74 F.3d 1322 (D.C. Cir. 1996) (''Nor, as we have noted, is there any doubt that *Machinists* 'pre-emption' applies to federal as well as state action.''). As set forth above, the Department's rule is not preempted under *Machinists.* Similarly, *Garmon* preemption is equally relevant to determining whether the NLRA preempts Federal or State laws or

regulations. *See, e.g., UAW-Labor Emp. & Training Corp.,* 325 F.3d at 363 (considering whether Department posting regulation was preempted by the NLRA under *Garmon*); *Nat'l Ass'n of Mfrs.* v. *Perez,* 103 F. Supp. 3d 7, 22 (D.D.C. 2015) (same). As the D.C. Circuit has explained, the relevant inquiry under *Garmon* is whether the activity in question is ''arguably'' protected or prohibited under the NLRA; this question applies equally to examine State and Federal laws and regulations. *UAW,* 325 F.3d at 363–65. And as explained above, the provisions of this final rule relating to self-organization are neither arguably protected nor arguably prohibited under the NLRA.

For the most part, though, commenters asserted that the Department's proposals would be preempted by the NLRA because, in their view, the Department lacks any authority to protect rights relating to self-organization and concerted activity for workers excluded from the NLRA. Commenters, including employers, trade associations, and a group of State Attorneys General, also contended that the Department exceeded its authority under the INA by regulating labor relations in the agricultural sector. In particular, these commenters pointed to the exclusion from the NLRA's protections of agricultural workers to demonstrate that the Department lacks authority for its proposed regulations. A comment from 22 State Attorneys General stated that the Department is ''seeking to circumvent'' Federal law ''by granting foreign workers federal rights that no American agricultural worker has.'' The U.S. Chamber of Commerce stated that ''nothing in INA § 1188's words or context suggests that Congress meant to enact a full-scale program of labor-management relations.'' The National Right to Work Legal Defense Foundation, Inc. stated that there is ''no reasonable basis for concluding that [the INA] grants the Department sweeping authority to create substantive labor laws for agricultural employees.'' And the Michigan Farm Bureau stated, ''Congress spoke as to what the Executive could do when it comes to agricultural workers, and they are exempt from the provisions of the NLRA.''

In other words, these commenters argue that because the NLRA does not protect concerted activity involving agricultural workers, no other Federal law nor agency may do so. The D.C. District Court confronted and rejected a similar argument in *Nat'l Ass'n of Mfrs.* v. *Perez,* regarding a Departmental posting regulation, explaining that ''[t]he Supreme Court has never found that Congress intended for the NLRA to occupy the 'field' with respect to the regulation of labor concerns.'' 103 F. Supp. 3d at 25. The district court further explained that ''Congress did not intend for the NLRA to wholly occupy the field with respect to labor regulation and thereby foreclose all other regulation of that area.'' *Id.* Importantly, the court also observed that the Department's regulation there was subject to the authority of the Procurement Act and not the NLRA. *Id.*

Here too, the Department is neither attempting to extend the full rights and benefits of the NLRA to agricultural workers nor attempting to devise a ''full-scale program of labor-management,'' as the U.S. Chamber of Commerce asserted. Instead, as set forth above, the Department is issuing these regulations pursuant to its statutory authority under the INA to better protect against adverse effect on similarly employed workers caused by the use of the H–2A program. This final rule, as detailed more fully in the section-by-section analysis below, provides for certain rights and protections to better protect workers employed under the H–2A program and excluded from the NLRA's coverage to engage in concerted activity, including self-organization, to better protect against adverse effect in light of the unique vulnerability of this workforce described above. Accordingly, these provisions establish and clarify labor standards for workers employed under the H–2A program. The labor standards in this rule do not apply to agricultural workers beyond the scope of the H–2A program. While the Department recognizes and appreciates the significant labor needs of U.S. agricultural employers, it notes that employer participation in the H–2A program is voluntary. Employers that object to compliance with the requirements of this final rule need not participate in the H–2A program at all. However, those employers that do seek the benefits of the H–2A program—namely, the ability to employ H–2A workers—must agree, as a condition of receiving the necessary labor certification, to comply with the terms and conditions of employment that the Department has determined are necessary to prevent adverse effect on similarly employed workers. *Cf. Adm'r* v. *Azzano Farms, Inc.,* ARB No. 2020–0013, 2023 WL 3042229, at *10 (ARB Mar. 30, 2023) (observing that the ARB has long recognized that employers that opt to participate in and obtain the benefits of the INA's temporary labor certification programs may not later disavow the requirements of those programs). As detailed in this section, the Department has determined that certain additional or expanded requirements are necessary to prevent such adverse effect.

In addition, even within the context of the H–2A program, the Department's final rule does not require collective bargaining, employer recognition, or any other action by the employer in response to worker organizing. *Cf. Rest. Law Ctr.* v. *City of New York,* 90 F.4th 101, 118 (2d Cir. 2024) (concluding that a New York State law protecting workers from arbitrary terminations and reductions in work hours and providing for arbitration is not preempted by the NLRA under *Machinists*). Instead, as outlined above and further detailed in the section-by-section analysis below, this final rule clarifies and expands existing protections for workers engaging in protected activities, including exercising rights under State and local laws; offers new protections for workers engaged in FLSA agriculture to engage in concerted activity; provides limited access to representation in disciplinary proceedings; and ensures greater access for workers to key service providers and to information about workers' rights.

Finally, the rights and protections detailed herein, which are pursuant to and in furtherance of the INA's requirements, are mutually supplemental to those required under the NLRA; an employer subject to either act (or both acts, in certain cases, as discussed below) must comply with all applicable laws and neither precludes application of the other. *See Powell* v. *U.S. Cartridge Co.,* 339 U.S. 497, 518–520 (1950).

For example, as noted in the preamble to the NPRM, because certain provisions of this proposed rule would be limited to workers engaged in FLSA agriculture, the Department recognizes and intends that workers who are not engaged in FLSA agricultural labor (*e.g.,* those workers engaged in logging occupations) will not be covered by those provisions of this final rule. The vast majority of workers excluded from these protections, however, are covered by the NLRA and are thus already afforded a right to engage in concerted activity under that law. Nothing in this final rule alters or circumscribes the rights of workers already protected by the NLRA to engage in conduct and exercise rights afforded under that law.

A number of commenters also stated that the Department's proposed regulations would violate the major questions doctrine, as set forth by the Supreme Court in *West Virginia* v. *EPA,* in which the Court held an agency

''must point to clear congressional authorization for the power it claims,'' rather than a ''merely plausible textual basis,'' in ''certain extraordinary cases.'' 597 U.S. 697, 723 (2022) (citations omitted). The Department's final rule does not implicate the major questions doctrine. First, this is not a rule that asserts ''extravagant statutory power over the national economy,'' *id.* at 724. The Department does not seek to regulate employers generally with this rule, or even agricultural employers at large; this rule applies only to those agricultural employers that have opted to participate in the H–2A program. Accordingly, the labor standards and protections in this rule do not apply to agricultural workers beyond the scope of the H–2A program. While an increasing number of employers have chosen to participate in the H–2A program, the program still makes up only a small fraction of the agricultural workforce.[79]

Second, this is not a case where the agency relied on statutory language in the ''vague language of an ancillary provision.'' *West Virginia,* 597 U.S. at 724 (citation omitted). Nor has the Department relied on a ''long-extant statute'' to claim ''unheralded power.'' *Util. Air Regul. Grp.* v. *EPA,* 573 U.S. 302, 324 (2014). Nor is this a case in which the Department lacks ''comparative expertise in making [the relevant] policy judgments,'' *West Virginia,* 597 U.S. at 729 (citation omitted), or has asserted authority that falls outside its ''particular domain,'' *Ala. Ass'n of Realtors* v. *HHS,* 141 S. Ct. 2485, 2489 (2021). To the contrary, as previously noted, the relevant grant of authority at issue here at 8 U.S.C. 1188(a) is one that the Department has long relied on to establish program requirements that ensure that the employment of H–2A workers does not adversely affect the wages and working conditions of workers in the United States similarly employed, and is an area where the Department has significant expertise. *See, e.g.,* 2023 NPRM, 88 FR at 63787; 2010 H–2A Final Rule, 75 FR at 6948 (discussing the need to ''prevent[] the exploitation of foreign workers, with its concomitant adverse effect on U.S. workers''); 2008 H–2A Final Rule, 73 FR at 77159 (noting that foreign workers ''may be subject to exploitation in ways that would adversely affect the wages and working conditions of U.S. workers by creating conditions resembling those akin to indentured servitude, driving down wages and working conditions for all workers, foreign and domestic''); 1987 H–2A IFR, 52 FR at 20508, 20513 (describing the ''minimum'' terms and conditions of employment necessary to prevent adverse effect). Since the inception of the H–2A program, these program requirements have included protections from retaliation for workers who exercise or assert their rights under the H–2A program, including by raising concerns or filing a complaint regarding the terms and conditions of their employment. 1987 H–2A IFR, 52 FR at 20517. Similarly, the Department has long required H–2A employers to provide workers with certain rights and benefits not required of other agricultural employers that do not utilize the H–2A program, such as the provision of meals or kitchen facilities and the provision of transportation and subsistence costs, on the basis that such requirements are necessary under the H–2A program to prevent adverse effect. *Id.* at 20513–16. This final rule simply continues the Department's long history of establishing the minimum terms and conditions of employment necessary under the H–2A program to prevent adverse effect on similarly employed workers. It does so by seeking to expand and improve the tools available to workers protected under the H–2A program to prevent exploitation and to ensure compliance with the law, in light of the Department's program experience and evidence described above demonstrating that the current framework of protections are insufficient to satisfy the Department's statutory mandate. In other words, this final rule does not purport to broadly grant collective bargaining rights to agricultural workers, nor to grant rights to labor organizations; rather, consistent with the Department's history of regulating under the H–2A program, this rule seeks to provide protections to workers in the H–2A program in order to prevent adverse effect.

i. Section 655.103(b), Definitions

In support of the new employer obligations the Department proposed in the NPRM, the Department proposed adding two new definitions to § 655.103(b). For the reasons discussed below, in this final rule the Department adopts the proposed definition of ''key service provider'' with modifications and adopts the definition of ''labor organization'' as proposed.

The Department proposed to define ''key service provider'' to mean a health-care provider; a community health worker; an education provider; an attorney; a legal advocate or other legal service provider; a government official, including a consular representative; a member of the clergy; and any other service provider to which an agricultural worker may need access. The list of service providers included in the proposed definition was intended to be illustrative and not exhaustive. The Department sought comment on the scope of this proposed definition, in particular as to whether it would be sufficient, whether other types of service providers should be included in the list of examples in the regulation, or whether this definition would be too broad.

The Department also proposed to define ''labor organization'' to mean ''[a]ny organization of any kind, or any agency or employee representation committee or plan, in which workers participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.'' The proposed definition is similar to the one used under the NLRA, with a key difference to reflect the nature of the H–2A program. While the proposed definition would thus incorporate many NLRA principles regarding the meaning of the term ''labor organization,'' the Department intended the range of organizations that would be considered labor organizations under these proposed regulations to be broader than under the NLRA because the Department's proposed definition would include organizations in which agricultural workers participate, whereas such organizations are excluded under the NLRA. The Department conveyed its belief that this broader definition is appropriate given the unique characteristics of the H–2A program and sought comment on the scope of the proposed definition. The Department also sought comment on whether the definition should include additional criteria or protections to ensure that any such organization would not be dominated, interfered with, or supported by employers, as would be prohibited by sec. 8(a)(2) of the NLRA, 29 U.S.C. 158(a)(2). The Department also welcomed comments on whether other terms introduced by the proposed regulations should be defined in 20 CFR 655.103(b) and on other definitions that the Department should consider.

[79] In 2022, direct on-farm employment amounted to 2.6 million jobs. *See* USDA, *Agriculture and its related industries provide 10.4 percent of U.S. employment, https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58282* (last visited Apr. 4, 2024). By comparison, in 2022 the Department certified H–2A temporary labor certifications for around 370,000 jobs. *See* USDA, *Florida, California, and Georgia accounted for one-third of H–2A jobs in FY 2022, https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=106604#* (last visited Apr. 4, 2024).

The Department received several comments in support of the proposed definition of ''key service provider'' from farmworker advocates and labor unions, and several comments in opposition to the proposed definition from agricultural associations and agricultural employers.

Several commenters commended the proposed definition as appropriate and not overly broad. CCUSA and USCCB expressed gratitude for the Department's inclusion of ''member of the clergy'' within the definition of ''key service provider,'' commending the Department on its explicit recognition of the important role played by clergy and religious representatives in the lives of H–2A workers.

Many commenters opposing the proposed definition said that the inclusion of the phrase ''and any other service provider to which a worker may need access'' would result in ambiguity and lead to confusion about the types of service providers the definition is intended to cover. Additionally, some commenters supported the addition of the provision but also urged the Department to consider adding other types of service providers to the illustrative list of examples in the definition, such as emergency responders, law enforcement officers, community outreach workers, and translators and interpreters. One commenter, the National Legal Aid & Defender Association (NLADA), asked the Department to clarify that it is the function and not the title of a service provider that determines whether the service provider falls within the definition.

The Department received comments in support of the proposed definition of ''labor organization'' from farmworker advocates and a SWA stating that the definition would provide clarity on the rights in the corresponding changes under the proposed rule. It also received comments in opposition to the proposed definition from agricultural associations, agricultural employers, and farm bureaus. Several commenters opposing the proposal commented that the proposed definition was overly broad, insufficiently clear, and would cause confusion among employers and workers alike about which organizations would be eligible for inclusion. Many pointed out that the Department's proposed definition was broader than the definition included in the NLRA. Some commenters recommended that the Department establish a directory of eligible labor organizations but did not suggest specific criteria for inclusion or exclusion in such a directory. Other commenters expressed that the Department should not expand the proposed definition of ''labor organization.'' The Department did not receive any comments regarding sec. 8(a)(2) of the NLRA, suggesting other needed definitions, or recommending other changes to existing definitions.

In response to comments about the definition of ''key service provider,'' in the final rule, the Department revises the definition to improve clarity and to expand the list of illustrative examples. Specifically, the Department adds ''a translator or interpreter,'' ''an emergency services provider,'' and ''a law enforcement officer'' to the list of illustrative examples in the definition. The Department agrees with commenters that such service providers should be explicitly included, as the services they provide are indispensable to a population of workers that is so often geographically and culturally isolated. The Department declines to add ''community outreach worker'' as the meaning of this term may not be commonly understood; the Department, nevertheless, believes that such individuals fall within the other illustrative examples included in the definition. The Department also replaces the phrase ''and any other service provider to which the worker may need access'' with the phrase ''and any other provider of similar services.'' The Department believes that this wording is clearer and avoids potential confusion about the meaning of ''key service provider'' while retaining the broad and inclusive meaning of the term. The Department also believes that this phrasing will properly convey that it is the function of the service provider and not the provider's title that determines inclusion under this definition, as suggested by commenters. The Department believes that this definition of ''key service provider,'' particularly as applied under new § 655.135(h)(1)(v), will help to prevent adverse effect on similarly employed workers in the United States by ensuring that H–2A and corresponding workers can consult with and receive necessary services to assist them in ensuring employer compliance with the terms and conditions of employment and advocating regarding working conditions, including health and safety, without fear of retaliation.

Upon consideration of comments related to the definition of ''labor organization,'' the Department adopts the definition as proposed in the NPRM. The definition will only be used in connection with the new protection under final 20 CFR 655.135(h)(2)(i) for ''concerted activity'' by persons engaged in agriculture as defined and applied in 29 U.S.C. 203(f). The Department believes that the proposed definition is sufficiently clear to provide a reasonable standard by which employers, workers, and labor organizations may determine the organizations to which the new provision refers. The Department also believes that this definition is sufficient to effectuate the rights under new § 655.135(h)(2)(i) intended to prevent adverse effect on similarly employed workers.

While the Department appreciates commenters' suggestions that the Department maintain a directory of eligible labor organizations, it does not believe that any such directory or list is necessary. The Department is not finalizing its proposals to provide employee contact information to labor organizations, to require H–2A employers to provide access to labor organizations, or to state whether they would agree to bargain with such an organization upon request over neutrality. Thus, this final rule does not create any independent rights or obligations for which such labor organizations would be ''eligible,'' as originally proposed.

ii. Section 655.135(h), No Unfair Treatment

The Department proposed to expand the scope of what constitutes prohibited unfair treatment under § 655.135(h) to better protect workers who exercise certain rights or engage in self-advocacy from intimidation or discrimination, including protections for consulting with key service providers; for exercising rights under any applicable Federal, State, or local laws or regulations, including safety and health laws; and, for certain workers, for engaging in concerted activities for the purpose of mutual aid or protection relating to wages or working conditions. The Department also proposed to redesignate current paragraphs (h)(1) through (h)(5) as (h)(1)(i) through (h)(1)(iv) and (h)(1)(vi). These prohibitions on unfair treatment would continue to require an employer to assure that it ''has not and will not intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person'' who has engaged in certain enumerated protected activities pertaining to the H–2A program requirements, namely, filing a complaint, instituting a proceeding, testifying in a proceeding, consulting with an attorney or legal assistance program regarding any H–2A violation, or exercising or asserting any right or protection under the H–2A program. *See* 20 CFR 655.135(h) (2023). The Department also proposed three new

categories of protected activity. First, the Department proposed to protect consulting with a ''key service provider'' (as defined above) on any matter pertaining to the H–2A program requirements, in proposed new § 655.135(h)(v). Second, the Department proposed to explicitly protect exercising rights (including filing a complaint, instituting a proceeding, or testifying in any proceeding) under applicable Federal, State, or local laws or regulations, including safety and health laws, in proposed new § 655.135(h)(vii). Third, the Department proposed a new category of protected activity limited to persons engaged in FLSA agriculture, to protect them from intimidation or other discrimination if the person has engaged in activities related to self-organization, including: any effort to form, join, or assist a labor organization; a secondary activity such as a secondary boycott or picket; or other concerted activities for the purpose of mutual aid or protection relating to wages or working conditions; or for refusing to engage in any or all of such activities. *See* proposed § 655.135(h)(2). To help inform workers of their rights under the H–2A program, the Department also proposed to include the protections that would be afforded under proposed § 655.135(h) in the disclosures required on the job order. The Department sought comments on each of these proposed provisions, which will be discussed separately below.

General Comments

The Department received many comments in support of its proposal to expand retaliation protections from Members of Congress, State Attorneys General, farmworker advocates, State agencies, legal aid organizations, farm labor unions, and others. These commenters noted that farmworkers in general, and H–2A workers in particular, are living and working in a foreign land, are often unfamiliar with their geographical surroundings and legal rights, often live in isolated environments where their access to information and resources is limited, and are entirely dependent on their employers due to their visa status. As noted above in Section VI.C.2.b, these factors make them particularly vulnerable to intimidation, retaliation, and coercion by employers when they seek to advocate for their rights.[80] They noted that preventing employers from suppressing the exercise of those rights is critically important for H–2A workers and that the proposed changes would strengthen farmworkers' rights and ability to advocate for and enforce the minimum working conditions required under the H–2A program without fear of retaliation from employers.

Commenters cited numerous examples of farmworkers who have experienced threats, retaliation, or both from employers when they sought to assert their rights, file complaints, or pursue legal action. The UFW Foundation asserted that many farm employers have prohibited their workers from meeting with service providers, including legal services, medical providers, or other advocates, and that other farmworkers have been unable to access needed services for fear of retaliation, leaving many farmworkers unaware of or afraid to assert their rights. They noted that such tactics make it difficult for the Department or worker advocates to detect egregious violations such as wage theft, charging workers for recruiter fees, and other violations of employment-related laws, and to enforce existing worker protections under the H–2A program. Farmworker Justice noted that some employers have attempted to surveil workers and restrict their movements, which can intensify workers' isolation and fear of retaliation.

Another commenter cited a number of court cases in which H–2A workers have complained of retaliation, as well as studies showing that H–2A workers are unlikely to complain about unlawful and substandard working conditions because of fear. *See, e.g., West* v. *Butikofer,* No. 19–cv–1039, 2020 WL 5245226, at *2 (N.D. Iowa Aug. 18, 2020); *Arreguin* v. *Sanchez,* 398 F. Supp. 3d 1314, 1320, 1325 (S.D. Ga. 2019); *Ruiz* v. *Fernandez,* 949 F. Supp. 2d 1055, 1076 (E.D. Wash. 2013); *Lopez* v. *Fish,* No. 2:11–cv–113, 2012 WL 2126856, at *1 (E.D. Tenn. May 12, 2012). These commenters stated that better access to advocates and service providers would help correct these problems and ensure acceptable working conditions for both H–2A and other farmworkers. They supported strengthening protections against retaliation and making sure that these protections are clearly communicated at the beginning of the employment relationship, such as through the job order, to help ensure that employers who break the law and engage in intimidation do not go unpunished.

The Department also received several comments from agricultural associations and agricultural employers generally opposing its proposals, as discussed above in Section VI.C.2.b, although very few specifically referenced the ''unfair treatment'' proposals. Other commenters contended that the proposed rules were overbroad, redundant, and unnecessary, that workers are already protected against retaliation by the existing rules, and that expanding the prohibitions would lead to unfounded accusations against employers.

Some commenters requested clarification or modification of the existing anti-retaliation protections. Farmworker Justice requested that the Department include broader language expressly protecting workers from retaliation for asking questions about pay; suggesting that restrooms be cleaned more frequently; or ''exercising any right'' or ''opposing any practice'' covered under Federal, State, or local laws; and asked the Department to clarify that ''filing a complaint'' in § 655.135(h)(1)(i) and proposed § 655.135(h)(1)(vii) should be interpreted broadly. A State agency suggested that the Department add the specific term ''interfere with'' to the list of prohibited adverse actions in § 655.135(h)(1), since ''interference'' with protected rights is a prohibited unfair labor practice under both the NLRA, 29 U.S.C. 158(a)(1) and the ALRA, Cal. Lab. Code § 1153, and also appears in California anti-retaliation statutes. The commenter also recommended adding a subsection that specifically prohibits discrimination against any person who has ''assisted, or participated in any manner in an investigation, proceeding, or hearing under 8 U.S.C. 1188,'' opining that participating in or providing evidence in an investigation is not currently protected under the Department's existing language.

An employer agent suggested that in lieu of redesignating and expanding the ''unfair treatment'' framework as outlined in the NPRM, the Department should instead simply require employers to provide ''assurances'' that they will not discriminate or retaliate, and should also include ''affirmative defenses'' stating that an adverse employment action will not be deemed unfair treatment if the adverse employment action was for a lawful, job-related reason or the employer had no actual or constructive knowledge of the protected actions taken by the worker. This comment suggested that the absence of a requirement that the employer had actual or constructive notice of a worker's engagement in protected activity could create perverse incentives for fraud and abuse,

[80] *See* Farmworker Justice Report at 30–31 (noting that H–2A workers fear retaliation in the form of discharge, deportation, or the denial of a job in the future; H–2A workers work for short periods and often ''lack the trust established among co-workers over a longer period of time''); CDM Report at 4–6.

especially where an employer may have legitimate, job-related reasons for discharging a worker. The comment contended that, under the existing language, any grievance or consultation would trigger legal protection from adverse employment action, even if the grievance or consultation does not concern any legally protected action or right, making it difficult or impossible for an employer to terminate a worker's employment even where they have a legitimate basis for doing so.

General Discussion

The Department adopts the proposed revisions with the modifications described in this section-by-section analysis. As explained in the NPRM and above, the Department continues to believe that these additional protections for unfair treatment and retaliation are necessary to prevent an adverse effect on the working conditions of workers in the United States similarly employed, as required under 8 U.S.C. 1188(a)(1), since workers must be free to file complaints and otherwise seek to enforce their rights without fear of retaliation or discrimination. The Department has long recognized that such protections are essential to the effective functioning of a complaints-based enforcement regime. *Mitchell* 361 U.S. at 292 (agreeing with the Department's interpretation of the FLSA's anti-retaliation provision and explaining that Congress ''chose to rely on information and complaints received from employees seeking to vindicate rights'' and ''effective enforcement could thus only be expected if employees felt free to approach officials with their grievances''); WHD, Field Assistance Bulletin No. 2022–02, Protecting Workers from Retaliation (Mar. 10, 2022) (FAB 2022–02);[81] *see also Kasten* v. *St.-Gobain Performance Plastics Corp.,* 563 U.S. 1, 12 (2011) (explaining that the FLSA ''antiretaliation provision makes [its] enforcement scheme effective by preventing 'fear of economic retaliation' from inducing workers 'quietly to accept substandard conditions.' '') (quoting *Mitchell,* 361 U.S. at 292). Based on both its enforcement experience and on the numerous comments citing examples of intimidation and retaliation against workers in the H–2A program, the Department believes that expanding the regulations' protections against unfair treatment is necessary to prevent adverse effect on the working conditions of workers in the United States.

For example, in the last few years alone, the Department has debarred and assessed penalties against H–2A employers that instructed workers to lie about their pay to investigators and threatened to kill, harm, punish, fire, blacklist, or deport workers for talking to authorities.[82] The Department also assessed penalties against at least two H–2ALC employers who confiscated workers' passports at three different farms to keep them from leaving their employment after they discovered that they were being underpaid.[83] In other recent cases, the Department charged a vineyard employer with unfair treatment violations after it retaliated against H–2A employees who asked why they were not being paid the required contract wage rate by dismissing them and sending them back to their home countries before the termination of the work contract.[84] In another instance, nine H–2A farmworkers filed a civil lawsuit against the employers for wage theft, underpayment, false imprisonment, and retaliation.[85] The Department has also recently obtained temporary restraining orders and preliminary injunctions against H–2A employers who, after workers requested more food and water, threatened workers with a gun, shooting twice near the workers, and who have threatened to physically assault, harm, fire, and deport workers who complained or spoke to WHD investigators.[86] In many of these cases, investigators reported that workers sought to remain anonymous for fear of retaliation, and often refused to speak with or cooperate with investigators at the worksite for fear that their employer would find out; in one case, the employer interrupted an employee interview and sought to eject the investigator from the property. These examples are just a few among the many cases where WHD has investigated and uncovered retaliation by H–2A employers against workers who raised concerns regarding their rights under the program.

The Department did not propose any changes to the prohibited conduct or existing protected activities under current § 655.135(h), other than to redesignate current paragraphs (h)(1) through (h)(5) into paragraphs (h)(1)(i) through (h)(1)(iv) and paragraph (h)(1)(vii). Therefore, it declines to adopt any substantive changes suggested by commenters to those provisions and finalizes those redesignations as proposed. However, the Department seeks to clarify that the existing protections for ''fil[ing] a complaint'' in final § 655.135(h)(1)(i) and ''exercis[ing] or assert[ing] . . . any right or protection'' under the program in final § 655.135(h)(1)(vi) already protect a wide range of advocacy, including asking questions about pay, requesting compliance with health and safety requirements, opposing illegal practices, reporting criminal conduct, talking to WHD investigators, and participating in or providing evidence in an investigation. *See, e.g., Kasten,* 563 U.S. at 17 (holding that ''filing any complaint'' includes oral complaints under the FLSA); FAB No. 2022–02 at 9 (explaining that asking an H–2A employer to provide food and water is covered under the existing ''no unfair treatment'' provisions).

[81] Available at *https://www.dol.gov/sites/dolgov/files/WHD/fab/fab-2022-2.pdf.*

[82] Individuals associated with this employer also pleaded guilty to criminal charges for their role in the forced labor racketeering conspiracy. *See* DOJ, Press Release, *Owner of Farm Labor Contracting Company Pleads Guilty in Racketeering Conspiracy Involving the Forced Labor of Mexican Workers* (Sept. 27, 2022), *https://www.justice.gov/opa/pr/owner-farm-labor-contracting-company-pleads-guilty-racketeering-conspiracy-involving-forced;* DOJ, Press Release, *Three Defendants Sentenced in Multi-State Racketeering Conspiracy Involving Forced Labor of Mexican Agricultural H–2A Workers* (Oct. 27, 2022), *https://www.justice.gov/opa/pr/three-defendants-sentenced-multi-state-racketeering-conspiracy-involving-forced-labor-mexican.*

[83] *See* DOL, News Release, *US Department of Labor fines North Carolina employers $139K after they shortchanged farmworkers; seized passports, visas to intimidate them* (Nov. 16, 2023), *https://www.dol.gov/newsroom/releases/whd/whd20231116;* DOL, News Release, *Department of Labor debars labor contractor who threatened, intimidated farmworkers; assesses $62K in penalties for abuses of agricultural workers* (Oct. 23, 2023), *https://www.dol.gov/newsroom/releases/whd/whd20231023;* DOL, News Release, *US Department of Labor Investigation Results in Judge Debarring North Carolina Farm Labor Contractor for Numerous Guest Worker Visa Program Violations* (Mar. 16, 2021), *https://www.dol.gov/newsroom/releases/whd/whd20210316.*

[84] *See* DOL, News Release, *Corrected: US Department of Labor investigations of labor contractors, vineyard yield $231K in penalties, recover $129K in back wages for 353 agricultural workers* (Jun. 1, 2023), *https://www.dol.gov/newsroom/releases/whd/whd20230601-0.*

[85] *See* Texas RioGrande Legal Aid, Press Release, *Farmworkers Sue Kentucky Tobacco Farm for Wage Theft, Retaliation, and Overtime Violations* (Dec. 11, 2023), *https://www.trla.org/news-releases/farmworkers-sue-kentucky-tobacco-farm-for-wage-theft-retaliation-amp-overtime-violations.*

[86] *See, e.g.,* DOL, Press Release, *US Department Of Labor Alleges Tunica Fish Farm, Processing Plant, Owners Interfered With Federal Wage Investigation, Seeks Temporary Restraining Order* (Sept. 7, 2023), *https://www.dol.gov/newsroom/releases/whd/whd20230919-1; Su* v. *Battle Fish North,* Case No. 23–CV–00348, 2023 WL 6619595 (filed N.D. Miss. Sept. 7, 2023) (DOL Motion for Temporary Restraining Order and Preliminary Injunction); *Su* v. *Battle Fish North,* Case No. 23–CV–00348 (N.D. Miss. Sept. 27, 2023) (Order granting preliminary injunction); DOL, Press Release, *Federal Court Orders Louisiana Farm, Owners to Stop Retaliation After Operator Denied Workers' Request for Water, Screamed Obscenities, Fired Shots* (Oct. 28, 2021), *https://www.dol.gov/newsroom/releases/whd/whd20211028-0.*

iii. Section 655.135(h)(1)(v), Consulting With Key Service Providers

Recognizing that H–2A workers frequently face barriers in accessing certain services, as discussed in the NPRM, the Department proposed to broaden the range of service providers and advocates with whom consultation regarding the terms and conditions of employment under the H–2A program is explicitly protected. Specifically, the Department proposed to add a new paragraph (h)(1)(v) to the existing list of protected activities at § 655.135(h), which would protect consulting with a ''key service provider,'' as defined in proposed § 655.103(b), regarding matters under the H–2A program. This proposal, like those in the existing list of protected activities at current § 655.135(h), would not be limited to persons engaged in FLSA agriculture. The Department noted that workers are already entitled to access and meet with many different service providers to discuss or assert rights under the H–2A program, without fear of retaliation under the Department's current regulatory framework. For example, under the current regulations, an employer may not retaliate against a worker because the worker goes to see a doctor to care for an injury the worker incurred while on the job, or because the worker consults a worker's rights advocacy organization regarding the employer's failure to pay the wages promised in the job order. *See, e.g.,* 20 CFR 655.135(e) and (h)(5). However, it proposed to make these rights explicit, and to include this express assurance on the job order (Form ETA–790A), in order to help ensure that workers will be aware of this protection. The Department stated that clarifying protections for consultation with such providers would increase the likelihood that workers will receive necessary services, help prevent the frequent isolation that renders workers more vulnerable to H–2A violations and other forms of labor exploitation, and better equip workers to enforce their rights under the program.

The Department received many comments in support of this proposal from farmworker advocates, State agencies, legal aid organizations, and others. In particular, the UFW Foundation asserted that farmworkers need better protections for consulting with key service providers such as health-care providers, education providers, legal services providers, clergy, governmental officials, or consular representatives. They cited many examples where employers have prohibited employees from meeting with such providers, including legal services and medical providers, and where workers have been unable to access needed services for fear of retaliation. For example, the comment highlighted ''a [farmworker] from Oaxaca . . . [who] fainted because of the heat and he was fired after going to the doctor'' and another farmworker of 35 years explained that he ''was once fired unjustly due to me telling the foreman that I had a foot injury.'' Another farmworker was threatened with losing her job after she complained about the lack of water while working in extreme heat.

An H–2A farmworker in Washington stated that his employer prohibited him from meeting with a key service provider and that he feared retaliation if the employer found out about the meeting. Another H–2A farmworker in Washington mentioned that his employer also prohibited him from meeting with key service providers, and, if other workers did meet with providers, they had to do so covertly. An H–2A worker in Nevada stated that workers on his farm have to pay for each medical visit outside of their workplace, and, if the worker gets too sick, the employer sends them back to their home country so that the employer is not responsible for any medical bills. He also commented that two H–2A farmworker colleagues died in a car accident in October 2023 and their employer refused to do anything about it until the Mexican consulate intervened.

Another farmworker association, the Farmworker Association of Florida, commented that many farmworkers remain isolated and lack access to medical care, transportation, and necessary medications, and that guaranteed access to advocates and service providers would help correct these problems, reduce fear of retaliation, and improve working conditions. Farmworker Justice also strongly supported the proposal, commenting that H–2A workers need access to a variety of essential services, including access to medical care for routine appointments, care for chronic conditions, emergency medical attention, and access to legal service providers, consulates, and other advocates to obtain important information about their rights and legal representation when their rights are violated. They stated that workers are commonly prevented from filing for workers' compensation or obtaining medical care out of fear of retaliation, that some employers threaten to send workers home because they are injured and cannot work, and that other employers insist on going with workers to the doctor, or refuse to transport them to the doctor, to prevent the report of a workplace injury. Farmworker Justice also recommended that the provision should be expanded to include additional rights for legal service providers, emergency providers, and others. The Department received a few comments from trade associations and agents opposing the proposal as unnecessary, because workers already enjoyed the right to meet with legal services and medical providers, and because the right was already guaranteed in certain States.

The Department adopts the proposal without modification, for the reasons set forth in the NPRM, and because the comments demonstrated the need for this protection to be made explicit. Although such consultation is protected under the Department's current regulations, the comments demonstrate that workers are being prohibited from accessing these key service providers, and thus the Department believes it is necessary to clearly spell out this right for both workers and employers. This final rule will help increase the likelihood that workers receive the vital services that they need to ensure compliance with their rights and protections under the program and to advocate regarding working conditions. As explained above, workers must be free to exercise such rights without fear of retaliation to avoid adverse effect on similarly employed workers.

iv. Section 655.135(h)(1)(vii), Exercising Rights Under Federal, State, or Local Laws

The Department also proposed to clarify existing regulations by adding a new provision, § 655.135(h)(1)(vii), to explicitly protect complaints, proceedings, and testimony under any applicable labor- or employment-related Federal, State, or local law or regulation, including those related to health and safety. It explained that the proposal was intended to explicitly prohibit employers from retaliating against any person who files a complaint, institutes or causes to be instituted any proceeding, or testifies or is about to testify in any proceeding under or related to any applicable Federal, State, or local labor- or employment-related law, rule, or regulation. The Department noted that these activities are already protected under the Department's existing regulatory framework because existing 20 CFR 655.135(e) requires employers to comply with all applicable Federal, State, and local laws, and § 655.135(h)(1) and (5) prohibit retaliation against workers who assert

their rights under the H–2A program. However, the Department explained that making these rights explicit would better inform workers and employers of their rights and protections both under the H–2A program itself and under other applicable laws. To this end, the new provision would expressly protect workers who seek to enforce their rights under other worker protection laws, including Federal, State, or local laws and regulations that may apply to workers protected under the H–2A program (*see, e.g.,* the Occupational Safety and Health Act, 29 U.S.C. ch. 15, or the FLSA, 29 U.S.C. 201 *et seq.*) against retaliation.

As noted above, the Department received many comments generally supporting this proposal to expand retaliation protections, including comments from Members of Congress, State Attorneys General, farmworker advocates, State agencies, legal aid organizations, farm labor unions, and others. Many workers' rights advocacy organizations expressed support for the proposed provision protecting individuals who exercise rights under Federal, State, or local laws, for a variety of reasons. For example, a number of State Attorneys General commented that the provisions would promote access to information about worker rights, reduce their fear of retaliation, prevent employers from suppressing workers' exercise of those rights, encourage self-advocacy and organizing, and positively impact H–2A workforces. The California LWDA stated that it has encountered instances of employers retaliating against agricultural employees for filing charges or testifying in a proceeding related to State labor law violations, which the commenter said the rule would help prevent. The commenter cited numerous examples of retaliation arising under the ALRA, Cal. Lab. Code § 1153, noting that such retaliation ''strikes at the very protections that the ALRA seeks to enforce by denying workers access'' to processes and remedies administered by the California Agricultural Labor Relations Board (ALRB).[87] The commenter noted that such cases demonstrate that farmworkers need protections not only when they file complaints or initiate proceedings under 8 U.S.C. 1188, but also when they file complaints under other applicable Federal, State, or local laws or regulations like the ALRA. Finally, the commenter also recommended adding language to specifically prohibit discrimination against any person who has ''assisted, or participated in any manner in an investigation, proceeding, or hearing,'' noting that the Department's proposed language does not expressly protect persons who may not testify in a proceeding, but who have participated in or supported the investigation by providing evidence or being interviewed by the Department or a legal service provider. Given the heightened vulnerability that H–2A workers face, the commenter suggested that such protections would provide further protection for workers and encourage them to cooperate in government enforcement proceedings. Another commenter, CDM, highlighted the frequency of sexual harassment and discrimination in the H–2A program, asserting that H–2A employers and recruiters routinely violate U.S. anti-discrimination laws by discriminating based on race, color, age, sex (including pregnancy, sexual orientation, and gender identity), and national origin in both hiring and employment.[88] It asked that the Department make it easier to file complaints and improve remedies for H–2A workers and applicants who face discrimination. CDM also stated that the proposed protection was insufficient and asked the Department to create additional independent anti-discrimination protections for H–2A workers that would be enforceable both by the Department and by private rights of action.

A workers' rights advocacy organization, PCUN, strongly supported the proposal, stating that the organization works with dozens of farmworkers who have experienced retaliation for seeking better working conditions and that the proposed rule would be especially helpful for such workers. In particular, it noted that farmworkers in Oregon recently experienced retaliation for seeking to enforce the new State OSHA regulations to protect workers from extreme heat (see footnote 79 for citations to these and other State employment regulations governing heat exposure). Workers contacted PCUN to report that they were laboring in over 100-degree heat and that the labor contractor they were working for did not provide them with water or shade. After the workers spoke out, they were all fired. This kind of retaliation is a major deterrent for workers to speak out when they see violations, including violations of labor law, discrimination on the basis of sex and immigration status, threats of violence, and issues of human trafficking, in addition to occupational health and safety standards.

The Department received a few comments opposing this and the other unfair treatment proposals as unnecessary or overly burdensome. For example, one commenter noted that such provisions duplicate existing laws and protections, and that this topic is already sufficiently covered by existing H–2A program requirements and by protections offered by the Department of State, various agencies within DHS, DOJ, and even multiple agencies among the 50 States. Another commenter suggested that in lieu of or in addition to expanding the ''unfair treatment'' framework to encompass the exercise of rights under any applicable Federal, State, or local laws as outlined in the NPRM, the Department should require employers to provide assurances or attestations that they do not discriminate.

The Department considered the comments and adopts the proposal to explicitly protect complaints, proceedings, and testimony under any applicable labor- or employment-related Federal, State, or local law or regulation, with the modifications described. The Department believes that making such protection explicit will help clarify and inform workers of their rights, reduce their fear of retaliation for seeking to exercise those rights, protect self-advocacy, and empower workers to enforce their existing rights to be free from discrimination and to a safe and healthy workplace, which in turn will better protect against adverse effect on similarly employed workers. As revised, the provision will expressly protect workers seeking to file complaints under Federal, State, or local anti-discrimination, health, or safety laws. This includes recently adopted regulations to protect against heat stress in States like California, Colorado,

[87] *See, e.g., H & R Gunlund Ranches, Inc.,* 39 ALRB No. 21 (2013) (finding that an employer violated the Act when it laid off a crew that had filed an unfair labor practice charge). The commenter also noted that many such investigations uncover violations of multiple Federal, State, or local laws or regulations, citing *Cinagro Farms, Inc.,* 48 ALRB No. 2 (2022) (Board found an unfair labor practice where the employer fired workers protesting misclassification and unpaid wages, and an independent violation where the employer misclassified employees as independent contractors in violation of the California Labor Code); *Gurinder S. Sandhu dba Sandhu Bros. Poultry and Farming,* 40 ALRB No. 12 (2014) (finding that worker's sexual harassment complaints were protected concerted activity); *Oceanview Produce Co.,* 21 ALRB No. 8 (1995) (finding that employees engaged in protected concerted activity when they refused to sign employer's attendance form for a required safety training that never occurred).

[88] *See, e.g.,* CDM and Penn Law Transnational Legal Clinic, *Engendering Exploitation: Gender Inequality in U.S. Labor Migration Programs* (Jan. 2018), *https://cdmigrante.org/wp-content/uploads/2018/01/Engendered-Exploitation.pdf.*

Oregon, and Washington,[89] and will also protect workers' rights to organize, to engage in collective bargaining, and to be free of unfair labor practices in States like California and New York that have passed laws guaranteeing such rights under State law. *See, e.g.,* ALRA, Cal. Lab. Code § 1153 (West 2024); N.Y. Lab. Law §§ 701–718 (West 2024). The Department disagrees with commenters who contended that the proposal is unnecessary, given the ample evidence of ongoing retaliation and fear of retaliation provided by other commenters. However, the Department adopts the recommendation of commenters who suggested that the new provision include language expressly clarifying that individuals who assist or participate in an investigation or hearing under such laws are protected. As revised, the final provision will expressly protect such participation or assistance in proceedings arising under State employment laws and State labor laws such as those cited above, as well as safety and health laws, consistent with this rulemaking's stated goals of disclosure and ensuring that workers are aware of their rights. The Department has therefore modified the provision to add the specific terms ''assisted or participated'' (or is about to ''assist or participate'') in any ''investigation'' or ''hearing,'' and to specifically reference ''employment laws and labor laws'' in addition to health and safety laws, as previously proposed. Thus, the revised provision will protect any person who has ''[f]iled a complaint, instituted, or caused to be instituted any proceeding; or testified, assisted, or participated (or is about to testify, assist, or participate) in any investigation, proceeding, or hearing under or related to any applicable Federal, State, or local laws or regulations, including safety and health, employment, and labor laws'' from unfair treatment on that basis. Finally, the Department declines to modify the proposal to include a private right of action in this provision (or any of the provisions at § 655.135(h)), since it did not propose or seek comment on such a proposal.

v. Prohibitions on Seeking To Alter or Waive the Terms and Conditions of Employment, Including the Right to Communicate With the Department

In the preamble to the NPRM, the Department noted that its regulations, including § 655.135(h), have long protected a worker's ability to communicate with the Department. In addition, the Department noted that its H–2A regulations have long required employers to fully disclose in the job order the material terms and conditions of employment under the job opportunity and have long prohibited employers from seeking to later alter those terms and conditions. *See* 20 CFR 655.103(b), 655.122(b) and (q); 29 CFR 501.5.

The Department also shared its observation, however, that in recent years, there has been a troubling trend of H–2A employers imposing ''side agreements'' that purport to add or waive certain terms and conditions of employment as compared to those disclosed in the job order. For example, after terminating a group of workers without cause, one H–2A employer presented the workers with forms falsely asserting that the workers had left voluntarily, purporting to waive the workers' rights to the three-fourths guarantee. *Sun Valley Orchards,* 2021 WL 2407468, at *10–11. Other H–2A employers have required workers to sign arbitration agreements after the workers have arrived at the place of employment, without having disclosed such a requirement in the job order. *See, e.g., Martinez-Gonzalez* v. *Elkhorn Packing Co.,* 25 F.4th 613, 619 (9th Cir. 2022); *Magana-Muñoz* v. *West Coast Berry Farms, LLC,* No. 5:20–cv–02087, 2020 WL 3869188, at *5 (N.D. Cal. July 9, 2020); *Cisneros* v. *Alco Harvest, Inc.,* 97 Cal. App. 5th 456, 459 (Cal. Ct. App. 2023). These practices violate the H–2A regulations and may mislead workers regarding their rights under the H–2A program, including their ability to communicate with the Department. Therefore, the Department reiterated in the preamble to the NPRM, as it does here, its longstanding requirements relevant to these ''side agreements.''

First, the Department's H–2A regulations include robust disclosure requirements. Specifically, employers must disclose in the job order all material terms and conditions of employment. *See* 20 CFR 655.103(b) (defining ''job order'' as ''[t]he document containing the material terms and conditions of employment''); 20 CFR 655.121(a)(4) (requiring H–2A job orders to meet the requirements specified for agricultural clearance orders under 20 CFR part 653, subpart F); 20 CFR 653.501(c)(1)(iv) and (c)(3)(viii) (requiring agricultural clearance orders to include material terms and conditions of employment). Each job qualification and requirement listed in the job order must be bona fide, as well as normal and accepted among non-H–2A employers in the same or similar occupations. 20 CFR 655.122(b) (job qualifications and requirements). Finally, the employer must provide H–2A workers with a copy of the written work contract (at minimum, the terms of the job order) before the worker travels to the place of employment. Such written disclosure must be made to workers in corresponding employment no later than the first day work commences. 20 CFR 655.122(q) (disclosure of work contract).

These requirements ensure that employers seeking to employ H–2A workers are adequately and accurately testing the local labor market to determine the availability of U.S. workers for the actual job opportunity and are not imposing inappropriate requirements that discourage otherwise qualified U.S. workers from applying. *See* 2010 H–2A Final Rule, 75 FR at 6901, 6906–6908. These requirements also ensure that workers are apprised of the accurate terms and conditions of employment before accepting employment with the employer and, in the case of many workers, traveling great distances and at significant personal expense to do so. *Adm'r* v. *Frank's Nursery LLC,* ARB Nos. 2020–0015 and 2020–0016, 2021 WL 4155563, at *3–4 (ARB Aug. 25, 2021) (describing the importance of disclosure to workers of all material terms and conditions of employment before the worker accepts the job offer), *aff'd,* No. 21–cv–3485, 2022 WL 2757373 (S.D. Tex. July 14, 2022).

Thus, pursuant to these requirements, an employer may not seek to add new material terms and conditions of employment after the worker arrives at the place of employment, even if such terms and conditions would otherwise be permissible if they had been disclosed in the job order. For example, even if a mandatory arbitration agreement would be a permissible term and condition of employment for a particular H–2A job opportunity if disclosed in the job order, it is a violation of the H–2A regulations for the employer to impose such a material term and condition of employment on the workers if it was not disclosed in the job order. *See Frank's Nursery,* 2022 WL 2757373, at *3–4 (affirming WHD

[89] *See, e.g.,* Cal. Code Regs. tit. 8, § 3395 (Heat Illness Prevention in Outdoor Places of Employment) (2024); Colo. Rev. Stat. Ann. § 8–13.5–203 (Extreme overwork protections) (West 2024); *Or. Mfrs. & Com.* v. *Or. Occupational Safety and Health Division,* No. 1:22–cv–00875, 2022 WL 17820312, at *9 (D. Or. Dec. 20, 2022) (dismissing challenge to Oregon Administrative Rules that protect Oregon workers from exposure to excessive ambient heat temperatures and hazardous levels of wildfire smoke while at work); Wash. Admin. §§ 296–62–095–296–62–09560 (General Occupational Health Standards—Outdoor Heat Exposure), 296–307–097–WAC 296–307–09760 (Safety Standards for Agriculture—Outdoor Heat Exposure) (2024).

Administrator's determination of violation and assessment of a civil money penalty for employer's failure to disclose in the job order a drug testing policy); *see also Magana-Muñoz,* 2020 WL 3869188, at *5 (discussing the Department's regulatory requirements for H–2A job orders and concluding that an arbitration agreement is a material term or condition of employment that must be disclosed in the job order); *Cisneros,* 97 Cal. App. 5th at 460–61 (same); *cf. ETA* v. *DeEugenio & Sons #2,* OALJ No. 2011–TLC–00410, slip op. at 3–5 (OALJ June 13, 2011) (affirming CO's denial of labor certification because employer failed to demonstrate that arbitration and grievance clauses listed in job order were normal and accepted requirements among non-H–2A employers in the occupation); *ETA* v. *Bourne, et al.,* OALJ No. 2011–TLC–00399, slip op. at 9–11 (OALJ June 6, 2011) (same); *ETA* v. *Head Bros.,* OALJ No. 2011–TLC–00394, slip op. at 5–7 (OALJ May 18, 2011) (same); *but see ETA* v. *Frey Produce et al.,* OALJ No. 2011–TLC–00403, slip op. at 6 (OALJ June 3, 2011) (concluding arbitration is not a job ''qualification or requirement'').

Second, and in addition to the disclosure requirements, the Department's H–2A regulations prohibit any person from seeking to have a worker waive any right afforded under the H–2A program. 29 CFR 501.5. Thus, an employer may not—at any time—request that a worker waive or reduce any of the terms and conditions of employment disclosed in the job order or other rights under the H–2A program, such as the provision of meals as disclosed in the job order, the right to the three-fourths guarantee, the prohibition on the payment of fees, the right to file complaints under Federal, State or local laws, or the payment of the H–2A wage rate for hours spent engaged in corresponding employment. For example, through its enforcement experience, the Department has learned of H–2A employers presenting their entire workforces with side ''opt-out'' agreements under which the workers purport to waive their right to employer-provided meals on certain days, despite the employer's disclosure in the job order that meals will be provided every day. The regulations prohibit such practices. In addition, an employer may never seek to prevent a worker from engaging in activity protected under the H–2A regulations, such as filing a complaint with, speaking with, or cooperating with the Department or other Federal, State, or local agency concerning the worker's rights. *See* 20 CFR 655.135(h); 29 CFR 501.4(a).

As explained in the NPRM, the Department is concerned that ''side agreements'' carry significant potential to mislead workers regarding their rights under the H–2A program, including the right to file complaints with and communicate with the Department. For example, an H–2A worker who is terminated without cause but is required to sign a form purportedly ''resigning'' from the job may believe—incorrectly—that they may no longer file a complaint with the Department to enforce their right to the three-fourths guarantee or their right to the cost of return transportation and subsistence. Another worker may misunderstand a ''side'' arbitration agreement as preventing the worker from filing a complaint with the Department before first submitting the issue to the employer's arbitration procedures, even though an employee who agrees to arbitrate a statutory claim is not waiving any substantive rights under the statute. *Gilmer* v. *Interstate/Johnson Lane Corp.,* 500 U.S. 20, 25 (1991). Moreover, an H–2A worker's agreement with their employer to arbitrate employment disputes does not limit the Department's ability to enforce the H–2A program's requirements. *Cf. EEOC* v. *Waffle House, Inc.,* 534 U.S. 279 (2002) (arbitration agreement between employer and employee did not bar EEOC enforcement action under the ADA); *Walsh* v. *Arizona Logistics, Inc.,* 998 F.3d 393, 397 (9th Cir. 2021) (arbitration agreement between employer and employee did not bar Department enforcement under FLSA). Accordingly, where an H–2A employer's job order discloses the existence of an arbitration clause that is otherwise permissible, the SWA and OFLC review the disclosure for actual or implied restrictions on workers' access to complaint systems and may require employers to include language in the job order affirmatively stating that the worker may not be prevented from filing complaints or communicating with the Department.

For efficiency and clarity, and to better inform workers of their rights under the H–2A program, the Department proposed in the NPRM to add standard language to the job order affirmatively stating that a worker may not be prevented from communicating with the Department or any other Federal, State, or local government agencies regarding the worker's rights. The Department also invited comments suggesting other means it could use to better inform workers of their rights and to better inform employers and workers alike of the longstanding limitations on ''side agreements.''

The Department received comments in support and in opposition to this proposal. Farmworker Justice expressed concern that such agreements are often presented in writing even though a worker may not be able to read, and that even if a worker can read, these side agreements are often presented in English, rather than the worker's primary language. Farmworker Justice also stated that workers may be denied the opportunity to have someone review the side agreements with them prior to signing them or may be forced to sign these agreements through intimidation, yelling, threats, or other unlawful measures. This same commenter also noted that such side agreements may force workers to waive rights afforded to them under the H–2A program, or, in the case of arbitration agreements, may lead workers to believe that they do not have a right to communicate with the Department. Another commenter, CDM, expressed concern over the imposition of breach of contract fees and other severe penalties on H–2A workers who leave—or attempt to leave—employment before the scheduled conclusion of the work contract.

Commenters in opposition, which included agricultural employers and agricultural associations, raised several concerns. First, some commenters pointed to the Ninth Circuit decision in *Martinez-Gonzalez* v. *Elkhorn Packing Co., LLC,* asserting that an H–2A employee and employer may enter into a binding arbitration agreement not specifically disclosed in the H–2A job order. These same commenters also asserted that the U.S. Supreme Court has held that arbitration agreements in the employment context are valid and enforceable under the Federal Arbitration Act. Additionally, these commenters stated that if the Department wanted to review arbitration agreements as part of an employer's job order, it could do so by defining such agreements as a ''material term and condition of employment.'' Commenters then asked the Department to specify what it would want to review with respect to an employer's arbitration agreement upon submission of a job order or temporary agricultural labor certification application. Additionally, one anonymous employer commented that it allows its U.S. workers to opt out of the H–2A contract.

For the reasons stated in the NPRM and as reflected in the comments in support of the proposal, the Department reiterates here its position prohibiting these side agreements. Similarly, the Department is including on the job

order the proposed standard language affirmatively stating that a worker may not be prevented from communicating with the Department or any other Federal, State, or local government agencies regarding the worker's rights. The Department believes that these clarifications will help prevent adverse effect on similarly employed workers in the United States by better informing workers of the terms and conditions of the job opportunity and of their rights under the program, improving employer compliance with the Department's longstanding requirements regarding disclosure of the terms and conditions of employment, and protecting workers from retaliation for asserting their rights under the program, including when communicating with any Federal, State, or local agency regarding those rights.

With respect to Farmworker Justice's concern regarding the disclosure of some ''side agreements'' in a language not understood by the worker, the Department notes that, in addition to the disclosure requirements discussed above, the employer must provide each worker a copy of the work contract ''in a language understood by the worker as necessary or reasonable.'' 20 CFR 655.122(q).

In response to concerns from commenters opposed to this proposal, the Department clarifies that it did not take a position in the NPRM and does not take a position in this final rule on whether an undisclosed arbitration agreement may be valid under the Federal Arbitration Act or under any applicable State law. Rather, as in the NPRM, the Department reiterates its longstanding policy that under the Department's H–2A regulations, an arbitration agreement is a material term and condition of the job that must be disclosed in the job order and that it is a violation for the employer to impose such a material term and condition of employment on the workers if it is not included in the job order and disclosed in the work contract. The Ninth Circuit's decision in *Elkhorn* does not require a different conclusion. There, the court addressed only the enforceability of the arbitration agreement at issue under the doctrines of economic duress and undue influence. *Elkhorn,* 25 F. 4th at 629. The court did not consider whether failure to disclose the existence of the agreement in the job order constituted a violation of the H–2A regulations, nor did it consider the impact of any such violation on the enforceability of the agreement under the Federal Arbitration Act or California law. *Id.; see also Cisneros,* 97 Cal. App. 4th at 461 (distinguishing questions presented in *Elkhorn* from question of whether failure to disclose arbitration agreement in H–2A job order violated the H–2A program regulations).

With respect to some commenters' assertions that the Department should amend its regulations to list arbitration agreements as a material term or condition that must be disclosed in the job order, the Department declines to do so, as such a revision is neither required nor practical. As described in the NPRM, the Department's H–2A regulations have long required an employer to include in the job order all material terms and conditions of the employer's specific job opportunity. While the regulations identify certain such materials terms and conditions, the regulations are not exhaustive and make plain that the employer must include those additional material terms and conditions of employment specific to the employer's job opportunity. *See, e.g.,* 20 CFR 655.121(a)(4) (incorporating requirements of 20 CFR part 653, subpart F) and 653.501(c)(iv) (providing nonexhaustive list of material terms and conditions of employment that must be disclosed in job order); *cf. Frank's Nursery,* 2021 WL 4155563, at *3–4 (concluding that drug testing—which also is not explicitly listed in the Department's regulations as a material term or condition of employment—is a material term or condition of employment that must disclosed on the job order). Similarly, the Department did not intend in the NPRM to suggest that H–2A employers must submit for SWA or CO review every arbitration agreement or other ''side agreement.'' Employers that intend to seek such agreements from workers as a requirement or condition of employment must disclose their existence in the job order and work contract in sufficient detail to provide adequate disclosure to workers and to permit the Department to consider whether such agreements constitute normal and accepted requirements among non-H–2A employers in the occupation; employers need not submit the entire agreement to satisfy these requirements. As in the normal course of processing job orders and applications, the reviewing SWA or CO may require additional information from the employer, if necessary.

In response to the comment from an anonymous employer indicating that it allows its U.S. workers to opt out of the H–2A contract, the Department notes that under the H–2A regulations, an H–2A employer's non-H–2A workers engaged in corresponding employment are entitled to the required wage rate for time spent performing that work, and to other benefits offered in the job order. *See, e.g.,* 20 CFR 655.103(b) (definition of corresponding employment); 20 CFR 655.122(l) (rates of pay); 20 CFR 655.122(i) (three-fourths guarantee). Moreover, in accordance with 29 CFR 501.5, it is unlawful for any person to seek to have an H–2A worker, a worker in corresponding employment, or a U.S. worker improperly rejected for employment or improperly laid off or displaced waive any rights afforded to that worker under the INA or under the H–2A regulations. Moreover, under 29 CFR 501.5, any agreement by a worker purporting to waive or modify any rights, even if entered into voluntarily, is void, with certain very limited exceptions.

vi. Section 655.135(h)(2)(i), Activities Related to Self-Organization and Concerted Activity

At § 655.135(h)(2), the Department also proposed a new protected activity relating to self-organization and concerted activity, which would be limited to persons engaged in FLSA agriculture, namely those workers who are not eligible for protection under sec. 7 of the NLRA, 29 U.S.C. 157, because they are not ''employees'' as defined in 29 U.S.C. 152(3). As discussed above, the Department explained that these additional proposed protections are necessary to prevent an adverse effect on the working conditions of workers in the United States similarly employed. 8 U.S.C. 1188(a)(1). Specifically, the Department proposed at § 655.135(h)(2) to protect engaging in activities related to self-organization, including any effort to form, join, or assist a labor organization, as defined in proposed § 655.103(b); a secondary activity such as a secondary boycott or picket; or other concerted activities for the purpose of mutual aid or protection relating to wages or working conditions. The Department also proposed to protect a person's refusal to engage in any such activities.

The Department explained that its enforcement experience has shown that the existing H–2A regulations currently do not provide sufficient protections for such workers to safely and consistently engage in self-advocacy to assert their rights, which adversely affects workers in the United States similarly employed. To address these concerns, the Department proposed to explicitly protect H–2A and corresponding workers engaged in FLSA agriculture who engage in concerted activity. The Department sought comments on whether the proposed additional protections would better empower and equip workers to enforce their existing

rights, thus reducing adverse effect on the working conditions of all similarly situated workers. The Department specifically sought comment on its proposed use of the terms ''concerted activity'' and ''mutual aid or protection,'' which it explained were based upon the general body of case law from the Federal courts and the NLRB broadly construing similar language in sec. 7 of the NLRA; however, it recognized that these terms must ultimately be interpreted consistently with the statutory purpose of the INA and the H–2A program, including the need to prevent adverse effect on workers in the United States and in light of the H–2A program's unique characteristics. It also specifically sought comments on whether to include the terms ''a secondary activity such as a secondary boycott or picket.'' Because the NLRA's prohibition on labor organizations engaging in secondary boycotts or pickets does not apply to the agricultural employees to whom the Department's proposed rule would apply (*see* 29 U.S.C. 158(b)(4)), the Department suggested that expressly protecting such activities would clarify workers' existing rights, prevent unnecessary confusion, avoid disputes, and help parties comply with their obligations under the proposed rule.

Many commenters endorsed the proposal to protect ''concerted activity'' as necessary to ensure effective enforcement and to avoid adverse effect on working conditions for all workers engaged in agriculture, noting that H–2A and other farmworkers frequently suffer from retaliation when seeking to engage in self-advocacy and organizing efforts. For example, Farmworker Justice commented that such additional regulatory safeguards against retaliation for engaging in concerted protected activity are essential to protecting and enforcing safe, fair, and legal working conditions, and that ''affording employees the right to freely discuss workplace concerns without fear of reprisal assures self-enforcement and employer compliance'' with their legal obligations. Farmworker Justice recommended that the regulations specifically protect workers' rights to discuss their workplace concerns among themselves and that employers be prohibited from taking any action to suppress these conversations, noting that ensuring the rights of agricultural workers to provide each other mutual aid and support can reinforce and improve enforcement. They further noted that the ability to confer and to engage in concerted protected activity with their coworkers to assert their legal rights and safe working conditions is even more important to H–2A workers, because their legal and work permit status is tied to a single employer. PCUN noted that many farmworkers report never having seen a DOL or State labor or safety inspector during their time working in agriculture. PCUN supported the proposal because it would give farmworkers more information and agency in making decisions about whether they want to act collectively, give ''modest protections'' to farmworkers who wish to advocate for regarding their working conditions through the use of a union, and reduce unlawful interference from employers.

Other workers' rights advocacy organizations also expressed support for the proposed provision, stating that farmworkers are very concerned about retaliation for taking concerted action to organize and enforce their rights, that retaliation against workers is very common, and that such tactics both violate workers' freedom of association and reduce the ability of authorities to enforce labor laws. Several advocacy organizations commented that these additional proposed protections are important to address the intimidation that farmworkers routinely face and to equip them with agency to advocate regarding their working conditions. Many individual commenters expressed support for strengthening workers' rights to advocate and unionize, with one adding that such activity can help protect them from unjust firing and retaliation.

As described above in Section VI.C.2.b, FLOC commented that it has been able to achieve many improvements for agricultural workers through collective bargaining with employers covering about 10,000 farmworkers in North Carolina, including many H–2A workers. It commented that the proposed protections would greatly help H–2A farmworkers in their efforts to act collectively and to obtain remedies for likely violations of the H–2A program's requirements. A joint comment from several State Attorneys General also expressed support for the provision, reasoning that it would positively impact H–2A workforces, who are particularly at risk of coercion by employers, by preventing employers from suppressing their exercise of their rights. The California LWDA expressed support for the proposed protections, stating that similar protections in its State have led to both workers being better able to advocate regarding their working conditions and stronger enforcement of labor laws. This commenter further recommended that the Department more closely align the proposed provision with language in the NLRA, removing references to wages and working conditions, arguing that such alignment would reduce litigation and allow relevant parties to rely on existing legal interpretations.

By contrast, many employers and trade associations opposed the proposal, for a variety of reasons. As described and addressed in Section VI.C.2.b, they contended that the Department's proposal exceeds its statutory authority, and that the Department failed to demonstrate how the proposed provision would prevent adverse effects on similarly employed workers in the United States, many of whom do not currently enjoy the protections the Department is proposing since they are excluded from the NLRA.

Wafla, a trade association, commented that the provision is redundant because Federal and State laws already protect individuals from threats, intimidation, restraint, coercion, and blacklisting; the commenter also expressed concern that the language defining concerted activity is too broad and that the protection could ''morph from employee discussions among themselves into activity by labor union officials and labor advocates who could claim to represent workers without their explicit consent.'' The National Right to Work Legal Defense Foundation, Inc. commented that the proposed provision would be unworkable because the Department cannot provide an enforcement body or mechanism such as the NLRB, which administers the similar rights and obligations created by the NLRA. The commenter asserted that the Department has not explained how the ''substantive rights and privileges'' created by the proposed rule would be enforced. The commenter stated that, since the Department has no statutory authority to regulate union conduct or punish unions and their officials for their transgressions against employees, the proposal would be particularly unclear for employees who wish to refrain from supporting a union or engaging in union activity.

An agent requested that the Department amend its proposals under § 655.135(h) to include objective standards, notice provisions, and other revisions to ensure due process toward employers. They contended that employers should remain free to take adverse employment action for lawful, job-related reasons against workers who engage in protected activity as long as the adverse employment action is unrelated to the protected activity, the employer did not know about the

protected activity, or both. They pointed out that the proposed provision was so broad that it would be difficult or impossible for an employer to discipline any worker who has ever engaged in concerted activity, even where they have a legitimate basis for doing so. A couple of unions and several advocacy groups specifically took issue with the Department's statement in the NPRM that it did not intend for its proposal to preempt any applicable State laws or regulations that may regulate labor-management relations, organizing, or collective bargaining by agricultural workers. 88 FR 63795. These commenters urged the Department to clarify in both preamble and regulatory text that the proposal is, in fact, intended to preempt State laws that, in the commenters' views, are less protective than the proposed provision, specifically citing two provisions of North Carolina State law, N.C. Gen. Stat. sec. 95–79(b), which prohibit agreements by farmworker unions providing for deduction of union dues and certain agreements relating to litigation with agricultural producers. *See, e.g., Farm Labor Organizing Committee* v. *Stein,* 56 F.4th 339, 345–51 (4th Cir. 2022). By contrast, wafla commented that States are free to choose whether to create agricultural collective bargaining rights applicable to workers in their own States under our system of federalism, and the Department cannot set or enforce a national baseline that applies to H–2A workers in every State.

Many commenters opposed the proposal to explicitly protect workers' rights to engage in secondary activity. The U.S. Chamber of Commerce commented that the proposal violates the NLRA even though that law does not cover agricultural employees, contending that the NLRA would still prohibit a labor organization with mixed membership of agricultural and non-agricultural employees from engaging in a secondary boycott. Thus, the Chamber contended that the Department cannot protect individual workers who engage in such activity because the NLRA bans covered or ''mixed'' labor organizations from engaging in that activity. The Chamber also cited the legislative history of the secondary boycott provision in the NLRA, suggesting that Congress was concerned about the impact of labor disputes in the agricultural sector. Several other trade associations, including AmericanHort, NHC, USApple, the Michigan Farm Bureau, Western Growers, and FSGA, also opposed the proposal. Many of these commenters asserted that the proposal to protect secondary activity, boycotts, and picketing was specifically preempted by the NLRA, that it exceeds the Department's statutory authority under the INA, and that the Department has failed to explain how the proposal would alleviate adverse effects on workers in the United States.

Other commenters, including a workers' rights advocacy organization and a labor union, expressed support for the proposal to specifically protect ''secondary activity,'' but expressed concern that the term ''secondary activity'' is not defined in either the rule or the NLRA. These commenters recommended that the Department include a specific definition, set forth in the AFL–CIO's comment, in the final rule. The AFL–CIO also stated that protecting secondary activity would be appropriate given the ''fissured structure'' of the farm labor industry, where labor recruiters supply workers to farm labor contractors who, in turn, provide labor on farms, who later sell their products to food processors, restaurants, and grocery stores. The comment stated that this severely fissured structure leads to abuse of workers because it involves a complex, hidden supply chain where labor recruiters and labor contractors must compete with one another based on labor costs. Additionally, one employer expressed general support for allowing workers to boycott and picket.

The Department has considered the comments and adopts the provision with modifications as described below. After reviewing the comments, it is clear that the fear of retaliation against farmworkers for taking concerted action to organize and enforce their rights is very common, and that the lack of legal protections for most farmworkers, especially H–2A workers who are vulnerable for the reasons set forth in Section VI.C.2.b, particularly because they are tied to a single employer, has contributed to this problem. The Department believes that prohibiting discrimination against workers for engaging in such activity would help address the intimidation reported by farmworkers, and thereby empower workers to join together to take action to enforce their rights under the program. As detailed in the NPRM and above, H–2A and corresponding workers must be free to advocate on behalf of themselves and their coworkers regarding the terms and conditions of their employment, without fear of retaliation, to prevent adverse effect on similarly employed workers. The Department emphasizes that the activity that is being protected in this final rule is not ''collective bargaining'' or ''unionization,'' but instead is ''concerted activity for mutual aid and protection,'' which encompasses numerous ways that workers can engage, individually or collectively, to enforce their rights. As discussed above in Section VI.C.2.b, farmworkers across the nation have engaged in a variety of concerted activity for mutual aid and protection to enforce their rights, including by banding together in worker centers to campaign for voluntary agreements and working with legal aid groups to file class action lawsuits.

As explained above in Section VI.C.2.b, providing additional protections for H–2A and corresponding workers to safely and consistently advocate on their own behalf regarding working conditions and assert their rights is necessary to ensure that the employment of H–2A workers does not adversely affect the wages and working conditions of similarly employed workers in the United States. Proposals to prohibit retaliation for self-advocacy and concerted activity thus fall within the Department's authority to ensure that foreign labor certification of H–2A workers does not adversely affect similarly employed workers in the United States. And, as explained in Section VI.C.2.b, this proposal is not preempted by the NLRA.

In addition, the Department disagrees that the proposed provision is redundant or unnecessary, that it would provide H–2A workers with more protection than other agricultural workers, that it would protect ''labor union officials and labor advocates'' rather than workers, or that it would create ''new rights and privileges'' for labor organizations. The provision is carefully crafted to apply only to ''any person engaged in agriculture as defined and applied in 29 U.S.C. 203(f)'' (*i.e.,* only those workers who are not already protected by sec. 7 of the NLRA), and it applies equally to H–2A and corresponding workers. By contrast, it does not apply to or create any rights for ''labor union officials,'' ''labor advocates,'' or labor organizations. It also does not purport to require recognition, collective bargaining, or any other action by an employer in response to worker organizing activity. Any such obligations, if they exist, would only apply in those States that have elected to apply their State labor relations programs to agricultural workers and would be unaffected by the new provision proposed by the Department. Instead, this new provision simply prohibits discrimination or retaliation against farmworkers who seek to self-organize or engage in other

concerted activity for mutual aid or protection.

Under the new provision, as explained in the NPRM preamble, an employer generally could not prohibit activities related to self-organization or other concerted activities for the purpose of mutual aid or protection that occur during nonproductive time, for example during lunch breaks, rest breaks, or while workers are riding as passengers in a vehicle when being transported between worksites. Nonproductive time also includes any noncompensable time, such as time after the end of the worker's workday. Similarly, the new provision is intended to permit workers to gather and converse for the purpose of mutual aid or protection in nonwork or common areas during nonwork hours, even if such areas are on employer premises, as explained in the NPRM preamble. For example, workers should generally be free to meet with one another after the end of their workday to discuss wages or working conditions in parking areas; common areas of worker housing, such as indoor or outdoor eating areas; recreational facilities; or other locations on the premises where workers would otherwise typically gather after work. In addition, although employers may establish reasonable work rules that limit discussions or meetings unrelated to the job while the worker is actively performing work, they may not apply or enforce work rules selectively to discourage worker self-organization or other concerted activities. For example, employers may place reasonable restrictions on employees' use of personal devices while in the field but may not apply such restrictions only to certain individuals who the employer suspects are engaged in organizing or other concerted activities, or only to those text messages or phone conversations that the employer perceives to be related to worker self-organization or other concerted activities. Similarly, employers may establish reasonable work rules limiting personal conversations during productive working hours where such conversations would affect productivity but may not selectively enforce such rules against workers for conversing about self-organization or other concerted activities. Such selective enforcement or discrimination in response to protected activity would likely violate this final rule as set forth in 20 CFR 655.135(h)(2)(i).

However, because of the breadth of activity that is protected under § 655.135(h)(2)(i) as concerted activity for mutual aid and protection, and in response to the commenters' concerns that this provision may limit employers from taking disciplinary actions against employees for reasons unrelated to protected activity, the Department has clarified in the final regulatory text that § 655.135(h)(2) prohibits only those adverse actions that are taken because of the listed protected activities. In particular, the Department has revised the language at § 655.135(h)(2) to prohibit adverse actions against any person because such person has engaged in the protected activities set forth in that provision or has refused to engage in such activities. This revision is consistent with the Department's original language prohibiting discrimination and its intent to expressly prohibit intimidation, threats, restraint, coercion, blacklisting, discharging, or any other form of discrimination by an H–2A employer in retaliation against agricultural workers, including prospective or former workers, for engaging in protected activities and ensures due process for employers who are charged with such a violation. As recently explained by the Supreme Court, discrimination typically means ''[t]o make a difference in treatment or favor (of one as compared with others),'' or treating someone worse than another who is similarly situated. *Bostock* v. *Clayton Cty.,* 140 S. Ct. 1731, 1740 (2020) (construing Title VII's prohibition against discrimination, and quoting *Webster's Second* 745 (1954)); *see also Murray* v. *UBS Sec., LLC,* 144 S. Ct. 445, 453 (2024); *Burlington N. & Santa Fe Ry.* v. *White,* 548 U.S. 53, 59 (2006) (''[T]he term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals.''). Finally, the Department notes that this revision does not require that protected activity be the sole reason for the action against an employee. Rather an employer will violate § 655.135(h)(2) whenever protected activity is a but-for cause of an adverse action against an employee. *See Bostock,* 140 S. Ct. at 1739 (explaining that an adverse action can have multiple but-for causes).

The Department declines the suggestion to delete the phrase ''relating to wages or working conditions.'' As the Department explained in the NPRM, the use of the terms ''concerted activity'' and ''mutual aid and protection'' draws upon the general body of case law from the Federal courts and the NLRB broadly construing similar language in the NLRA. The Department adopts its proposed interpretations of ''concerted activity'' and ''mutual aid and protection'' in this final rule. *See* 88 FR 63793–63794. The Department believes it is appropriate to interpret these terms broadly in order to protect workers' ability to advocate on behalf of themselves and their coworkers regarding the terms and conditions of employment without fear of retaliation, in order to prevent adverse effect. As explained herein and in the NPRM, such advocacy can take a number of forms and the Department concludes it would be contrary to its intent and purpose in adopting this new provision to protect only a narrow set of concerted activities. However, the Department's regulation must ultimately be interpreted consistently with the statutory purpose of the INA and the H–2A program, and thus the Department retains the reference to the general term ''wages and working conditions,'' which it believes is broad and encompassing. For example, as discussed above, farmworkers who band together to protest unsafe housing or transportation, lack of clean drinking water or bathroom facilities, lack of accessible kitchen facilities, unfair or undisclosed deductions for food and beverages, or being offered poor quality or spoiled food would be covered, as would workers who jointly discussed or expressed concerns about their wages or an employer's failure to comply with health and safety laws.

In addition, the Department has modified the language in this final rule to remove the express reference to ''a secondary activity such as a secondary boycott or picket.'' It recognizes the concerns expressed by commenters about the complexity of the concept of secondary activity as developed under decades of caselaw construing NLRA sec. 158(b)(4)(i) and (ii),[90] and has determined that the inclusion of such

[90] The term ''secondary activity,'' as developed in the caselaw, generally regulates the activities of labor organizations, and refers to a key distinction under the NLRA between lawful ''primary strikes and primary picketing,'' which are expressly protected, and threatening or coercive ''secondary'' conduct—that is, conduct aimed at a ''secondary'' or ''neutral'' employer, which is expressly prohibited. *See* 29 U.S.C. 158(b)(4). As explained by the NLRB, ''[t]he NLRA protects the right to strike or picket a primary employer—an employer with whom a union has a labor dispute. But it also seeks to keep neutral employers from being dragged into the fray. Thus, it is unlawful for a union to coerce a neutral employer to force it to cease doing business with a primary employer. That is only one aspect, however, of a complex legal picture.'' NLRB, *Secondary boycotts (Section 8(b)(4)), https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/secondary-boycotts-section-8b4* (last accessed Feb. 22, 2024); *see also Di Giorgio Fruit Corp.* v. *NLRB,* 191 F.2d 642, 649 (D.C. Cir. 1951) (explaining that a Teamsters Local was engaged in ''primary picketing'' at the place of its members' own employment, in support of a strike against their employer, which is ''called a primary activity in the language of labor law,'' and thus did not fall within the NLRA's ban against secondary activity.)

terms in this final rule would create unnecessary confusion and would not further the stated goals of clarity and disclosure. As the Supreme Court has recognized, the question of what constitutes secondary activity is ''among the labor law's most intricate.'' *NLRB* v. *Local 825 Int'l Union of Operating Eng'rs,* 400 U.S. 297, 303 (1971). Thus, the Department has determined that including this term, even with the definition proposed by some commenters, could lead to uncertainty, and therefore is removing the term from this final rule. Instead, the Department seeks to clarify the breadth of activities that are protected as ''concerted activities for the purpose of mutual aid or protection relating to wages or working conditions'' of H–2A workers and similarly employed workers.

The Department generally agrees with the AFL–CIO and Farmworker Justice that otherwise lawful ''peaceful expressive activity'' by groups of individual workers, such as handing out flyers, leafleting, or picketing outside a grocery store that sells agricultural products derived from the labor of H–2A workers in order to discourage customers from buying those specific products, would generally be protected as ''concerted activity for mutual aid and protection'' under this final rule. Notably, this type of concerted activity has been deemed permissible even in the NLRA context. *See, e.g., NLRB* v. *Fruit and Vegetable Packers and Warehousemen, Local 760,* 377 U.S. 58, 71–73 (1964) (a labor union's engaging in peaceful expressive activity, such as consumer handbilling or picketing at a retail grocery store seeking to persuade customers not to buy apples that were produced by a certain agricultural employer, was not prohibited ''secondary activity'' under NLRA sec. 8(b)(4)(ii) where the activity did not ''threaten, coerce, or restrain'' anyone and was directed at customers rather than employees of the store); *see also Edward J. DeBartelo Corp.* v. *Florida Gulf Coast Building Trades Council,* 485 U.S. 568, 578 (1988) (peaceful consumer handbilling or leafleting by a labor union at the entrances to a shopping center urging consumers not to patronize those stores was protected under the First Amendment and was not an unfair labor practice under NLRA); *Wartman* v. *United Food and Commercial Workers Local 653,* 871 F.3d 638, 644 (8th Cir. 2017) (labor union did not violate NLRA by picketing grocery stores, even though the picketing effectively disrupted the stores' relationships with customers and suppliers, where union's objective was to urge the public not to shop at the stores and to pressure the store owners to resolve a labor dispute but not to force or require any person to cease doing business with any other person); *but see 520 South Michigan Avenue Associates, Ltd.* v. *Unite Here Local 1,* 760 F.3d 708, 711 (7th Cir. 2014) (remanding for trial on whether certain activities engaged in by a labor union against a hotel were coercive and whether any such coercive conduct actually caused damages to the hotel or was protected under the NLRA or the First Amendment or both).

Thus, under this final rule, a group of workers engaged in a labor dispute who meet with the management of a grocery store to explain their labor dispute and seek to persuade the store to stop carrying the products sold by the workers' employer until the labor dispute is resolved would be engaged in protected concerted activity, as long as otherwise not prohibited by law. Similarly, in response to the comment from the AFL–CIO, the Department clarifies that, to the extent that individual workers are engaged in otherwise lawful peaceful leafleting or picketing at an agricultural worksite, including a ''fissured workplace'' (such as an employee of a farm labor contractor picketing on the premises of the farm where they work, which is owned by a grower or other entity that may or may not be a joint employer of the workers), such lawful activity is generally protected under this final rule, since the object of the activity is to affect working conditions at the workers' own place of work. These examples are intended to be illustrative and not exhaustive.

As explained in the NPRM, the Department intends to interpret the terms ''concerted activity'' broadly, to include concerted activities for the broad purpose of ''mutual aid or protection'' as well as for the narrower purpose of ''self-organization,'' as long as the object of the activity is related to the workers' own wages and working conditions. *See, e.g., Eastex, Inc.* v. *NLRB,* 437 U.S. 556, 565–66 (1978) (explaining that the terms as set forth in NLRA sec. 7 are intended to protect workers from retaliation by their employers, even ''when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship,'' such as through political or administrative action). And even though ''some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity[, and w]e may assume that at some point . . . becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause,'' it is neither necessary nor appropriate to attempt to precisely delineate those boundaries here. *Id.* at 567–68.

As further discussed below, the Department does not intend to protect concerted activity that is currently prohibited by State law,[91] or to preempt, supersede, or otherwise interfere with the operation of State laws that authorize or regulate organizing, collective bargaining, unfair labor practices, or labor-management relations in the agricultural sector. Instead, it intends for this rule to complement State collective bargaining laws, not to conflict with them, as well as to ensure workers are able to engage in lawful concerted activity without being retaliated against in States without such laws. As under its existing unfair treatment provisions, the Department will thoroughly investigate any complaint and consider all the facts, including, among other things, relevant State laws, the nature of the adverse action, any judicial or administrative findings of unlawful conduct, and evidence relating to causation, before determining whether unlawful retaliation or discrimination has occurred.

Finally, as noted in the NPRM, the remedies provided for under this proposed regulation are not intended to be exclusive; if an agricultural worker has other remedies available under State or local law, the remedies contemplated under this proposal are not intended to displace them. 88 FR at 63792. In addition, the Department does not intend for this provision to preempt any applicable State laws or regulations that expressly protect agricultural workers or regulate labor-management relations, organizing, or collective bargaining in the agricultural sector. 88 FR at 63792, 63795. Several commenters, such as the AFL–CIO, FLOC, Comité de Apoyo a los Trabajadores Agrícolas, and CDM, asked

[91] For example, in New York, ''[n]otwithstanding any other provision of law, for farm laborers the term 'concerted activities' shall not include a right to strike or other concerted stoppage of work or slowdown.'' N.Y. Lab. Law § 703); *See also* N.Y. Lab. Law § 704–b(1)) (''It shall be an unfair labor practice for a farm laborer or an employee organization representing farm laborers to strike any agricultural employer.''); *See also* Cal. Lab. Code §§ 1154(d)(2) and 1154.5 (making it an unfair labor practice for ''a labor organization or its agents'' to engage in secondary strikes, or boycotts; ''publicity which includes picketing and has the effect of requesting the public to cease patronizing such other employer'' permitted only by certified representative labor organizations; publicity other than picketing permitted only in certain circumstances).

the Department to ''clarify'' that it does intend for this regulation to preempt State laws that, in their view, are less protective than the proposed provision. They specifically cited two provisions of North Carolina's 2017 Farm Act, N.C. Gen. Stat. sec. 95–79(b), which prohibit certain agreements providing for deduction of union dues or litigation with agricultural producers or both. *See Farm Labor Organizing Committee* v. *Stein,* 56 F.4th 339, 345–51 (4th Cir. 2022) (finding that the provisions did not violate the equal protection clause or the First Amendment rights of the union or its members to expressive activity and to freedom of association, and were rationally related to legitimate state interests). In the commenters' view, the North Carolina statute directly conflicts with the proposed regulation protecting concerted activity, and the proposed regulation should therefore preempt the State law, as in *Maine Forest Products Council* v. *Cormier,* 51 F.4th 1 (1st Cir. 2022). That case held that a Maine statute prohibiting certain employment by non-U.S. residents was preempted by the INA and the H–2A regulations, because the H–2A program unmistakably conflicted with the restrictions imposed by the Maine law. *See also Rogers* v. *Larson,* 563 F.2d 617, 626 (3d Cir. 1977) (holding that a Virgin Islands statute prohibiting hiring of foreign workers was preempted by the INA for similar reasons).

It is generally true where State laws are ''in conflict or at cross-purposes'' with Federal law, such as the INA, ''Congress has the power to preempt state law,'' *Arizona* v. *United States,* 567 U.S. 387, 399 (2012), and that courts have found preemption where it is impossible for a private party to comply with both State and Federal law (*i.e.,* conflict preemption) or where under the circumstances of a particular case the challenged State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (*i.e.,* obstacle preemption). *Id.; Cormier,* 51 F.4th at 3 (citing *Arizona,* 567 U.S. at 399). Federal regulations can be just as preemptive as Federal laws. For example, in *Cormier,* the First Circuit recently held that the federally enacted H–2A program confers a right on private actors (either explicitly or implicitly) that unmistakably conflicted with the restrictions imposed by the Maine law, which prohibited Maine landowners from hiring anyone who is not a ''resident of the United States,'' including an H–2A worker, to drive trucks ''transport[ing] forest products'' within the State. 51 F.4th at 3, 8. *See also Dandamudi* v. *Tisch,* 686 F.3d 66, 80 (2d Cir. 2012) (State statute was obstacle to accomplishment and execution of the full purposes and objectives of Congress where it disqualified certain immigrants merely because of their immigration status); *Rogers* v. *Larson,* 563 F.2d at 626 (same, where Territorial law gave preference to citizens and permanent residents over lawful immigrants who were authorized to work). However, to find preemption, there must be a clear conflict between the two provisions, or at least a ''direct and significant obstacle.'' In *Cormier,* the court held the Maine statute was ''a blunt intrusion on the implicit federal right,'' and ''constitutes a direct and significant obstacle to achieving the H–2A program's clear and manifest objectives,'' since it ''would nullify the implicit federal right of the employer to hire foreign laborers on a temporary basis, and ''thus rudely ''interfere[s] with the careful balance struck by Congress.'' *Cormier,* 51 F.4th at 10 (quoting *Arizona,* 567 U.S. at 406). Furthermore, the State law was ''in tension with the structure and purpose of the H–2A statutory provisions and would effectively give states a veto power over the federal program'' by overriding ''the specific H–2A work authorizations provided by federal law.'' *Cormier,* 51 F.4th at 11.

By contrast, courts have declined to find that all State employment laws relating to immigrants are preempted by the INA. *See, e.g., DeCanas* v. *Bica,* 424 U.S. 351, 355 (1976) (holding that a California State law restricting employment of unauthorized immigrants was not preempted by the INA); *LeClerc* v. *Webb,* 419 F.3d 405, 424 (5th Cir. 2005) (Louisiana Supreme Court rule that rendered ''nonimmigrant aliens'' ineligible to sit for the Louisiana Bar was not preempted by the H–1B provisions of the INA, since ''the field of alien employment law tolerates harmonious state regulation''). ''Federal regulation . . . should not be deemed preemptive in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'' *LeClerc* v. *Webb,* 419 F.3d at 423 (quoting *DeCanas,* 424 U.S. at 356). Indeed, *Cormier* itself notes that the H–2A regulations themselves specifically require compliance with all applicable employment-related laws that pertain to working conditions. 51 F.4th at 10 (citing 20 CFR 653.501(c)(3)(iii)). Here, unlike the Maine law at issue in *Cormier,* the Department does not believe that the North Carolina State law presents a clear conflict or a ''direct and significant obstacle'' to the operation of the H–2A program or the specific regulation in question. The law does not appear to govern whether a farmworker in North Carolina may engage in protected concerted activity as outlined herein, or whether a North Carolina employer could discipline a worker for such activity, and unlike the Maine law at issue in *Cormier* would not ''effectively give states a veto power over the federal program'' or ''override the specific H–2A work authorizations provided by federal law.'' 51 F.4th at 7–8. As noted in the preamble to the NPRM, the Department is cognizant that over a dozen States have enacted laws that regulate organizing, collective bargaining, labor-management relations, overtime, heat stress, tools, and other issues affecting agricultural workers.[92] It has carefully crafted its new protections for concerted activity to avoid creating conflicts with existing State laws and regulations that provide for a system of collective bargaining for farmworkers and/or explicitly prohibit retaliation against farmworkers for exerting other rights guaranteed by State laws or regulations.[93]

vii. Section 655.135(h)(2)(ii), Refusing To Attend or Participate in ''Captive Audience Meeting'' Related to Protected Activity

The Department proposed a new provision at § 655.135(m)(3) to prohibit employers from engaging in ''coercive speech'' intended to oppose workers' protected activity, such as organizing or advocating regarding their working conditions on behalf of themselves and their coworkers. Specifically, the Department proposed to prohibit employers from engaging in ''coercive employer speech intended to oppose workers' protected activity'' (sometimes

[92] *See, e.g.,* ALRA, Cal. Lab. Code § 1153; Colorado Agricultural Labor Rights and Responsibilities Act, Colo. Rev. Stat. 8–13.5–201 (state law requiring access and employer-provided transportation to ''key service providers''); Arizona Agricultural Employment Relations Act, Ariz. Rev. Stat. Ann. § 3–3101–3125; Ariz. Rev. Stat. Ann. § 23–1381–1395; New York Farm Laborers Fair Labor Practices Act (2020) (amending New York Labor Law Code §§ 701–718, Chapter 31, Article 20. Or. Rev. Stat. secs. 658.405 through 658.511 (state laws requiring licensing and bonding of agricultural recruiters); Generally speaking, the Department supports such protections for farmworkers and believes that they can help to avoid adverse impact on the working conditions of workers in the United States by helping to improve such conditions for all workers.

[93] In addition, this final rule does not require employers to recognize any labor organization, to engage in collective bargaining, or to reach any CBA; rather, any such agreement would be governed and enforced solely under any applicable Federal, State, or local law.

referred to as ''captive audience meetings'' or ''cornering''), in which the employer seeks to persuade workers not to engage in protected activity, unless the employer (a) explains the purpose of the meeting or communication; (b) informs employees that attendance or participation is voluntary and that they are free to leave at any time; (c) assures employees that nonattendance or nonparticipation will not result in reprisals (including any loss of pay if the meeting or discussion occurs during their regularly scheduled working hours); and (d) assures employees that attendance or participation will not result in rewards or benefits (including additional pay for attending meetings or discussions concerning their rights to engage in protected activity outside their regularly scheduled working hours). The proposal was modeled on the ''*Johnnie's Poultry*'' safeguards that were developed by the NLRB to ensure that workers are not coerced into cooperating with their employers in various situations. *See* 88 FR at 63798 (citing *Johnnie's Poultry Co.,* 146 NLRB 770, 774 (1964) (providing safeguards required when employers question employees about protected activity to prepare a defense against unfair-labor-practice charges); *Sunbelt Rentals, Inc.,* 374 NLRB No. 24 (2022) (reaffirming *Johnnie's Poultry* rule). The Department explained that it sought to balance workers' rights to engage in (or to refrain from engaging in) concerted activity, and employers' rights to engage in speech concerning any such activity, without unduly infringing on either party's expression. It also sought to prohibit employers from retaliating against a worker for attending or refusing to attend such a ''captive audience'' meeting or discussion, even if the meeting were to occur during their regularly scheduled working hours.

The Department sought comment on whether there would be other ways to better protect workers' rights to refrain from listening to employers' coercive speech, whether other safeguards or employer disclosures would be appropriate, and how to most appropriately tailor the prohibition to avoid infringing on employer's free speech rights while protecting workers' right to engage in protected activity.

The Department received a significant number of comments in strong opposition to proposed § 655.135(m)(3), many of which raised First Amendment concerns and contended that the proposed prohibition exceeded the Department's authority. The U.S. Chamber of Commerce, for example, contended that ''the Department's proposal contains unconstitutional restrictions on employers' free speech rights.'' Referring to this proposed provision and other proposed provisions relating to worker voice and empowerment, U.S. Representatives Foxx and Thompson opined that ''Congress has given no authority to DOL to impose these mandates on H–2A employers,'' and that ''[s]uch authority cannot be found in the Immigration and Nationality Act or the Fair Labor Standards Act.'' Wafla contended that ''this proposed section silences employer free speech rights,'' and that ''[t]he proposed rules, taken as a whole, are hypocritical because they recognize employee association and speech rights while gagging employers' free speech rights.'' The U.S. Chamber of Commerce noted that ''mandatory work meetings in which an employer talks about unions . . . have long been lawful under the NLRA and, more important, protected by the U.S. Constitution.'' Commenters also contended that both the First Amendment and the NLRA protect employers' freedom to hold mandatory work meetings and to express their views, regardless of the subject matter, stating that NLRA precedent balances the interests of employers and employees by expressly protecting employer speech, except when the speech amounts to a ''promise of benefit'' or ''threat of reprisal.'' The Chamber said that the Department cannot mean that all mandatory work meetings are inherently coercive and thus ''it seems to mean that all meetings about unions are coercive,'' and that doing so ''draws the Department into regulating the substance of an employer's speech—a subject it is constitutionally forbidden to touch.''

USA Farmers opined that this proposal ''lacks a valid legal basis and plainly violates an employer's First Amendment rights.'' USA Farmers also stated that ''[a]n employer has the right to communicate with employees,'' and that ''[a]n employer can also require employee attendance at meetings and such meetings are routinely counted as compensable time.'' It also suggested that any restrictions on speech should be applied evenly, not just to employers but to outside groups. The Cato Institute commented that the proposal was too broad because the proposed ''speech restrictions apply not just during a union campaign but any time an employer opposes unionization.'' Many commenters, including IFPA, asked for clarification of the proposal, stating that it is not clear how or when employers would need to provide the required disclosures to employees, and that the proposal did not provide guidance regarding the records that would be needed to verify such notice was given to workers.

Labor unions and worker advocates generally supported the proposal, stating that it would help to protect workers by preventing employers from trying to discourage workers from advancing their rights in the workplace and would help to ensure that the employment of H–2A workers does not adversely affect the working conditions of similarly employed workers in the United States. Farmworker Justice expressed support for the proposal, commenting that agricultural employers have a ''unique ability'' to control and require the attendance of H–2A workers at mandatory meetings, while the UFW shared personal anecdotes from farmworkers they have worked with, describing experiences with employers using captive audience meetings to stifle union activity.

Several elected officials and State agencies also supported the proposal, commenting that it would help to address the intimidation and isolation faced by farmworkers. For example, 11 State Attorneys General observed that this proposal, combined with other worker voice and empowerment proposals in the NPRM, would help protect workers from misinformation, retaliation, and coercive speech that hinders self-advocacy and organizing. The California LWDA said that employer captive audience meetings have detrimental effects on workers' ability to organize, reasoning that the proposed prohibition would protect both employers' speech rights and workers' rights to refrain from listening to coercive speech.

However, several of these commenters questioned the practical effect of the proposed rule without modification. For example, the AFL–CIO suggested that any final rule should clarify when employer speech should be deemed ''coercive'' and when it would be permissible. It suggested that the rule be revised to entirely prohibit employers from engaging in ''speech addressed to H–2A workers intended to oppose those workers' protected activity'' without providing express warnings. Farmworker Justice suggested that the proposal should also require ''that the employer supplement any oral assurances in writing to the worker before the employer engages in a discussion of union activity or participation.''

After consideration of the comments received, this final rule adopts a modified version of the proposal. This final rule does not adopt the language at proposed § 655.135(m)(3) prohibiting

coercive employer speech, but instead incorporates a version of that proposal into the protected activity framework at § 655.135(h)(2)(ii). The Department considered the objections voiced by many commenters, in particular those questioning whether the proposed prohibition as drafted would interfere with employers' speech. In addition, the Department notes that at least five States have enacted laws that target the same problem in a way that avoids concerns about potential infringement on the First Amendment rights of employers while protecting workers' rights as well. Four States, namely Connecticut (2022), New York (2023), Maine (2023), and Minnesota (2023), have recently joined Oregon (2010) [94] by enacting laws that do not prohibit mandatory captive audience meetings *per se,* but instead protect workers who leave or refuse to attend such meetings (or who refuse to listen to such speech) from being disciplined or fired. For example, the New York law prohibits employers from disciplining or discriminating against employees for refusing to attend employer-sponsored meetings, listen to speech, or view communications that are primarily intended to convey the employer's opinion about ''religious or political matters,'' including the decision to join or support any labor organization. The Department therefore concludes that the interest underlying this proposal—*i.e.,* preventing employers from coercing or threatening farmworkers into attending meetings or listening to employer speech intended to oppose protected activity, under the implied threat of discipline if the farmworkers exercise their protected right not to listen to such speech—can be better served by instead adding a new protected activity to the proposed anti-retaliation provision at § 655.135(h)(2).

Therefore, the Department is not adopting the proposed language to prohibit coercive speech outright, but instead incorporates a version of the proposed provision into the list of protected activities in the ''unfair treatment'' provisions at § 655.135(h)(2)(ii). The final provision expressly prohibits employers from retaliating or discriminating against a worker for refusing to attend a ''captive audience'' meeting (or portion thereof), if the primary purpose of the meeting (or a certain portion of the meeting) is to communicate the employer's opinion concerning any activity protected under these regulations. It also protects a worker from retaliation for refusing to listen to employer-sponsored speech or view employer-sponsored communications, if the primary purpose of the speech or communication (or that portion of the speech or communication) is to communicate the employer's opinion concerning any activity protected under these regulations, even if the meeting, speech, or communication occurs during their regularly scheduled working hours.

This protection is limited to those workers engaged in FLSA agriculture. As explained in the NPRM, the Department believes that ''a worker's right to engage, or not engage, in self-organization and concerted activity under [final § 655.135(h)(2)(i)] [95] would include the worker's right to listen and the worker's right to refrain from listening to employer speech concerning the worker's exercise of those rights.'' 88 FR at 63797 (citing NLRA sec. 7). This modification is intended to permit H–2A employers to freely engage in speech regarding these topics, as requested by certain commenters, including employers, trade associations, Members of Congress, and a think tank. At the same time, the revision responds to comments by worker advocates urging the Department to protect workers' rights to refrain from listening to employer speech on these topics. Therefore, this final rule includes regulatory text to expressly protect those rights in § 655.135(h)(2)(ii).

As with the protection for ''concerted activity'' in 20 CFR 655.135(h)(2)(i), this provision is limited to those workers who are not already protected by sec. 7 of the NLRA. And as with the other protections against unfair treatment for concerted activity, this new protection will also be disclosed to workers through the job order and through other worker outreach tools. The Department believes that this approach strikes a better balance between protecting workers' rights to engage in (or to refrain from engaging in) concerted activity and protecting employers' First Amendment right to engage in speech concerning any such activity, without unduly infringing on either party's expression. The Department acknowledges that employers generally have First Amendment rights to express any views, arguments, or opinions on any subject, including but not limited to the protected concerted activities outlined in 20 CFR 655.135(h)(2)(i), as long as they do not engage in unlawful threats or coercion. However, the Department also believes that workers enjoy First Amendment rights to decline or refuse to attend mandatory employer-sponsored speeches or meetings concerning the exercise of their rights to engage in protected activities. Workers should therefore be free to leave (or refuse to attend) such a ''captive audience meeting,'' and should not be threatened, disciplined, coerced, suffer other reprisals, or lose out on any reward or benefit if they exercise their protected rights not to listen to such speech or to attend such a meeting. As detailed above, the Department believes that ensuring that workers can individually or collectively advocate regarding their working conditions, without fear of reprisal, will better prevent adverse effect as required under 8 U.S.C. 1188(a)(1). As also detailed above, protecting the right to engage in (or to refuse to engage in) concerted activity is a demonstrated method to empower such worker advocacy. The Department also believes that protecting workers' rights to refuse to attend such ''captive audience meetings'' is an important aspect of the worker's right to engage in or refuse to engage in concerted activity, as set forth in new § 655.135(h)(2)(i). As the comments received on the ''captive audience'' proposal reflect, a worker must have the freedom to choose whether to listen to—or not to listen to—speech concerning the benefits or drawbacks of engaging in concerted activity to fully effectuate their right to engage in, or to refuse to engage in, such activity. The Department believes that expressly protecting a worker's right to refuse to attend or to leave such a meeting is the simplest and fairest method of ensuring that workers' participation is voluntary at all times.

Finally, consistent with the preamble discussion in the NPRM, this revised provision is not intended to affect attendance at mandatory meetings on subjects other than those involving workers' exercise of protected rights (*e.g.,* work assignments for the day, tools, job training, or safety instructions). The Department recognizes, as it did in the NPRM, that employers may and do regularly require workers to attend meetings on such work-related subjects. But if the employer announces a special meeting at the beginning or end of the workday to express their opinion regarding labor unions, health and safety complaints, or whether workers should communicate with government investigators, a worker may choose not to attend that meeting and may instead choose to continue performing their regularly assigned duties. Similarly, if the ''primary

[94] *See, e.g.,* Conn. Gen. Stat. Ann. § 31–51q (2022), Me. Rev. Stat. Ann., tit. 26, § 600–B (effective Sept. 19, 2023); 2023 Minn. S.F. No. 3035, codified as Minn. Stat. Ann. § 181.531 (effective August 1, 2023); N.Y. Lab. Law § 201–d (McKinney 2023); Or. Rev. Stat. § 659.786(1) (2010).

[95] Proposed § 655.135(h)(2).

purpose'' of a regular 30-minute daily meeting is to discuss work assignments, but the employer changes topics and instead devotes the last 15 minutes to discussing whether workers should engage in certain protected activity, a worker would have the choice to leave that meeting at that point. Of course, the employer may choose to minimize any disruption by, for example, announcing that the first 10 minutes of the meeting will be about organizing, and allowing workers who object to wait elsewhere, then invite them into the meeting when they change topics and begin making work assignments. However, the employer is not required to do so. And if a retaliation complaint is received, WHD will thoroughly investigate all the facts and circumstances of the case (as it does with any complaint) before charging the employer with unfair treatment.

viii. Proposed § 655.135(m)

The Department proposed a new employer obligation at § 655.135(m) that included a number of protections intended to help prevent an adverse effect on the working conditions of workers in the United States similarly employed, 8 U.S.C. 1188(a)(1). The obligations under proposed § 655.135(m) would apply only to workers engaged in FLSA agriculture. Specifically, the Department proposed requirements that an employer provide to a requesting labor organization the contact information of H–2A workers and workers in corresponding employment employed at the place(s) of employment; permit a worker to designate a representative of their choosing to attend any meeting that may lead to discipline; refrain from captive audience meetings unless the employer provides certain information to ensure that any such meeting is not coercive; and attest either that they will bargain in good faith over the terms of a proposed labor neutrality agreement with a requesting labor organization or that they will not do so and provide an explanation for why they have declined. For the reasons explained below, the Department finalizes, with modifications, the proposal that employers must permit workers to designate a representative in certain disciplinary meetings. The Department does not finalize the proposal to provide a requesting labor organization contact information for H–2A and corresponding workers, nor does it finalize the proposal requiring employers to attest that they will bargain in good faith over a labor neutrality agreement or provide a reason for declining to do so. As explained above in Section VI.C.2.b.vii, the Department has also withdrawn the proposal to prohibit all coercive employer speech or require that certain warnings be given to ensure that the workers have the opportunity to opt out of attending such speeches or meetings, and instead has finalized an alternative at § 655.135(h)(2)(ii) that protects a worker from retaliation for opting out of (or refusing to attend) such a ''captive audience meeting'' or speech.

A. Section 655.135(m), Designation of Representative

In the NPRM, the Department proposed to require employers to permit a worker to designate a representative of their choosing to attend any meeting between the employer and the worker where the worker reasonably believes that the meeting may lead to discipline and to permit the worker to receive advice and assistance from the representative during any such meeting. As noted above, this proposal was limited to workers engaged in FLSA agriculture.

The NPRM set forth two rationales for the proposal. First, the Department believes that this obligation would help safeguard workers against unjust discipline (including termination) by giving workers the opportunity to secure a witness, advisor, or advocate in a potentially adversarial situation. Second, allowing H–2A workers and workers in corresponding employment the option to have a representative in these meetings (if they so choose) would allow them to better advocate for themselves regarding the terms and conditions of their employment and thereby prevent adverse effect on the working conditions of similarly employed workers in the United States. That is, the ability to have a representative's presence at such a meeting would enhance workers' ability to act in concert with their coworkers to protect their mutual interest in ensuring that their employer does not impose punishment unjustly.

In the preamble to the NPRM, the Department clarified that there was no limit to who a worker may designate as a representative. As the NPRM explained, it would be impractical to limit such representatives to union representatives, given low union density in agricultural workplaces, or to coworkers, because the temporary nature of H–2A work may limit the development of relationships with coworkers. For example, the worker may prefer to designate a representative who is not employed by the employer, such as a legal aid advocate, member of the clergy, or other key service provider.

The NPRM requested commenter feedback on a few specific questions. First, the Department sought comments regarding the scope of situations in which employers' obligations under the proposal would apply, including, for example, whether the obligation should apply in all situations that a worker may reasonably believe could involve or lead to discipline (such as where employers correct work techniques, give instructions, or provide training), or should apply only in situations more analogous to the ''investigatory interviews'' addressed in *NLRB* v. *J. Weingarten, Inc.,* 420 U.S. 251, 267 (1975). The Department further sought comment on whether it should draw on sources other than *Weingarten* (and the line of cases applying *Weingarten*) in determining applicability of this obligation or should consider any other interactions between farm employers and their interactions with nonunionized agricultural workers. Second, the Department sought comments on how to ensure that workers are adequately informed of the employer's obligation to permit workers to request a representative and the circumstances under which this obligation would arise. Finally, the Department requested comments as to how to best implement this obligation in an agricultural setting, including those settings subject to §§ 655.200 through 655.235 (herding and livestock production workers).

Several commenters expressed support for the proposal. A group of State Attorneys General expressed the view that the proposal would have a positive impact on H–2A workers who face heightened risks of coercion and abuse by employers, adding that the proposal would prevent employers from suppressing workers from exercising their rights. A group of U.S. Senators also supported the proposal as one way to ensure that workers can advocate regarding their working conditions without fear. Similarly, an advocacy organization expressed the view that the proposal would bolster workers' ability to engage in concerted activity and would prevent unfair discipline by employers. A State government agency, California LWDA, observed that agricultural workers in California already enjoy a right to representation in investigatory or pre-disciplinary meetings and opined that access to such representatives should be extended to H–2A workforces.

Other commenters objected to the provision as a general matter or expressed concerns about certain aspects of the provision. A few trade associations questioned the

Department's authority for the proposal. For example, one commenter, FFVA, stated that the proposal lacks congressional authority, and another, USA Farmers, stated that the proposal lacks a valid statutory basis. Along similar lines, a few commenters expressed the view that the Department did not adequately explain how the proposal would protect workers in the United States from adverse effect. Other commenters stated that the proposal amounted to an attempt by the Department to selectively apply provisions of the NLRA to H–2A workers.

Because the NPRM proposed that the designated representative would not be limited to union representatives or coworkers, several commenters identified that this proposal would require employers to permit third parties unaffiliated with farming operations to enter the workplace. Some of these commenters expressed employer concerns about a requirement to permit unaffiliated third parties to enter the workplace. For example, several commenters—FFVA, AmericanHort, and Western Growers—expressed the view that the proposal would effect a physical taking of property under *Cedar Point,* 141 S. Ct. 2063. Other commenters, including FFVA, Western Growers, NCAE, and American Farm Bureau Federation, expressed concern that the provision would allow outsiders who may be unaware of food safety protocols in worksites where workers are harvesting or otherwise preparing food products. These commenters stated that the provision would therefore interfere with employers' obligations under the Food Safety Modernization Act and its implementing regulations and under the Global Food Safety Initiative, which FFVA stated requires producers to restrict site access to certain personnel trained in food safety protocols. Another trade association, the American Farm Bureau Federation, further commented that requiring H–2A employers to permit unaffiliated third parties onsite would increase liability risks and insurance costs for employers.

Many commenters opposed the rule on the grounds that it was vague and could unnecessarily delay disciplinary actions. Some trade associations expressed the view that the proposal would cause significant disruption to the workplace because the proposed definitions of ''meeting'' and ''discipline'' are vague, which could be interpreted to require employers to allow an employee to have a representative present for minor counseling or correction of job performance. One advocacy group, the Cato Institute, observed that the proposal does not include a requirement that the representative appear at the appointed time for the ''meeting.'' Other commenters, including wafla and USA Farmers, stated that representation could take days or weeks to arrange in the setting of agricultural work and expressed concerned that the proposal would leave employers open to liability in cases where the behavior needing correction is dangerous to other employees. Commenters, including Cato and Mercer Ranch, Inc., similarly said that the proposal is vague and impractical. Another trade association expressed concern that involving additional parties in each disciplinary meeting could lead to breaches of confidential business information or further disputes or perceptions of unequitable treatment between employees.

After considering comments discussed above, the Department adopts the proposed revisions at § 655.135(m) with some modifications. First, this final rule provides that the employer's obligation will be limited to investigatory interviews analogous to investigatory interviews under *Weingarten.* However, this final rule maintains the approach, as described in the preamble to the NPRM, of permitting workers to designate the person of their choice as a representative, regardless of whether the designated representative is a union representative, a coworker, or someone else. Second, the Department deletes the final sentence of the provision which would have required employers to permit third-party designated representatives to physically access the worksite. In its place, the Department adds two new sentences clarifying that: (1) where the worker's designated representative is present at the worksite, the employer must permit the representative to attend the investigatory interview in-person; but (2) when the worker's designated representative is not present at the worksite, the employer must permit the representative to attend the investigatory interview remotely, by telephone or videoconference. Third, the Department makes non-substantive changes to the regulatory text to revise ''workers'' to read ''a worker'' or ''the worker,'' for consistency with other parts of this final rule. Fourth, the provision is renumbered as § 655.135(m). The Department further explains the first and second modifications in turn.

First, in a modification to the provision as proposed in the NPRM, this final rule adopts from the NLRA context the principle that employees should have recourse to representatives in ''investigatory interviews.'' As discussed in the NPRM, it is well-established that under the NLRA, in a workplace covered by a CBA, employers must grant an employee's request to have a representative present in an investigatory interview that the employee reasonably believes might result in disciplinary action. *See Weingarten,* 420 U.S. at 256, 267. In *Weingarten,* the Supreme Court concluded that denying a representative constitutes interference with an employee's right to engage in concerted activities for mutual aid or protection under sec. 7 of the NLRA. *Id.* An employee's request for a representative constitutes concerted activity because a representative's presence safeguards the interests of employees generally, not solely the interest of the requesting employee. *See id.* at 260–61. Courts have cited similar considerations in deeming reasonable the view that sec. 7 of the NLRA permitted nonunion workers to designate a coworker to provide assistance during investigatory interviews that may lead to disciplinary action. *See Epilepsy Found. of Ne. Ohio* v. *NLRB,* 268 F.3d 1095, 1100 (D.C. Cir. 2001).

The NPRM proposed that in the H–2A program, the employer's obligation would apply in the context of ''meetings between the employer and a worker where the worker reasonably believes that the meeting may lead to discipline.'' Under the original proposal, the scope of situations in which this obligation would have applied is broader than the ''investigatory interviews'' in which a worker's right to a representative is recognized under sec. 7 of the NLRA. *See Weingarten,* 420 U.S. at 253, 257–58 (recognizing right to representative in ''investigatory interview which the employee reasonably believed might result in disciplinary action'').

After reviewing the comments, the Department adopts the ''investigatory interview'' concept from *Weingarten* and its progeny. The Department's decision to draw from a concept that developed in the NLRA context is similar to its decision to adopt language similar to sec. 7 in § 655.135(h)(2)(i). As in § 655.135(h)(2)(i), the Department adopts the ''investigatory interview'' concept from the NLRA context to enhance workers' ability to engage in concerted activities for the purpose of mutual aid or protection, thus helping to avoid adverse effects on similarly employed workers in the United States. In incorporating the term ''investigatory

interview'' in this final rule, the Department draws on the *Weingarten* body of case law but notes that the term must be interpreted consistently with the statutory purpose of the INA and the H–2A program, in light of the H–2A program's unique characteristics and the changes the Department is making in this final rule.

The Department also believes that adopting the ''investigatory interview'' concept is the best way to address several concerns raised by commenters while still maintaining protections for workers. In particular, trade associations expressed the view that the terms ''meeting'' and ''discipline'' in the NPRM proposal are vague, creating challenges for employers in determining when their obligation arises. Trade associations also expressed the view that ''meetings'' would capture an overly wide range of communications between employers and employees, thereby burdening employers. Adopting the ''investigatory interview'' concept addresses both these concerns because it clearly limits the obligation to a narrower and more clearly defined range of employer-employee communications. Moreover, adopting the ''investigatory interview'' concept from *Weingarten* will assist employers and employees in determining the scope of an employer's obligation under these regulations, because stakeholders may refer to a wide body of interpretive material applying *Weingarten,* including decisions by courts and the NLRB. The Department intends that the following core principles—taken from decisions applying *Weingarten*—should apply in determining the scope and application of ''investigatory interviews'' under these regulations. These core principles will apply to these regulations regardless of whether, in the future, courts or the NLRB limit the scope of the *Weingarten* right under sec. 7 of the NLRA.

As noted above, an ''investigatory interview'' arises in a ''situation where [a worker] *reasonably believes* the investigation will result in disciplinary action.'' *Weingarten,* 420 U.S. at 257 (emphasis added). Therefore, whether a meeting or conversation constitutes an ''investigatory interview'' must be evaluated from an objective standard. *Consol. Edison Co. of New York, Inc.,* 323 NLRB 910 (1997). The question is whether a similarly situated worker would reasonably believe that discipline might result from the interview, considering all the circumstances. *Weingarten,* 420 U.S. at 257–58 & n.5; *Consol. Edison,* 323 NLRB 910. For example, ''run-of-the-mill shop-floor conversation as, for example, the giving of instructions or training or needed corrections of work techniques,'' generally do not constitute ''investigatory interviews,'' since ''[i]n such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview.'' *Weingarten,* 420 U.S. at 258. Moreover, an employee does not have a reasonable fear of discipline in a conversation where the employer merely announces a disciplinary decision that the employer has already made, *see Baton Rouge Water Works Co.,* 246 NLRB 995, 997 (1979), or where the employer states that the worker does not face discipline, *Gen. Elec. Co.,* 240 NLRB 479, 480 (1979).

However, the intent of the employer or its representative is not dispositive of whether an interaction constitutes an investigatory interview; that is, an interaction may constitute an ''investigatory interview'' even where the employer did not intend to seek discipline, so long as a similarly situated worker would reasonably believe that discipline might result. *Consol. Edison,* 323 NLRB 910. In that analysis, the individual worker's previous treatment by the employer (including prior discipline of the worker) is relevant to assessing whether a similarly situated worker would reasonably maintain such a belief. *See Verizon Cal., Inc. & Commc'ns Workers of Am., Loc. 9588, AFL–CIO,* 364 NLRB 1008, 1011–12 (2016); *E.I. Dupont De Nemours & Co., Inc.,* 362 NLRB 843, 843, 855–56 (2015).

The worker's request for a representative need not take a particular form or incorporate any particular words, so long as the request is sufficient to place the employer on notice that the worker desires a representative. *Montgomery Ward & Co.,* 269 NLRB 904, 905 n.3 (1984). Of course, the worker's explicit request for a representative is sufficient, *see, e.g., Consol. Edison,* 323 NLRB at 914; *Montgomery Ward,* 273 NLRB at 1227, but the request need not be explicit if it provides sufficient notice, such as, for example, where the worker asks the employer whether he needs assistance from a representative, *see, e.g., NLRB* v. *N.J. Bell Tel. Co.,* 936 F.2d 144, 145 (3d Cir. 1991).

A worker may make a request for a representative at any point during an investigatory interview. *See, e.g., Prudential Ins. Co. of Am.,* 251 NLRB 1591, 1591–92 (1980), *enforcement denied on other grounds,* 661 F.2d 398 (5th Cir. 1981). Before the interview, the employer must inform the worker about the subject matter of the interview and must permit the worker to consult with the representative. *Pac. Tel. & Tel. Co.* v. *NLRB,* 711 F.2d 134, 136–37 (9th Cir. 1983). During the interview, the employer must permit the representative to provide active assistance and advice to the worker. *NLRB* v. *Texaco, Inc.,* 659 F.2d 124, 126 (9th Cir. 1981) (citing *Weingarten,* 420 U.S. at 262–63). The worker may designate the representative of his choice, absent extenuating circumstances. *Anheuser-Busch, Inc.* v. *NLRB,* 338 F.3d 267, 276–78 (4th Cir. 2003). Finally, once the worker has requested a representative, the employer has several options: (1) grant the request (including delaying the interview if necessary); (2) forgo the interview; or (3) offer the employee the choice between continuing the interview without a representative or having no interview at all. *NLRB* v. *N.J. Bell Tel. Co.,* 936 F.2d 144, 148–49 (3d Cir. 1991).

As explained, these core principles defining the scope of ''investigatory interviews'' under this final rule reflect decisions applying *Weingarten.* Under *Weingarten,* of course, the designated representatives are typically shop stewards or other union representatives. However, although the Department adopts *Weingarten's* ''investigatory interview'' concept, the Department maintains the NPRM's approach that, under the H–2A regulations, a worker who chooses to designate a representative in an investigatory interview is not limited to designating a union representative. Again, ''investigatory interview'' as used in this final rule must be interpreted consistently with the statutory purpose of the INA and the H–2A program, in light of the H–2A program's unique characteristics. In the H–2A context, due to low unionization rates in agricultural workplaces, limiting designated representatives to union representatives would severely curtail workers' ability to identify a representative. Also, the Department believes it is appropriate to permit a worker to designate a non-coworker as a representative because the temporary nature of H–2A work contracts means that it may be difficult for a H–2A worker to build trusted relationships with coworkers. This approach is consistent with the core principle that an employer must permit the worker to designate the representative of their choice. *Anheuser-Busch,* 338 F.3d at 276–78. In the NLRA setting, that principle protects the worker's ability to select the union representative of their choice, but in the H–2A context, that principle protects the worker's ability to select any representative of their choice.

The second modification to the NPRM involves removing the final sentence of the proposed provision requiring representatives to be guaranteed physical access to the worksite and adding two sentences pertaining to representatives' attendance at investigatory interviews. First, where the designated representative is present at the worksite at the time of the investigatory interview, the employer must permit the representative to attend the investigatory interview in person. The second sentence clarifies that where the designated representative is not present at the worksite at the time of the investigatory interview, the employer must permit the designated representative to ''attend'' an investigatory interview remotely, by telephone or videoconference.

The proposal to require a designated representative access to the worksite or property was intended to facilitate the worker's ability to designate the representative of their choice. The Department believes that removing that requirement and substituting the new modified requirements will continue to serve that goal, while also mooting employers' concerns about the entry of unaffiliated third parties on employer worksites, liability risks, and food safety obligations, and their assertion that the entry of unaffiliated third parties raises ''takings'' concerns under *Cedar Point.* Clarifying that representatives may attend remotely also ensures that the worker may designate the representative of their choice. *See Anheuser-Busch,* 338 F.3d at 276–78. With remote attendance as an option, a worker may more easily obtain participation from their representative of choice, even if the representative is not local. Also, if the employer, worker, and worker's representative are all amenable, this final rule does not prohibit a worker's representative who is not usually present at the worksite from attending a scheduled investigatory interview in person. In other words, if the employer schedules an investigatory interview for a future date and agrees to the in-person participation of a worker's representative who is not usually present at the worksite (*e.g.,* a key service provider such as a member of the clergy), that representative may attend the investigatory interview in person. The Department notes that the final rule's requirement that the employer ''must permit the worker to receive advice and active assistance from the designated representative during any such investigatory interview'' applies equally where the representative participates remotely and where the representative participates in person.

As explained, the Department believes that these modifications will address comments stating the language proposed in the NPRM was vague or unclear. The Department believes that its modifications to the regulatory language will also mitigate implementation concerns raised in the comments. For examples, the modifications will address employers' concerns that the language proposed in the NPRM could prevent employers from providing minor counseling or routine corrections of job performance. Under the core principles outlined above, investigatory interviews normally do not include giving instructions or providing corrections of work techniques. Typically, the Department will consider that an employer's obligation under § 655.135(m) will arise when the employer's representative (such as an owner, manager, or supervisor) seeks to question a worker, the questioning is part of an investigation, and the worker reasonably believes that they might face discipline. Along similar lines, the modifications address concerns that the proposal would expose employers to liability for dangerous circumstances. Under the core principles, investigatory interviews do not include interactions where the employer announces a disciplinary decision that the employer has already reached. In certain situations implicating safety considerations, employers routinely impose discipline without conducting an interview; for example, where an employer's representative witnesses conduct such as unsafe operation of a vehicle or machinery. Nothing in this final rule prevents an employer from intervening to stop a dangerous situation. However, any situation where an employer seeks to question a worker, and the worker believes that questioning may result in discipline, constitutes an investigatory interview.

The modifications will also mitigate concerns that the proposal would lead to wasted time on the worksite (on the rationale that arranging a representative could take days or weeks to arrange) and that the proposal did not explain what employers should do if a representative is not available or does not timely appear. Under the core principles, if an employer is concerned about delays in arranging a representative, the employer has the option to forgo the interview or offer the employee the choice between continuing the interview without a representative or having no interview at all. Should the employer opt to forgo the interview, an employer may impose discipline without conducting an interview so long as any resulting termination complies with the requirements of for cause termination as described further below. Or, if applicable in actual fact, the employer may tell the worker that the interview will not lead to discipline and may in that case proceed with an interview without a representative present. The Department believes that these options for employers will significantly mitigate delays.

However, where the employer requires an investigatory interview to undertake a fair and objective investigation into job performance or misconduct in compliance with § 655.122(n)(2)(i)(D) and the worker requests a representative, the employer must allow a reasonable delay for the representative to join the investigatory interview (either in person or remotely). The Department will look at all facts and circumstances when determining what constitutes a reasonable delay, including, for example, whether the designated representative is engaged in time-sensitive work that cannot be paused, is assigned to work in a different location, or cannot readily be contacted due to lack of telephone service in remote areas. The Department will also consider the time sensitivity of the employer's need to conduct the investigatory interview. Moreover, the Department emphasizes that the employer must not consider the worker's request for a representative in any way in the employer's decision whether to impose discipline. Additionally, employers must adhere to the core principle requiring that employers inform workers of the subject of the interview and employers must not intimidate or coerce workers into declining a representative. For example, an employer does not fulfill its obligation under § 655.135(m) where the employer misrepresents the subject of the interview, or where the employer relays to a worker that the worker will avoid discipline if they decline a representative, but that the worker may face discipline if it requests a representative.

The Department further underscores that, should the employer eventually seek to terminate a worker for cause under 20 CFR 655.122(n) based on such discipline, or based on a series of infractions, the employer must establish that it satisfied the five conditions specified in § 655.122(n), including that it undertook a fair and objective investigation into the performance or misconduct and that it engaged in progressive discipline. Where an employer opts to forgo an investigatory

interview after a worker requests a representative, the Department will examine whether the investigation was fair and objective even absent the investigatory interview. Moreover, more generally, because § 655.135(m) is an employer obligation, the Department may take enforcement action against an employer that unlawfully fails to permit a worker to designate a representative.

The changes to the regulatory text respecting remote attendance of representatives will also mitigate employers' concerns about delays. Because the regulations now provide for remote attendance by representatives, in the case of remote participation, employers need not delay an investigatory interview until such representatives arrive in person. Moreover, consistent with the regulatory text and the core principles outlined above, if the worker designates a representative who is not immediately available, the worker may select an alternative representative, including a representative who is available to attend remotely. Under the core principles, the worker may select the representative of their choice, but if there are extenuating circumstances, the employer need not delay the interview. The Department will consider such extenuating circumstances to include where the designated representative's failure to timely appear causes undue delay. As explained above, the Department will consider all facts and circumstances in analyzing whether longer delays are reasonable.

The Department believes that requirements of new § 655.135(m), as modified from the NPRM as discussed above, will help to protect against adverse effect on similarly employed workers. As explained above, the Department believes that protecting workers' right to engage in concerted activity will better prevent adverse effect caused by use of the H–2A program. Allowing H–2A workers and workers in corresponding employment the option to have a representative in an investigatory interview (if they so choose) under new § 655.135(m) will enhance workers' ability to act in concert with their coworkers to protect their mutual interest in ensuring that their employer does not impose punishment unjustly. The protections in new § 655.135(m) also will help safeguard workers against unjust discipline (including termination and infractions that may lead to termination) by giving workers the opportunity to secure a witness, advisor, or advocate in a potentially adversarial situation. These protections thus will bolster the clarifications made regarding a termination for cause under § 655.122(n) of this final rule—clarifications that are intended to protect a worker's entitlement to protections under other regulatory provisions that prevent adverse effect (§§ 655.122(h)(2), 655.122(i), and 655.153).

Finally, the Department has considered the question it posed in the NPRM about the best means to ensure that workers are informed of employer's obligation to permit workers to designate a representative in an investigatory interview. The Department did not receive comments on this subject, but upon reflection, the Department concludes that the best means to ensure that workers are adequately informed of this obligation is to require that employers include notification in the job offer. Therefore, the Department has included on the job order, in the conditions of employment and assurances to which an employer must agree, a statement regarding the requirements of new § 655.135(m).

B. Proposed § 655.135(m)(1), Employee Contact Information

The Department proposed in § 655.135(m)(1) to require employers to provide to a requesting labor organization an electronic list of employee contact information for all H–2A workers and workers in corresponding employment engaged in agriculture as defined under the FLSA and employed at the place(s) of employment included within the employer's H–2A Application. 88 FR at 63795–63796, 63825. The Department proposed to require the employer to update the list once per certification period, if requested by the labor organization. *Id.* The Department explained in the NPRM that this provision was intended to bolster the ability of workers to effectively self-organize and to engage in concerted activity protected under proposed § 655.135(h)(2), by providing workers with access to information regarding the arguments both for and against organization and with information and resources necessary to engage in concerted activity regarding working conditions. *Id.* at 63795. The proposal was modeled on the NLRB's voter list requirements under the NLRA. *Id.* at 63795–96 (citing 29 CFR 102.62(d), 102.67(l); *RadNet Mgmt., Inc.* v. *NLRB,* 992 F.3d 1114, 1122–23 (D.C. Cir. 2021) (provision of contact information to labor organizations is fundamental to effective exercise of organizing rights).

The Department received a significant number of comments in strong opposition to proposed § 655.135(m)(1). The majority of these comments cited the potential risks to workers' privacy and safety posed by sharing this information without the employee's consent. Many commenters, including trade associations, an agent, and an individual employer, observed that employers would have little if any means to verify the legitimacy of an organization requesting the employee contact information under this provision. As a result, an employer could inadvertently provide sensitive and private employee contact information to illegitimate third parties. Even where the request came from a bona fide labor organization, commenters noted that such an organization may not have received a majority of support from the workers nor have successfully petitioned for an election from a governing labor board. For example, citing *Excelsior Underwear, Inc.,* 156 NLRB 1236, 1245 (1966), the National Right to Work Legal Defense Foundation, Inc. stated that the NLRB requires disclosure of voter lists ''only after an election has been directed'' in light of the organizational interests at stake, namely that a ''real question concerning representation exists.'' Relatedly, several commenters expressed concern with the potential liability to employers for providing worker information without the worker's explicit consent, in the event of an abuse of that information by the third party. These commenters requested that, if finalized, the provision include an opt-out mechanism for employees and a disclaimer of liability for employers, or some mechanism for pre-registration or other vetting of the requesting organizations by the Department. Many commenters also objected to the proposal due to the potential burden on employers to comply with the proposed provision, since multiple labor organizations could request the list each season, along with one update per season. For similar privacy-related and employer-burden reasons, many commenters opposed any expansion of the proposed provision to include a provision of employee contact information to other organizations. Finally, the North Carolina Farm Bureau Federation, Inc. and U.S. Representatives Foxx and Thompson each opined that the proposal was unconstitutional, citing respectively First Amendment and separation of powers concerns.

The Department also received some comments in support of the proposal, citing the need for workers to have access to information regarding their rights. For example, 11 State Attorneys

General observed that this proposal, combined with other worker voice and empowerment proposals in the NPRM, would ''connect workers to important information about their employers and their rights.'' A group of U.S. Senators observed that the worker voice and empowerment proposals, including the employee contact information proposal, would ''ensur[e] workers can advocate for and seek out better working conditions without fear.'' Some of the comments in support of the proposal, however, reflected similar concerns as noted above regarding worker privacy and recommended that any final rule include some verification or enforcement mechanism. For example, the AFL–CIO suggested that any final rule include a proviso that ''[t]he requesting labor organization shall not use the list for purposes other than seeking to represent H–2A workers or otherwise assisting them in relation to their terms and conditions of employment and related matters.'' Farmworker Justice suggested a similar caveat. On the other hand, the California LWDA advised against including an ''opt out'' mechanism in any final rule as a means to mitigate the privacy concerns, noting the potential for abuse of such a mechanism.

After consideration of the comments received, the Department has decided not to adopt the proposed employee contact information provision in this final rule. The Department believes that the interest underlying this proposal (*i.e.,* workers' access to information about their rights) is better furthered through other provisions of this final rule, including § 655.135(n), regarding access to worker housing, § 655.135(h)(1)(v), protecting employees from retaliation for inquiring about or asserting their rights or consulting with key service providers, and § 655.135(h)(2)(i), protecting persons engaged in FLSA agriculture from retaliation for engaging in activities related to self-organization. These protections also will be disclosed to workers through the job order and through other employee outreach tools.

However, as discussed in the NPRM, a worker's ability to gather and share coworkers' contact information, both amongst other workers and with labor organizations, is itself concerted activity, and therefore is protected activity under § 655.135(h)(2) of this final rule. *Quicken Loans, Inc.* v. *NLRB,* 830 F.3d 542, 545 (D.C. Cir. 2016) (citing *Beth Israel Hospital* v. *NLRB,* 437 U.S. 483, 491 (1978) and *Eastex, Inc.* v. *NLRB,* 437 U.S. 556, 565 (1978) (rights to organization and to engage in concerted activity ''necessarily encompass employees' rights to communicate with one another and with third parties'' about organization and working conditions). For example, a worker who gathers coworkers' contact information and shares that information with a union so that the union can contact the workers regarding the benefits of unionization is engaging in protected, concerted activity and self-organization. Under § 655.135(h)(2)(i), as adopted in this final rule, an employer may not retaliate against the worker for gathering or sharing this information.

C. Proposed § 655.135(m)(4), Commitment To Bargain in Good Faith Over Proposed Labor Neutrality Agreement

The Department proposed adding a new provision at 20 CFR 655.135(m)(4) that would require an H–2A employer to attest either that they will bargain in good faith over the terms of a proposed labor neutrality agreement with a requesting labor organization, or that they will not so bargain and provide an explanation for why they have declined to do so. The Department also proposed that the employer's response must be disclosed in the job order. The Department stated that the goal of this proposal was to provide workers and worker advocacy groups with this information about employers to enhance transparency. 88 FR at 63798–63799.

Commenters that supported the proposal, such as the UFW Foundation, stated that they appreciated the transparency it would provide. For example, a comment by several State Attorneys General stated that the required disclosures would allow workers to use the information to assess job opportunities. California LWDA believed the proposal would increase workers' access to information about job opportunities and workers' rights.

Many commenters, however, opposed the proposal. Although the Department stated that an employer's choice whether to bargain over any labor neutrality agreement, and whether to ultimately enter any labor neutrality agreement, would be entirely voluntary, several commenters, including wafla and USA Farmers, raised concerns that the proposal would compel speech from employers, in violation of the First Amendment.

Commenters also questioned whether the Department's proposal would prevent adverse effect. For example, USA Farmers, a national trade association representing agricultural employers, claimed that the information that the Department sought was ''wholly irrelevant to an employer's request for a temporary [agricultural] labor certification'' under the H–2A program and ''has nothing whatsoever to do with an employer's need for temporary labor or with preventing adverse effect.'' A number of trade associations that represent H–2A employers, such as IFPA, TIPA, and GFVGA, questioned the Department's authority for the proposal, stating that the INA ''does not grant the authority to advance labor organization, rather the authority is intended to prevent the adverse effect'' on workers in the United States. The National Right to Work Legal Defense Foundation, Inc. claimed that the Department lacked a statutory basis for the proposal.

A number of commenters also expressed confusion with the proposal's requirements. For example, wafla, a trade association, argued that it would ''require an employer to disclose their hypothetical position on labor organizing'' without the benefit of a specific request from a labor organization. USA Farmers noted that it would not be possible for an employer to reasonably respond to the Department's request because of the potential unknown scenarios that might arise in the future. Employers and groups representing employers also raised concerns about facing enhanced enforcement from the Department if they chose to decline to bargain on the job order.

After consideration of the comments and the concerns raised by a number of commenters, the Department has decided not to finalize the proposal. The Department also believes that a number of other provisions of this final rule, such as the expanded rights of access to worker housing at § 655.135(n), the protections surrounding termination for cause at § 655.122(n), and disclosures regarding productivity standards and overtime wage rates at § 655.122(l)(4), will adequately serve the proposal's stated goals of transparency and disclosure of information for workers.

ix. Section 655.135(n), Access to Worker Housing

In the NPRM, the Department proposed the addition of a new provision, § 655.135(n), governing access to worker housing, intended to protect the rights of association and access to information for H–2A workers and workers in corresponding employment and to address the isolation that contributes to the vulnerability of some H–2A workers.

The Department explained that, due to the temporary nature of their work and dependency on a single employer for work, housing, transportation, and

necessities, among other factors, H–2A workers are particularly vulnerable to labor exploitation, including violations of H–2A program requirements, dangerous working conditions, retaliation, and labor trafficking. Geographic isolation and employer-imposed limitations on workers' movements and communication exacerbate this vulnerability. The Department discussed studies by nongovernmental organizations highlighting the vulnerability faced by H–2A workers, as well as some employers' use of isolation and monitoring—including rules or practices limiting workers' ability to leave employer-furnished housing, leaving workers in remote areas without transportation or means of communication, deliberately limiting workers' access to their support systems, and confiscating workers' personal cellular phones and passports—as a means of controlling workers and forcing them to accept substandard and illegal working conditions.[96] The Department explained that it was proposing the new provision at § 655.135(n), governing access to worker housing, to protect workers' rights to association and access to information both to make them less susceptible to labor exploitation, including trafficking, and to interrupt factors that impose barriers to workers advocating or complaining regarding working conditions and thus have an adverse effect on workers in the United States similarly employed.

In light of these serious concerns, the Department proposed two distinct, but complementary, protections: § 655.135(n)(1), which would protect the right of workers in employer-furnished housing to invite guests to their living quarters and nearby common areas, and § 655.135(n)(2), which would provide a narrow right of access to labor organizations as a backstop to the protections of § 655.135(n)(1).

Specifically, the proposed § 655.135(n)(1) would provide that workers residing in employer-furnished housing must be permitted to invite, or accept at their discretion, guests to their living quarters and/or the common areas or outdoor spaces near such housing during time that is outside of workers' workday and subject only to reasonable restrictions designed to protect worker safety or prevent interference with other workers' enjoyment of these areas. The proposed regulation would explicitly permit workers to invite guests or to accept (or reject) visitors wishing to speak with them. As explained in the NPRM, this protection would recognize that workers do not relinquish their rights to association or access to information simply by virtue of residing in employer-furnished housing. Further, it would prevent employers from using the statutorily required provision of housing as a means to isolate or control their workforce by blocking their access to information and assistance from the outside. The Department explained that, because the right to invite or accept visitors would be limited to housing areas and to time that is outside of workers' workday, it did not anticipate that this proposal would disrupt employers' business operations. As proposed, § 655.135(n)(1) would apply to all housing furnished pursuant to the employer's statutory and regulatory obligations. The Department explained that while it anticipated that this protection would be the most beneficial for workers who reside in housing that is geographically isolated, it recognized that even workers whose housing is more centrally located may be isolated by virtue of employer policies that limit their ability to leave housing or to interact with the public, even during time that is outside of workers' workday, and would benefit from a protected right to invite and accept visitors. Because workers typically reside in shared quarters, the Department proposed to permit reasonable restrictions designed to protect worker safety or to prevent interference with other workers' enjoyment of the housing.

Recognizing that the effectiveness of proposed § 655.135(n)(1) may be limited where H–2A workers are unaware of, or afraid to exercise, their right to invite or accept visitors in employer-furnished housing, the Department proposed a second requirement at § 655.135(n)(2) that would provide a narrow right of access to labor organizations. The Department explained that labor organizations would have an incentive to report concerns of labor exploitation to the Department or other law enforcement agencies, as well as to provide information to workers on their rights under the H–2A program and to engage in self-organization. Under the proposed § 655.135(n)(2), where employer-furnished housing for H–2A workers and workers in corresponding employment who are engaged in FLSA agriculture is not readily accessible to the public, a labor organization would be permitted to access the common areas or outdoor spaces near worker housing for the purposes of meeting with workers during time that is outside of workers' workday for up to 10 hours per month.

The Department proposed to include the protections that would be afforded under proposed § 655.135(n) in the disclosures required on the job order to help inform workers of their rights under this proposal. Additionally, the Department proposed corresponding edits to § 655.132(e)(1) to address instances in which the employer-furnished housing is provided by the fixed-site agricultural business (''grower'') as part of its agreement with an H–2ALC. Under the current provision, where housing is owned, operated, or secured by the grower, the H–2ALC is required to include with its H–2A Application proof that the housing complies with the applicable standards set forth in § 655.122(d) and certified by the SWA. The Department proposed to add to this provision the requirement that the H–2ALC also provide with its H–2A Application proof that the grower has agreed to comply with the requirements of proposed § 655.135(n). The Department explained that, in doing so, it sought to ensure that the protections for access to worker housing would be met even where the H–2ALC fulfills its obligation to furnish housing through its agreement with its client grower.

The Department sought comments on all aspects of this proposal. With respect to the proposed § 655.135(n)(1), the Department asked whether this provision should be limited to workers residing in certain types of employer-furnished housing or in certain locations. The Department also sought comments on what would constitute reasonable or unreasonable restrictions and other means of balancing different workers' interests in shared housing and on visitor policies that may unduly hinder workers' rights to invite or accept guests. With respect to the proposed § 655.135(n)(2), the Department sought comments on the proposed limitations placed on labor organizations' right of access, including the cap of 10 hours per month, and how to understand when worker housing is not readily accessible to the public; how the proposal would apply when workers engaged in FLSA agriculture share housing with workers not engaged in FLSA agriculture (§ 655.135(n)(2) applies only with respect to the former); whether the right of access in this provision should be expanded to provide similar access to some or all key service providers as defined in proposed § 655.103(b); and, if so, whether the

[96] 88 FR at 63750, 63799–63801 & nn.80–81 (citing Polaris 2018–2020 Report; CDM Report; Farmworker Justice Report; *U.S.* v. *Patricio,* No. 5:21-cr-00009 (S.D. Ga.)).

Department should limit the scope of the catchall term ''any other service provider to which an agricultural worker may need access.'' With respect to the proposed corresponding edits to § 655.132(e)(1), the Department sought comments on what would constitute the requisite proof that an H–2ALC would be required to submit with its application, as well as alternative means of ensuring compliance with the access protections where housing is provided directly by a grower. In addition, the Department sought comments on whether and how the protections of proposed (n) should apply with respect to workers housed pursuant to §§ 655.230 (housing for work performed on the range in herding and range production of livestock occupations) and 655.304 (mobile housing for workers engaged in animal shearing or custom combining).

As described in more detail below, this proposal received general support from some legislators and many worker advocacy groups and individuals. For example, a joint comment of 15 U.S. Senators expressed support for the access provision, stating that in combination with the rest of the proposed rule, this would ensure workers can advocate for better working conditions without fear. The Alliance to End Human Trafficking explained that H–2A workers' isolation and vulnerability increases their risk of being subject to labor exploitation or trafficking and that the provision would help reduce this risk by protecting H–2A workers' rights of association and access to information. Farmworker Justice and NLADA explained that farmworker housing is often physically isolated from the surrounding community, creating ''conditions in which workers are vulnerable to abuse and may be denied their rights,'' and expressed support for the Department's proposal to increase workers' access to information about their rights and to recognize their rights to have visitors and to access essential services. Numerous individuals submitted public comments supporting the access provision, particularly the protection in paragraph (n)(1) of workers' right to invite guests to employer-furnished housing. Additionally, Farmworker Justice and NLADA noted that in some areas, rights of access to farmworker housing have already been established under State law or interpretations of Federal law and asked the Department to ensure that any regulatory provisions regarding access are minimum standards and are not intended to preempt any more expansive or permissive State access requirements.

Employers, trade associations, and agents were generally opposed to the access provision, though this opposition was largely directed at the narrow right of access for labor organizations in paragraph (n)(2).

Protecting Workers' Right To Invite Guests to Housing Areas

Worker advocacy organizations generally supported the proposed language of paragraph (n)(1), which was intended to protect the right of workers in employer-furnished housing to invite guests to their living quarters and nearby common areas. Advocacy organizations, such as the North Carolina Justice Center, UMOS, PCUN, the National Women's Law Center, and the UFW Foundation, explained that this provision would help address isolation and vulnerable living situations among H–2A workers. Farmworker Justice, the UFW Foundation, and AWAC described instances in which employers prohibited visits from service providers, labor organization representatives, and family, or retaliated against workers who met with such outside parties. The UFW Foundation explained that while some States already recognize the right of farmworkers to invite or accept guests, ''a federal rule clearly protecting that right is long overdue.'' Individuals also expressed support for this provision on a variety of grounds, including that it would allow workers to build connections with the surrounding community, access legal and medical services, and feel secure in their homes, and would ''facilitate liberty and the pursuit of happiness.''

While expressing support for the proposed provision, several worker advocacy groups, including Farmworker Justice and AWAC, explained that merely requiring that workers be allowed to invite guests would be an insufficient means of preventing worker isolation because many workers would be afraid to exercise this right. Both organizations suggested the Department should protect access for a range of service providers.

Some employers and trade associations also supported this aspect of the proposal. For example, USApple described it as ''reasonable,'' noting that most employers permit the occupants (*i.e.,* the workers) to determine who may visit and have policies in place for guests, such as specified hours and check-in procedures. The National Cotton Ginners Association and Texas Cotton Ginners' Association stated that ''the requirement to allow access to housing by non-employees must be tempered by recognizing that the employer is responsible for meeting all housing requirements.'' For instance, allowing workers to invite guests could result in guests staying overnight without the employer's knowledge and, potentially, in violation of occupancy requirements.

While most of the opposition to this proposal was reserved for the limited right of access for labor organizations, some commenters also opposed the proposed language in paragraph (n)(1) intended to protect the right of workers in employer-furnished housing to invite guests to their living quarters and nearby common areas. One employer, McCorkle Nurseries, Inc., objected to what it characterized as ''mandatory access to worker housing for guests.'' Several other employers stated that they must be able to limit access to employer-furnished housing for workers' safety but noted that most employers already permit guests during specified hours or allow family members to pick up and drop off workers for visits. Several trade associations, including NHC, IFPA, and GFVGA, stated that they do not support ''blanket access'' for guests in employer-provided housing and that it is imperative to give employers the discretion to impose restrictions on guest access, but that it is common for growers providing housing to provide access to a specific place on the housing property to meet guests, such as a common area or parking lot. These organizations also noted that allowing guests increases both the risk of disruptions at workers' homes and employers' liabilities, such as potential injuries, nuisance complaints, and insurance costs. Seso, Inc. opined that without procedural safeguards around the meaning of workers' right to ''invite or accept'' guests, there is the ''obvious potential for rampant abuse,'' and Americans for Prosperity Foundation speculated that allowing employees to invite guests could result in union representatives ''pos[ing] as bona fide job seekers,'' ''get[ting] hired for the sole purpose of sowing discord,'' and then ''invit[ing] their labor contacts on the property.'' The Wyoming Department of Agriculture opined that the proposal would prohibit employers from ''providing any level of restrictions or guidance to their employees regarding who they bring on their premises'' and ''allow undocumented friends or family to stay'' in the housing.

The Department sought comment on whether the protections in proposed § 655.135(n)(1) should be limited to workers in certain types of employer-

furnished housing or in certain locations. Farmworker Justice and NLADA responded that these protections ''should apply without qualification to all H–2A workers,'' explaining that H–2A workers often have difficulty accessing information and services due to limited transportation, limited English language proficiency, and a lack of integration into a local community, and that even workers in housing that is less physically or geographically isolated may be isolated by virtue of employer policies either intended to isolate workers or which have that effect.

The Department also sought commenters' feedback on the types of visitor policies that would be reasonable to protect worker safety and to balance different workers' interests in shared housing versus those that may unduly hinder workers' rights to invite or accept guests. Farmworker Justice and NLADA reasoned that any determination of what constitutes a reasonable restriction must recognize that H–2A workers' legal status ties them to a single employer, making them uniquely vulnerable. These commenters explained that restrictions that interfere with workers' privacy rights or make them vulnerable to undue influence or retaliation, such as requiring visitors to provide prior notice or submit to surveillance during their visit, would not be reasonable. Similarly, these commenters opined that restrictions that have the effect of making visitation difficult would be unreasonable. For instance, they reasoned, while restricting visitors' shared access to sleeping quarters during ''sleeping hours'' may be reasonable where there are alternate private places to meet, it would generally not be reasonable if it ''unfairly and unreasonably limits a worker's ability to meet with their guest at the time outside work hours of that worker's choosing.'' These commenters also asserted that no restriction of emergency services should be considered reasonable and that the final rule should require employers to assist workers in contacting and accessing emergency services, particularly in areas that are difficult to access or where language barriers exist. The California LWDA emphasized the need to ensure that such reasonable restrictions are ''narrowly construed'' and recommended minor edits to the language of proposed paragraph (n)(1) to provide that workers' right to invite or accept guests is ''subject only to reasonable restrictions to protect workers from immediate risks to their physical safety or prevent significant interference with other workers' enjoyment of these areas.''

Wafla stated that owners and operators of worker housing should be allowed to set reasonable rules and limits regarding visitors on the property, including rules governing sleeping hours and locations of visits; workers should work within these visitation rules or conduct visits offsite.

Narrow Right of Access for Labor Organizations

Commenters supporting this provision stated it was necessary due to H–2A workers' relative isolation. For instance, California LWDA expressed support for granting a narrow right of access to labor organizations, stating that because H–2A workers living on their employers' property are isolated, providing labor organizations access to workers in areas near their homes is ''an important and necessary tool to provide workers with information about their right to organize.'' The Concerned Law Students of the University of Georgia also noted that this provision would make it easier for labor organizations to contact workers and protect them from retaliation. AFL–CIO explained that allowing access by labor organizations when H–2A workers are both working and living on the farm will ''ensure that H–2A workers are not insulated from outside entities who can apprise workers of their rights and help them enforce their rights, thereby protecting them from exploitation.''

Some commenters expressed opposition to this provision on the ground that it unfairly favors unions over employers. A couple of U.S. House Members opined that it would interfere with the important work that takes place on farms. MásLabor and USApple stated that labor organizations should only be granted access after being invited by workers. Wafla criticized the Department for not proposing a mechanism by which labor organizations could be sanctioned if they engage in intimidation or coercion. Several trade associations, including GFVGA, NHC, and employers expressed concern that the provision would burden employers that would have to determine which organizations—potentially more than one—are entitled to the proposed right of access and monitor their access. Organizations such as AmericanHort and USApple noted that it is not clear how the Department would enforce the provision.

Other commenters opposed providing a narrow right of access for labor organizations on the grounds that doing so would conflict with existing legal precedent or requirements. The U.S. Chamber of Commerce, NCAE, and other trade associations argued that the provision would constitute a *per se* physical taking of property under *Cedar Point,* 141 S. Ct. 2063. Multiple trade associations, such as NCAE, FFVA, GFVGA, NHC, and wafla, and some employers warned that this proposed right of access would conflict with farms' food safety and biosecurity protocols required by either the Food Safety Modernization Act of 2011 or the Global Food Safety Initiative. For example, FFVA stated that these generally accepted practices require employers to restrict access to only authorized personnel who are trained in practices to ensure food safety.

Access for Key Service Providers

The Department received many comments in response to its question on whether the right of access in proposed § 655.135(n)(2) should be expanded to provide a similar right of access to some or all ''key service providers,'' as defined in proposed § 655.103(b). In particular, Farmworker Justice and AWAC emphasized the critical role that service providers play in ensuring that workers' basic needs are met. Noting the vulnerable nature of H–2A workers (*see* Section VI.C.2.b), these commenters described H–2A workers' need to access a variety of essential services during their period of employment, including routine and emergency medical care, legal information and representation, and consular services. AWAC emphasized that in rural areas, workers also depend on churches, food banks, educators, and other providers for assistance in meeting their basic needs.

These commenters all raised the need for such service providers to have an independent right of access, explaining that relying on workers' right to extend invitations alone would be insufficient because workers are often unaware of their rights or the available services and agencies, or are afraid to exercise their rights due to a fear of retaliation. AWAC stated that, in the rural areas it serves, workers often feel trapped in remote labor camps and understand from the presence of camp gates and ''Private Property'' or ''No Trespassing'' signs that they are not permitted contact with outside guests. According to the commenter, workers' isolation and lack of access to information is exacerbated by the fact that internet and cell phone service are extremely limited in these areas. Farmworker Justice cited to testimony from the passage of Oregon's farmworker housing access protections, which described egregious incidents such as armed camp guards interfering with workers' access to legal services

employees, workers not being permitted to see close family members, and a Catholic priest and nun witnessing or experiencing interference while trying to connect workers to medical care. They also cited a recent example of a farmworker who became ill and died after being unable to access emergency medical services.

Advocacy organizations such as CDM, Migration that Works, and NLADA stated that service providers' access should not be limited by what they called the ''arbitrary restrictions'' that apply to labor organizations' access under proposed § 655.135(n)(2), such as the 10-hour-per-month limit or the requirement that the housing not be readily accessible to the public. Farmworker Justice explained that the First Amendment jurisprudence governing service providers' access—*see, e.g., Schneider* v. *New Jersey,* 308 U.S. 147, 152 (1939); *Martin* v. *City of Struthers, Ohio,* 319 U.S. 141, 144 (1943); *Rivero* v. *Montgomery Cty.,* 259 F. Supp. 3d 334, 346 (D. Md. 2017)—differs from that governing labor organizations.

Some trade associations concurred in the importance of service providers' access. For example, the National Cotton Ginners Association and Texas Cotton Ginners' Association stated that ''workers should have the ability to reasonably allow access of housing to 'key service providers' such as health care-providers or community health workers.''

Job Order Disclosure and Corresponding Edits to § 655.132(e)(1)

The California LWDA supported the Department's proposal to include the paragraph (n) protections that are adopted in the disclosures required on the job order to help inform workers of their rights. It also supported the Department's proposed corresponding edits to § 655.132(e)(1) to address instances in which the employer-provided housing is provided by the grower as part of its agreement with an H–2ALC by requiring the H–2ALC to include proof that the grower has agreed to comply with the requirements of § 655.135(n), and suggested that a written statement agreeing to compliance could constitute the requisite proof. Farmworker Justice and NLADA likewise supported the Department's proposed corresponding edits to § 655.132(e)(1), calling these ''necessary and appropriate.'' They stated that an H–2ALC could meet this requirement by submitting a grower's acknowledgement of its responsibility to comply with the protections of § 655.135(n).

Wafla opposed the corresponding edits to § 655.132(e)(1) because it would require growers to comply with the requirements of paragraph (n) where an H–2ALC meets its obligation to furnish housing through an agreement with the grower.

Workers Housed Pursuant to §§ 655.230 and 655.304

Farmworker Justice and NLADA expressed support for applying the protections of proposed paragraph (n) with respect to workers housed pursuant to §§ 655.230 (housing for work performed on the range in herding and range production of livestock occupations) and 655.304 (mobile housing for workers engaged in animal shearing or custom combining), noting that these workers are even more isolated than other H–2A workers and are entirely dependent on their employers for access to food and water, medical care, and other basic essential needs. According to the commenters, these workers have also been subject to some of the most egregious reports of abuse and exploitation—including assault and battery, false imprisonment, denial of medical care, withholding of food and water, confiscating documents, visa fraud, wage theft, and labor trafficking. In light of the workers' extreme isolation and vulnerability, these commenters asserted that the protections of paragraph (n) are necessary to enable these workers to access needed service providers. Further, these commenters suggested that the Department revise § 655.210(d)(2) to require employers to provide these workers—who are often outside of cell phone service range with their whereabout known only by their employer—with a means to communicate directly with emergency responders at all times, such as a satellite phone, as well as a GPS tracking device or locator to allow them to provide their coordinates to emergency or other services.

The Department did not receive any comments specifically opposing the application of the protections in paragraph (n) to workers housed pursuant to §§ 655.230 and 655.304, though, in its opposition to the proposed narrow right of access for labor organizations, the Western Range Association stated that workers employed in the range production of livestock are often housed in remote locations, not on private property, and thus ''the employer may not have control of who is allowed on the property.''

After considering the totality of the comments discussed above in this Section VI.C.2.b.ix, the Department adopts this proposal with significant modifications. As explained below, the Department finds it appropriate to retain the language of paragraph (n)(1) recognizing workers' right to invite guests, but to eliminate the language of paragraph (n)(2) providing a narrow right of access for labor organizations. The resulting paragraph is redesignated as paragraph (n). To paragraph (n), the Department adds additional language clarifying what is meant by workers' ability to ''accept'' guests. The Department also adopts the corresponding edits at § 655.132(e)(1), and confirms that the protections of § 655.135(n) will apply equally to workers housed pursuant to §§ 655.230 (housing for work performed on the range in herding and range production of livestock occupations) and 655.304 (mobile housing for workers engaged in animal shearing or custom combining). As detailed above in Section VI.C.2.b, the Department has serious concerns regarding H–2A workers' unique vulnerabilities, which make them significantly more likely to accept employers' noncompliance with H–2A and other legal requirements and place them at a greater risk of serious abuse, labor exploitation, and trafficking. Workers' isolation and lack of information regarding their rights exacerbate these vulnerabilities. In this rule, the Department seeks to protect workers' rights to association and access to information to prevent labor exploitation, including trafficking, and to interrupt factors that impose barriers to workers advocating or complaining regarding working conditions and thus have an adverse effect on workers in the United States similarly employed.

Removal of Narrow Right of Access for Labor Organizations

In light of the significant concerns raised by commenters regarding proposed paragraph (n)(2)'s narrow rights of access for labor organizations, the Department withdraws this portion of its proposal. In particular, the Department found persuasive commenters' operational concerns regarding employers' ability to determine which organizations would be entitled to access and how to appropriately monitor such access; the potential cumulative impact should multiple labor organizations seek access to employer-furnished housing areas; and the Department's authority to resolve any disputes between employers and labor organizations that may arise. Additionally, the Department has determined that it could address workers' isolation and the resultant

risks of labor exploitation and worsening working conditions through a more tailored measure.

While the Department appreciates and has fully considered the other concerns raised by commenters, particularly those related to potentially conflicting legal authority or obligations, it does not believe these raised significant barriers to the implementation of the proposed right of access for labor organizations. Most notably, *Cedar Point,* 141 S. Ct. 2063, which was cited by many commenters opposing this provision, did not address the circumstances at issue here—namely, agricultural workers, *who by virtue of residing on employer property,* are subject to extreme isolation and generally inaccessible to labor organizations or others who may wish to communicate or associate with the workers. *See also Lechmere, Inc.* v. *NLRB,* 502 U.S. 527, 534 (1992) (where '''the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them,' employers' property rights may be 'required to yield to the extent needed to permit communication of information on the right to organize''' (citing *NLRB* v. *Babcock & Wilcox Co.,* 351 U.S. 105, 113 (1956))); *Cedar Point,* 141 S. Ct. at 2080–81 (Kavanaugh, J. concurring) (characterizing the *Babcock* Court's interpretation of the NLRA to afford union organizers access to company property only when ''needed''—*i.e.,* when employees live on company property and union organizers have no other reasonable means of communicating with the employees—as consistent with a *Cedar Point* exception).

Similarly, the Department does not believe that the requirements of the FDA Food Safety Modernization Act of 2011 [97] are incompatible with guest access to employer-furnished *housing* areas. While whole-heartedly agreeing with commenters on the importance of this legislation and food safety requirements more generally, the Department believes that employers can balance reasonable guest access to housing areas with the need to have more restrictions in place with respect to the actual worksites. Moreover, based on the comments the Department received, many employers *do* manage to balance their obligations to ensure food safety and to permit reasonable guest access.

[97] Public Law 111–353, 124 Stat. 3885 (Jan. 4, 2011).

Protecting Workers' Right To Invite Guests to Housing Areas

As explained in the NPRM and above, the Department has serious concerns regarding the isolation of H–2A workers and how this isolation, when combined with these workers' unique vulnerabilities, render them particularly at risk of being subject to workplace abuses, labor exploitation, and trafficking. The Department's regulatory change governing the right to invite guests to worker housing is intended to protect workers' rights to association and access to information. The Department believes that this change will help protect workers against abuse, exploitation, and trafficking, and lessen barriers to workers' ability to advocate or complain regarding working conditions, as detailed above. Thus, the change should help prevent adverse effects on workers in the United States similarly employed.

These concerns are shared by many of the commenters. Many worker advocacy organizations shared stories of workers subject to extreme isolation, as well as abuse and exploitation. *See, e.g.,* AWAC comment (describing workers' isolation due to physical isolation of worker camps and the deliberate assertion of ''no entry'' policies by owners; cultural and linguistic isolation; near-total absence of transportation and resultant inability to leave the camp area, even for critical medical care; the lack of internet access and irregularity and unreliability of cellphone service; and workers' fear of retaliation due in part to their dependency of their employer); Farmworker Justice comment (describing workers' vulnerability due to dependency on employer and isolation due to location of housing, lack of transportation and often cell phone reception, fear of retaliation, and employer policies, as well as instances in which workers' family members and church representatives experienced difficulty accessing the workers); and UFW Foundation comment (describing workers' isolation and numerous instances of worker abuse and retaliation against workers).

Indeed, most commenters, including employers, appeared to support workers' right to invite guests to employer-provided worker housing areas, provided that employers may put in place reasonable restrictions necessary to protect the health and safety of their workers and help balance the competing needs of workers in shared housing. To address these concerns, the Department adopts the language in proposed paragraph (n)(1) recognizing the right of workers residing in employer-furnished housing to invite, or accept at their discretion, guests to their living quarters and/or the common areas or outdoor spaces near such housing during time that is outside of the workers' workday. The paragraph that contained this language is redesignated as paragraph (n). The Department disagrees with comments that suggested that this would provide unrestricted access for workers' guests, noting that it adopts the proposed language permitting ''reasonable restrictions designed to protect worker safety or prevent interference with other workers' enjoyment of these areas.'' The Department declines the California LWDA's suggestion that the Department narrow this language permitting reasonable restrictions, believing that the proposed language strikes the right balance of protecting workers' right to invite guests with the property owner's right to adopt reasonable guest policies.

After considering the comments received, the Department believes that the reasonableness of rules governing guest access must be determined by those rules' effect on workers' rights of association and access to information in light of all the available facts. For example, several employers raised concerns that the language of paragraph (n)(1) would allow workers to invite friends or relatives to stay overnight or even to reside with them in worker housing for extended periods. Although it will evaluate questions on a guest policy's reasonableness based on the specific facts before it, the Department believes that, under many circumstances, an employer policy prohibiting overnight guests would be reasonable. Where such a policy would raise concern is in instances where evidence suggests that an employer is using the policy as a pretext to limit visitation, either more generally or with respect to specific individuals. For instance, a guest policy restricting visitation during ''sleeping hours,'' broadly defined as 7:00 p.m. to 7:00 a.m. and encompassing the time that most workers and their guests are likely to be off work and available, would most likely be considered unreasonable. Similarly, a restriction on bringing guests into shared sleeping quarters may be reasonable where there are alternate spaces in the housing area in which to have a private conversation, but would be less so if a worker were forced to meet with a service provider in a crowded common area where the conversation could be overheard. Moreover, the Department will consider any restriction of the access of

emergency medical personnel to be unreasonable.

The Department remains concerned that the effectiveness of the protection adopted may be limited where H–2A workers are unaware of, or afraid to exercise, their right to invite or accept visitors in employer-furnished housing, particularly in light of its decision to withdraw proposed paragraph (n)(2), and similar concerns raised by commenters. Worker advocacy organizations such as Farmworker Justice, AWAC, and NLADA described the importance of third parties, such as key service providers, having an independent right of access as a means of addressing these concerns and bolstering workers' right to invite guests. Several of these organizations also emphasized the need to broaden the range of service providers or entities with such access.

Rather than create a specific right of access for key service providers, the Department has added language to the regulatory text clarifying workers' right to accept guests. A worker cannot choose to accept (or reject) a visitor if the worker has no way of knowing that a potential visitor wishes to communicate with them. *See Rivero,* 259 F. Supp. 3d at 345 (''Migrant farmworkers' right to receive information . . . would have little force if it did not also implicitly (or . . . explicitly) protect providers' right to contact the workers.''). Therefore, the Department has added the following language explaining this connection: ''Because workers' ability to accept guests at their discretion depends on the ability of potential guests to contact and seek an invitation from those workers, restrictions impeding this ability to contact and seek an invitation will be evaluated as restrictions on the workers' ability to accept guests.'' The Department believes this language will help ensure that all potential visitors—whether family or friends, key service providers, labor organizations, or others—are able to contact workers, express their interest in communicating, and seek an invitation from one or more workers. For example, a representative from a local church who wishes to invite workers to worship and to share information on the services the church provides and does not have the workers' telephone numbers would be able to enter the employer's property, make their way to the employer-furnished housing, knock on the door or otherwise approach workers to see if they would like to receive the information the church representative wishes to share, and perhaps leave a note or flyer for a worker or workers who are not present in the employer-furnished housing. The potential guests' ability to permissibly enter employer-furnished housing to contact and seek an invitation from one or more workers will vary depending on the location and layout of the housing and other relevant facts. This language will also be incorporated into the job order to provide clarity to both workers and employers.

Paragraph (n) is intended to protect workers' First Amendment rights as a means of both preventing the isolation that can lead to serious instances of labor exploitation and trafficking and advancing the Department's statutory duty of preventing adverse effect. Agricultural workers in the United States, including H–2A workers and workers in corresponding employment, enjoy fundamental First Amendment rights, including the rights of association and to receive information from those who wish to provide it. *Rivero* v. *Montogomery Cty.,* 259 F. Supp. 3d 334, 355 (D. Md. 2017) (explaining that H–2A workers, who are lawful residents of the United States, ''are entitled to unfettered exchange of information just as much as any other individual in a community,'' and do not ''forfeit their constitutional rights by living on their employer's premises''); *see also, e.g., Petersen* v. *Talisman Sugar Corp.,* 478 F.2d 73, 82–83 (5th Cir. 1973) (holding that property owner that housed migrant farmworkers on its property ''must accommodate its property rights to the extent necessary to allow the free flow of ideas and information'' between the migrant farmworkers and the labor and faith-based organizers that wished to visit them); *Mid-Hudson Legal Servs., Inc.* v. *G & U, Inc.,* 437 F. Supp. 60, 62 (S.D.N.Y. 1977) (legal service providers had First Amendment right to enter migrant community on farm property at reasonable times for the purpose of discussing with its inhabitants the living or working conditions prevalent at the farm); *Folgueras* v. *Hassle,* 331 F. Supp. 615, 623 (W.D. Mich. 1971) (explaining that property owner who opened up portions of his property as the living areas for those working on his farm does not have the right to censor the associations, information, and friendships of the migrants living in his camps); *see also Rivero,* 259 F. Supp. 3d at 345–48 (discussing the right of service providers and other visitors ''to impart information and opinions'' to these workers in their homes); *Martin* v. *City of Struthers,* 319 U.S. 141, 141 (1943) (''For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings.''). While these rights must be balanced against the rights of property owners, a ''farm owner should not be able to wield his property rights through trespass law to completely suppress the exchange of ideas and information that might benefit the workers he houses and, potentially, the public as a whole.'' *Rivero,* 259 F. Supp. 3d at 355. Given the myriad factors that isolate H–2A workers, from the often remote location of farmworker housing, cultural and linguistic barriers, lack of transportation and, often, internet and cell phone reception, the Department finds that there are not reliable alternate avenues of communication available that would justify limiting workers' right to invite or accept guests into their homes. *See Rivero,* 259 F. Supp. 3d at 355 & n.15 (noting that H–2A workers ''lead lives especially tethered to their employer''); *Asociacion de Trabajadores Agricolas de Puerto Rico* v. *Green Giant Co.,* 518 F.2d 130, 140 (3d Cir. 1975) (explaining that First Amendment protections would extend to situations involving improper isolation of workers and mistreatment of migrant workers). This is particularly true given the importance of preventing serious instances of labor exploitation and trafficking and the Department's statutory duty of preventing adverse effect.

Job Order Disclosure and Corresponding Edits to § 655.132(e)(1)

As noted above, the Department proposed to include the paragraph (n) protections in the disclosures required on the job order to help inform workers of their rights and to make corresponding edits to § 655.132(e)(1) to require an H–2ALC that meets its obligation to furnish housing through an agreement with a grower to include proof that the grower has agreed to comply with the requirements of § 655.135(n). The Department believes that these steps will inform workers of their rights and help ensure compliance with the new requirements at § 655.135(n) and hereby adopts them. The Department believes that a written statement from the grower agreeing to comply with the requirements at § 655.135(n) would constitute the requisite proof an H–2ALC would be required to submit with its *Application* under § 655.132(e)(1).

Workers Housed Pursuant to §§ 655.230 and 655.304

As noted above, the Department sought comments on whether and how the protections of proposed paragraph (n) should apply with respect to workers housed pursuant to §§ 655.230 (housing for work performed on the range in herding and range production of livestock occupations) and 655.304 (mobile housing for workers engaged in animal shearing or custom combining). The Department agrees with the commenters that addressed this issue that the protections adopted in paragraph (n) should apply equally to workers housed pursuant to §§ 655.230 and 655.304. As the relevant requirements of §§ 655.132(e)(1) and 655.135 apply equally with respect to employers who house workers pursuant to §§ 655.230 and 655.304, no further regulatory changes are required. *See* §§ 655.215(a) (requiring compliance with §§ 655.130 through 655.132 unless otherwise specified), 655.303(a) (same), and 655.130(a) (requiring all H–2A applicants to agree to the assurances and obligations of § 655.135). In response to the concern that employers may not have the ability to control who is allowed on the range land on which workers work and reside, the Department notes that such employers can make arrangements with property owners to ensure that access is provided pursuant to § 655.135(n), just as H–2ALCs who meet their obligation to furnish housing through contractual arrangements with growers will now need to do. While the Department appreciates the suggestion by Farmworker Justice and NLADA that it revise § 655.210(d)(2) to require employers to provide such workers with the means to communicate directly with emergency responders at all times, such as a satellite phone as well as a GPS tracking device or locator, it declines to adopt this suggestion in this final rule. As the Department did not propose changes to § 655.210(d) in the NPRM, it did not get sufficient comments to determine whether this suggestion is feasible.

No Preemption of Greater Protections

As explained in the NPRM and herein, the Department is aware that farmworker housing access protections already exist in some parts of the country under State law or by virtue of Federal First Amendment jurisprudence. This final rule is intended to establish minimum standards for access to employer-provided housing in the H–2A program. It is not intended to preempt or curtail any other more expansive access protections, whether established under the First Amendment to the United States Constitution, and/or other Federal, State, or local law. Accordingly, in addition to enforcement of § 655.135(n) by the Department, H–2A workers, workers in corresponding employment, and those seeking to visit them in or near employer-provided housing may also be able to assert their rights through private litigation or complaints to State government agencies.

x. Section 655.135(o), Passport Withholding

In the NPRM, the Department proposed adding a new paragraph (o) to § 655.135 to better protect workers from potential labor trafficking by directly prohibiting an employer from confiscating a worker's passport, visa, or other immigration or government identification documents. Under the proposal, the only exceptions to this prohibition would be where the worker has stated in writing: that the worker voluntarily requested that the employer keep these documents safe, that the employer did not direct the worker to submit such a request, and that the worker understands that the passport, visa, or other immigration or government identification document will be returned to the worker immediately upon the worker's request. Even in such cases, the worker must be able to have ready access to the document, at least during regular business hours and at a location that does not meaningfully restrict the worker's ability to access the document.

As set forth in the NPRM, H–2A workers are extremely vulnerable to labor exploitation, and an employer taking or holding a worker's passport is an egregious act that can be a strong indication of such exploitation. Labor trafficking, including the restriction of a worker's movements, harms not only the worker who is trafficked but also the agricultural workforce in the area by subjecting workers to depressed working conditions. While the current regulation at § 655.135(e) requires an employer to comply with all applicable Federal, State, and local laws, including the TVPA's prohibition on destroying or confiscating a passport, immigration document, or government identification document while committing or with the intent to violate certain trafficking offenses, 18 U.S.C. 1592(a), WHD has encountered difficulty enforcing this prohibition absent a trafficking conviction. Accordingly, to protect workers subject to this practice from potential labor trafficking, as well as protect other agricultural workers from the resulting adverse effects on working conditions pursuant to 8 U.S.C. 1188(a)(1), the Department proposed to flatly prohibit the taking or withholding of a worker's passport, visa, or other immigration or government identification documents against the worker's wishes, independent of the requirements of other Federal, State, or local laws. In addition, the Department proposed to include the failure to comply with this prohibition among the violations that may subject an employer to debarment under § 655.182 and 29 CFR 501.20. To help inform workers of their rights under this proposal, the Department proposed to include the prohibition on the withholding of passports, visas, and other immigration or government identification documents in the disclosures required on the job order. Finally, the Department explained that nothing in the current regulation at § 655.135(e), nor in the proposed § 655.135(o), is intended to prohibit an employer or agent from facilitating a prospective H–2A worker's submission of the worker's passport, visa, or other identification documents to the United States Government for purposes of visa application, processing, or entry to the United States, provided that the worker voluntarily requests the employer's assistance in these processes and that the documents are returned to the worker immediately upon return by the United States Government.

The Department sought comments on this proposal, particularly regarding whether the Department should include any other requirements for application of the proposed exception to this prohibition, and whether the Department should include any additional exceptions to this prohibition.

The vast majority of comments the Department received on this proposal were supportive. Trade associations, including IFPA and NHC; a workers' rights advocacy organization, the AWAC; Washington State; and several private employers expressed support for the proposed prohibition on passport withholding, without offering further rationale. One employer stated that it had no objection to the proposal.

Numerous commenters, including the National Women's Law Center, Marylanders for Food and Farmer Protection, and Proteus, Inc., expressed general support for the proposal on the ground that it could help prevent human trafficking. Individuals commented that the proposal would protect workers from coercion and exploitation, as well as scams and other abuses. One individual expressed

support, saying that passport confiscation gives an employer too much leverage over an employee.

Advocacy organizations and legislators expressed similar support, citing studies of labor trafficking in the H–2A program and specific instances of labor trafficking and reasoning that the proposal would provide urgently needed protections. For example, the UFW Foundation cited a report by Polaris, the organization that operates the National Human Trafficking Hotline, that identified over 2,800 H–2A workers who experienced labor trafficking from 2018 to 2020 [98] and provided stories from five H–2A workers who experienced passport withholding. The Alliance to End Human Trafficking stated that, in its work with migrant workers, it has found that withholding of travel documents is a common method of coercion used by traffickers. Similarly, CCUSA and USCCB expressed support for the proposal, identifying restrictions on mobility, including restricting workers' access to their passports and other documents, as a pattern often seen by those engaged in pastoral outreach to migrant farmers. Several other workers' rights advocacy organizations, including Migration that Works, UMOS, CDM, and the North Carolina Justice Center, described the anecdotal experiences of specific H–2A workers whose travel documents were confiscated by employers and who were subsequently subjected to abusive working conditions. A joint comment from 15 U.S. Senators stated that prohibiting employers from confiscating or holding a worker's passport, visa, or other identification would prevent labor trafficking, and a joint comment from 43 U.S. House Members described the proposal as an urgently needed precaution.

A variety of commenters expressed support based on the workability of the proposal. Farmworker Justice noted that the requirement is not so complex or overly broad as to hamper legitimate and consensual document safekeeping by employers. Specifically, according to Farmworker Justice, the exception will ''still allow workers to provide their passports or documents to their employers if they so wish, and will allow for employers to help facilitate any submission of these documents to the U.S. Government for the purposes of visa application, entry to the United States, or any other proper purpose.'' AILA expressed similar support, stating that employees must have unfettered access to their documents, but it can be helpful to allow employers to safeguard employee documents. SRFA commented that, although allowing honest employers to help safeguard employees' documents can protect them from problems that arise from document theft, damage, or loss, the proposal strikes a reasonable balance between safeguarding and ensuring access. CDM expressed strong support for the prohibition on passport withholding, including the proposal to make this violation a ground for debarment under § 655.182 and 29 CFR 501.20, and also urged the Department not to broaden the proposed exceptions to this prohibition ''as their narrowness is critical to ensuring that these proposed changes can achieve their goal of preventing forced labor through this type of coercion.''

While supporting the proposal, several commenters suggested that it does not go far enough to protect workers. Farmworker Justice stated that concerns remain about similar abuses like Social Security number and mail withholding. An individual called the proposal ''necessary but insufficient,'' recommending that the Department create an independent body to which workers can report abuses without fear of reprisal or deportation and that can conduct unannounced inspections and levy sanctions against noncompliant employers.

Finally, some commenters addressed the potential overlap of the proposal with the existing TVPA prohibition at 18 U.S.C. 1592(a), which is incorporated into the H–2A regulations via § 655.135(e). CCUSA and USCCB explained that the proposed prohibition on passport withholding is a ''more direct approach'' than finding a violation of § 655.135(e) based on a violation of the TVPA and ''would be easier for the Department to enforce, including through potential debarment, and would provide clearer expectations for employers and workers alike.'' While stating that document confiscation is already prohibited by law, a couple of university professors said it would be helpful to include the specific prohibition in the H–2A regulations because it would enhance enforceability, ensure all program actors are aware of the prohibition, and promote a ''whole of government'' approach. The trade associations NCAE and Florida Citrus Mutual expressed support for the proposed prohibition on passport withholding, while stating that it is redundant with existing regulations, and the agent másLabor stated that it did not object to the proposal as it ''simply mirrors existing law.'' Another agent, Mountain Plains Agricultural Service, stated that existing law makes it ''very clear'' that passport withholding is prohibited and questioned what the proposal would accomplish. While agreeing that employers should not withhold employee passports, the trade association, wafla, stated that the proposal is duplicative and unnecessary.

After considering the comments discussed above, the Department adopts the proposed prohibition on passport withholding as proposed in the NPRM.

As explained in the NPRM and above, the withholding of a worker's passport, visa, or other immigration or government identification documents is an egregious restriction of a worker's movements and may be indicative of labor exploitation or trafficking. Not only does this harm the specific workers whose documents are taken, it harms the agricultural workforce more broadly by subjecting workers to depressed working conditions. While a few commenters questioned the necessity of the proposal given the TVPA's existing prohibition on the destruction or confiscation of passports and other immigration and government identification documents, the Department continues to believe that the addition of a direct prohibition at § 655.135(o) will enhance its enforcement and ensure that workers and employers alike are aware of the prohibition. The majority of comments received support the Department's position on the importance and necessity of adding § 655.135(o), and thus the Department has determined that this addition is necessary to better help prevent such exploitation and trafficking, as well as to prevent an adverse effect on the working conditions of similarly employed workers in the United States as is required by 8 U.S.C. 1188(a)(1)(B).

The Department notes that this prohibition applies equally to a worker's immigration documents that may be provided by the U.S. Government to the employer or employer's agent in the first instance. For example, after approving an employer's petition (Form I–129) to extend an H–2A worker's period of authorized employment, USCIS typically attaches the worker's new arrival/departure record (Form I–94) to the Form I–129 approval notice that USCIS provides to the employer and relies on the employer to give the Form I–94 to the worker. In such instances, an employer's failure to give the Form I–94 to the worker would constitute a violation of § 655.135(o) unless the employer is keeping the document safe at the worker's request and meets the

[98] Polaris 2018–2020 Report, at 7, 10. *See also* 2023 NPRM, 88 FR at 63750, 63799.

requirements of that exception (*i.e.,* the worker provided a written statement indicating that the worker voluntarily requested that the employer keep this immigration document safe, that the employer did not direct the worker to submit such a request, and that the worker understands that the immigration document will be returned to the worker immediately upon the worker's request). While the Department appreciates the suggestions that it should address similar abuses, such as Social Security number and mail withholding, and that it should create an independent body to which workers can report violations, it declines to adopt either in this final rule. Neither suggestion is within the scope of the current rulemaking, and there is insufficient detail to determine whether the Department has the authority to implement the latter suggestion. The Department notes that, in addition to reporting violations to WHD, workers may report such violations to the applicable SWA, which has the authority to investigate, resolve, or refer worker complaints to enforcement agencies as appropriate, as well as to remove access to services for noncompliant employers. Workers may also access resources and assistance through DHS's Blue Campaign website, *https://www.dhs.gov/blue-campaign,* which includes information on reporting suspected human trafficking to law enforcement and getting help from the National Human Trafficking Hotline.

3. Section 655.137, Disclosure of Foreign Worker Recruitment.

a. Summary of Proposal in §§ 655.137, 655.135(p), and 655.167(c)(8)

The Department proposed new disclosure requirements to enhance foreign worker recruitment chain transparency and bolster the Department's capacity to protect vulnerable agricultural workers from exploitation and abuse, as explained more fully below. Pursuant to its authority under the INA, the Department regulates the conduct of U.S. employers using foreign labor certification programs and doing business with foreign labor recruiters. 8 U.S.C. 1188(c)(3)(A)(i); 8 U.S.C. 1188(g)(2). The INA authorizes the Department to promulgate regulations governing recruitment. 8 U.S.C. 1188(c)(3)(A)(i). The Department may only issue a labor certification to an employer that has ''complied with the criteria for certification (including criteria for the recruitment of eligible individuals as prescribed by the Secretary).'' *Id.* The INA states that ''[t]he Secretary of Labor is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section.'' 8 U.S.C. 1188(g)(2).

As the Department has noted in prior rulemaking, though there are limits to the liability the Department can impose on employers for the actions of recruiters abroad, the Department can regulate the conduct of recruiters in the H–2A program through enforcement of employer obligations to foreign workers, such as enforcement of the prohibition on the imposition of recruitment fees. 2010 H–2A Final Rule, 75 FR at 6926. Specifically, employers must contractually forbid any foreign labor contractor or recruiter (or any agent of such foreign labor contractor or recruiter) whom the employer engages, either directly or indirectly, in international recruitment from seeking payments or other compensation from prospective employees in both the H–2A and H–2B programs, at 20 CFR 655.135(k) and 655.20(p), respectively. The Department's H–2B regulations at §§ 655.9 and 655.20(aa) additionally require employers to provide copies of their agreements with foreign labor recruiters and disclose information about the foreign labor recruiters that have or will be engaged in the recruitment of H–2B workers in connection with the employer's applications.

In the NPRM, the Department proposed similar additional foreign labor recruiter disclosure requirements in the H–2A program to require the employer to identify any foreign labor recruiters, provide copies of the agreements between the employer and recruiter, and ensure the agreement clearly prohibits the foreign labor contractor or recruiter from seeking or receiving payments or other compensation from prospective employees. Specifically, the Department proposed a new § 655.137, *Disclosure of Foreign Worker Recruitment,* a new related assurance at § 655.135(p), and a new § 655.167(c)(8) that provides applicable document retention requirements.

The proposed new provisions at § 655.137 govern what information and documentation an employer must provide at filing regarding foreign worker recruitment, as well as how it must maintain and update that information. These proposed provisions also cover how the Department may disseminate or publish the information it receives. Paragraph (a) proposed that if the employer engaged or plans to engage an agent or foreign labor recruiter, directly or indirectly, in international recruitment, the employer, and its attorney or agent, as applicable, must provide copies of all contracts and agreements with any agent or recruiter or both, executed in connection with the job opportunity, a requirement that is also covered by a new assurance proposed at § 655.135(p). These agreements must contain the contractual prohibition against charging fees as set forth in § 655.135(k). In paragraph (b), the Department proposed to require that applications must contain all recruitment-related information required in the *Application for Temporary Employment Certification,* as defined in § 655.103(b), including the identity and location of all persons and entities hired by or working for the recruiter or agent, and any of the agents or employees of those persons and entities, to recruit prospective foreign workers for the H–2A job opportunity.

Paragraph (c) of § 655.137 proposed that employers must continue to keep the foreign labor recruiter information referenced in paragraphs (a) and (b) up to date until the end of the work contract period, with this updated information available in the event of a post-certification audit or upon request by the Department. Proposed § 655.167(c)(8) governs applicable employer document retention requirements. The Department likewise proposed sharing the foreign worker recruitment information it received from employers with any other Federal agency, as appropriate for investigative or enforcement purposes, as set forth in § 655.130(f). Finally, the Department proposed in paragraph (d) to maintain a publicly available list of agents and recruiters (including government registration numbers, if any) who are party to the agreements employers submit, as well as the persons and entities the employer identified as hired by or working for the recruiter and the locations in which they are operating.

As explained in the NPRM, the Department proposed these changes because disclosure of information about the recruitment chain will assist the Department to carry out its enforcement obligations, protect vulnerable agricultural workers and program integrity, and ensure equitable administration of the H–2A program for law abiding employers. Determining the identity and location of persons hired by or working for the recruiter or its agent to recruit or solicit prospective H–2A workers—effectively acting as sub-

recruiters, sub-agents, or sub-contractors—bolsters program integrity by aiding enforcement of provisions like § 655.135(k), which prohibits the seeking or receiving of recruitment fees. In addition, the information collection would require additional disclosures relating to foreign worker recruitment that will bring a greater level of transparency to the H–2A worker recruitment process. By maintaining and making public a list of agents and recruiters, the NPRM observed that the Department will be in a better position to map international recruitment relationships, identify where and when prohibited fees are collected, ensure that contractual prohibitions on collecting prohibited fees are bona fide, and, when contractual prohibitions are not bona fide or do not exist, implement sanctions against and collect remedies from the appropriate entity. Workers will be better protected against fraudulent recruiting schemes because they will be able to verify whether a recruiter is in fact recruiting for legitimate H–2A job opportunities in the United States. A list of foreign labor recruiters will enhance transparency and aid enforcement by facilitating information sharing between the Departments and the public, and assist OFLC, other agencies, workers, and community and worker advocates to better understand the roles of recruiters and their agents in the recruitment chain, while permitting a closer examination of applications or certifications involving recruiters who may be engaged in improper behavior.

The NPRM also noted that information about the identity of the international and domestic recruiters of foreign labor will assist the Department in more appropriately directing its audits and investigations. For example, in the course of its enforcement, WHD sometimes reviews allegations from H–2A workers that they have been charged recruitment fees. Those workers, however, are frequently unaware of the contractual arrangements between the individuals alleged to have charged those fees and the recruitment agencies for which they may serve as sub-agents or sub-recruiters, and may only know the names, partial names, or nicknames of such individuals. The information required under § 655.137 will improve WHD's ability to identify individuals charging fees, connect such individuals' relationships with recruitment agencies contracted by the employer, determine whether all entities had contractually prohibited cost-shifting as required under § 655.135(k), and hold the appropriate parties responsible. Such information will also improve WHD's ability to plan enforcement actions if, for example, a sub-recruiter working for multiple agencies or serving multiple employers is found, as a matter of practice, to be charging prohibited fees or otherwise engaging in conduct in violation of the requirements of the H–2A program. Finally, enhancing tools to strengthen enforcement of the prohibition on the collection of prohibited fees and other recruitment abuses ensures that employers who comply with the H–2A program requirements are not disadvantaged by the actions of unscrupulous employers, such as those who pass recruitment fees on to workers.

The Department received comments both in support of and opposed to the proposal. After consideration of the comments received, the Department is adopting the proposals with a minor technical change, as discussed in more detail below.

General Support: The Department received some comments that were generally supportive of the new disclosure requirements. Many Federal elected officials and a State government expressed support for the proposal to increase transparency in the recruitment process, with some Federal elected officials noting that the current process has ''enabled third party recruiters to charge prospective H–2A workers exorbitant fees, indebting workers who come here just to make ends meet,'' and others noting that the proposals will ''not only improve worker protections, but . . . also bring the H–2A program in line with the H–2B program.'' Some Federal elected officials further observed that ''[s]imilar protections . . . already exist for H–2B workers; DOL's rule simply extends these protections to H–2A workers.'' Concerned Law Students of University of Georgia, a student group, submitted a comment noting that ''[g]reater recruitment transparency should help enforcement officials and advocates find and eliminate the roots of the problem.'' PCUN, CAUSE, UMOS, UFW Foundation, and Green America and North Carolina Justice Center, workers' rights advocacy and public policy organizations, respectively, expressed support for how these changes would ''bolster DOL's enforcement capacity against exploitative and abusive recruiters.'' Another workers' rights organization, AWAC, ''strongly endorse[d] . . . [the] additional transparency [and] protections in recruitment practices and hiring process,'' contained within the proposed rule. The Agricultural Justice Project, UMOS, and Marylanders for Food and Farmworker Protection were supportive, with Marylanders for Food and Farmworker Protection noting specifically that ''[e]nhanced transparency . . . is crucial for preventing recruitment fraud.'' CCUSA and USCCB was also broadly supportive of this rulemaking effort, stating that ''[i]ncreased oversight of the H–2A recruitment process through the proposed provisions is commendable, as it aims to provide more protection to prospective workers through enhanced transparency.'' Additionally, many individuals expressed general support for the proposal. The Department values and appreciates these commenters' general support and their unique and informed perspectives on the need for and potential impact of the proposal.

b. Section 655.137(a), Collecting Contracts/Agreements; Prohibition on Fees

Consistent with §§ 655.9(a) and 655.20(aa) in the H–2B program, the Department proposed new provisions at §§ 655.137(a) and 655.135(p) to require an employer and its attorney or agent, as applicable, to provide a copy of all agreements with any agent or recruiter that the employer engages or plans to engage in the recruitment of prospective H–2A workers, regardless of whether the agent or recruiter is located in the United States or abroad. This proposed requirement to disclose agreements with recruiters would encompass all agreements, whether written or verbal, involving the whole recruitment chain that brings an H–2A worker to the employer's certified H–2A job opportunity in the United States. The Department received several comments on this proposal. The Department's responses to these comments are provided below. Following full consideration of these comments, the Department has decided to retain the proposal in this final rule, with one minor technical change. The Department has revised proposed § 655.137(a) to include language clarifying the paragraph applies where an employer engages or plans to engage a foreign labor recruiter. This technical correction is necessary to ensure the paragraph is consistent with the Department's practice in the H–2B program, the Department's proposal to require disclosure of agreements where the employer engages or plans to engage a foreign labor recruiter, and the Department's proposed language at § 655.135(p), which requires the employer provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H–2A workers.

A couple of employers, including Titan Farms, LLC, and some trade associations, including TIPA, IFPA, GFVGA, USApple, and NHC, supported sharing recruitment agreements with the Department, but only if ''all confidential business information is redacted.'' Wafla opposed this aspect of the proposal because sharing the agreements may expose ''trade secrets, pricing information, or other unique information that cannot be made public'' and suggested that the Department request these agreements only if ''[it] suspects an issue . . . during a post-certification inspection.'' Similarly, the U.S. Chamber of Commerce, a trade association, opposed collection of the agreements because they may contain ''sensitive, proprietary business information.''

The Department appreciates the concerns cited by commenters and reiterates that confidential business information or sensitive data will not be disclosed to the public. Consistent with the handling of such contracts in the H–2B program, ''[a]greements between the employer and the foreign labor recruiter will not be made public unless required by law.'' 2015 H–2B IFR, 80 FR 24042, 24057 (Apr. 29, 2015).[99] The Department notes that in all the years it has been collecting these contracts in the H–2B program, it is not aware of an instance where the confidential terms or business information was disclosed to the public.

Collecting the contracts and agreements allows the Department to verify that the contractual prohibition required by § 655.135(k) has been included. As noted in the NPRM, the Department remains concerned about workers being charged fees unlawfully. A recent report published by Polaris, an organization working to combat labor trafficking, notes that abuses by foreign labor recruiters continue, with workers reporting unlawful fees charged by ''foreign labor recruiters, their employers, or their direct supervisors at their jobs,'' and that additional transparency in the recruitment chain is needed to ensure the Department can identify, investigate, and hold accountable those employers and other entities who engage in abusive and unlawful behavior at various stages of the international recruitment process.[100]

In their comment, Farmworker Justice, citing a 2018 CDM report,[101] stated that 58% of workers recruited from Mexico ''reported paying a recruitment fee that on average amounted to $590 per worker'' and almost half of these workers ''needed to take out a loan to cover illegal recruitment fees and other pre-employment expenses.'' The commenter expressed concern that in other cases, ''individuals purporting to be recruiters who have no relationship with an actual H–2A employer often charge prospective foreign workers for the chance to get a job that does not even exist.'' A different workers' rights advocacy organization, the North Carolina Justice Center, stated that some workers are ''explicitly coached by the recruiter to lie about the [recruitment] fee at their consular interview,'' further noting that ''the person charging and collecting the fee is a step or two removed from the U.S. based employer and is not directly in touch with the employer.'' This commenter expressed support for the Department's proposal as a way to ''make it easier to recover illegal fees in the future, and hopefully, motivate employers to take more proactive steps to make sure that no one in their recruiting pipeline is charging illegal fees.'' The UFW Foundation cited accounts of workers who were charged exorbitant fees of as much as $10,000 to obtain H–2A employment. These comments reflect the Department's concerns regarding unlawful collection of fees and reiterate to the Department the need to collect the foreign labor recruiter information to shed light on the process of recruitment, as well as to aid in the enforcement of the regulations.

The NPRM did not propose to change, and this final rule retains, § 655.135(k), which will continue to require the employer to contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly, from seeking or receiving payments from any prospective employees. The specific language covers subcontractors. In addition, the required contractual prohibition applies to the agents and employees of the recruiting agent, and the prohibition against charging workers recruitment-related fees encompasses both direct and indirect fees. As such, the written contract(s) the employer submits under this final rule must contain this contractual prohibition on charging fees and the prohibition language must include the quoted language specified in § 655.135(k).

A workers' rights advocacy organization, CDM, citing an account from a Florida worker, also urged the Department to prohibit recruiters or employers from requiring that workers, or people acting on behalf of workers, sign promissory notes or pay breach of contract fees. To this end, the commenter recommended amending § 655.135(j) so that ''payments'' include any payment provided by the employee, a relative, or any person acting on the employee's behalf. It also suggested that ''payment'' include requiring that any employee, relative, or person acting on the employer's behalf ''sign a negotiable instrument or grant a security interest in any collateral.'' It further alleged that this amendment would bring the rule into ''alignment with DHS's proposed revisions to 8 CFR 214.2(h)(5)(xi), which would clarify that fees prohibited in H–2A recruitment include breach of contract fees and penalties.''

The Department agrees with CDM that it is important to clearly and explicitly prohibit breach of contract fees from being collected from prospective employees, but did not propose the suggested change in the NPRM and the Department does not believe such a change is necessary for enforcement of breach of contract fees. The Department takes the opportunity to clarify, however, that the existing contractual fee prohibition language is broadly interpreted and § 655.135(k) already requires employers to prohibit, in writing, foreign labor contractors or recruiters from receiving payments or compensation from prospective employees, and includes language that employers must include in contracts with foreign labor contractors or recruiters. The required contractual prohibition against recruitment-related fees applies to the agents and employees of the recruiting agent, and the prohibition against charging workers recruitment-related payments encompasses both direct and indirect fees. As such, the written contract(s) the employer submits under this final rule must contain this contractual prohibition on charging fees and the prohibition language must include the language specified in § 655.135(k): ''Under this agreement, [name of foreign labor contractor or recruiter] and any agent or employee of [name of foreign labor contractor or recruiter] are prohibited from seeking or receiving payments from any prospective employee of [employer name] at any

[99] Interim Final Rule, *Temporary Non-Agricultural Employment of H–2B Aliens in the United States,* 80 FR 24042 (Apr. 29, 2015) (2015 H–2B IFR).

[100] Polaris, *Human Trafficking on Temporary Work Visas: A Data Analysis 2015–2017* 13 (2018), *https://polarisproject.org/wp-content/uploads/2019/01/Human-Trafficking-on-Temporary-Work-Visas.pdf.*

[101] CDM, *Recruitment Revealed, Fundamental Flaws in the H–2 Temporary Worker Program and Recommendations for Change* 16,18 (2018), *http://www.cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf.*

time, including before or after the worker obtains employment. Payments include but are not limited to any direct or indirect fees paid by such employees for recruitment, job placement, processing, maintenance, attorney fees, agent fees, application fees, or any fees related to obtaining H–2A labor certification.''

Consistent with the H–2B program, this final rule requires employers to provide a copy of the agreement at the time the employer files the H–2A Application. Employers, and their attorneys or agents, as applicable, are expected to provide these names and geographic locations to the best of their knowledge at the time the application is filed. The Department expects that, as a normal business practice, when completing the written agreement with the primary recruiting agent or recruiter, the employer and, if applicable, the employer's authorized attorney or agent, will ask whom the recruiter plans to use to recruit workers in foreign countries, and whether those persons or entities plan to hire other persons or entities to conduct such recruitment, throughout the recruitment chain.

At the time of collection, the Department will review the agreements to obtain the names of the foreign labor recruiters and government registration and license numbers, if any (for purposes of maintaining a public list, as described below), and to verify that these agreements include the required contractual prohibition against charging fees.[102] The Department may further review the agreements during the course of an audit examination or investigation. Certification of an employer's application that includes such an agreement does not indicate general approval of the agreement or the terms therein. Where the required contractual prohibition is not readily discernible, the Department may request further information to ensure that the contractual prohibition is included in the agreement.

To reiterate, agreements between the employer and the foreign labor recruiter will not be made public unless required by law. Consistent with the Department's current practice in the H–2B program, this final rule allows the Department to obtain the agreements, but the Department will only share with the public the identity of the recruiters, not the agreements in their entirety.

c. Section 635.137(b), Information Collection, and (c), Retention

The NPRM proposed at §§ 655.137(b) and 655.135(p) to require an employer and its attorney or agent, as applicable, to disclose to the Department the identity (*i.e.,* name and, if applicable, identification number) and geographic location of persons and entities hired by or working for the foreign labor recruiter and any of the agents or employees of those persons and entities who will recruit or solicit prospective H–2A workers for the job opportunities offered by the employer. As the NPRM explained, these proposed new provisions are consistent with the H–2B provisions at §§ 655.9(b) and 655.20(aa). As in the H–2B program, the NPRM proposed to interpret the term 'working for' to encompass any persons or entities engaged in recruiting prospective foreign workers for the H–2A job opportunities offered by the employer, whether they are hired directly by the primary recruiter or are working indirectly for that recruiter downstream in the recruitment chain. 2015 H–2B IFR, 80 FR at 24057. If the recruiter has a valid registration number or license number that is issued by a government agency and authorizes the recruiter to engage in the solicitation or recruitment of workers, the proposal required the employer to provide this unique identification information.

The NPRM also proposed that the Department will gather the additional recruitment chain information when the employer files its application and will require the employer to submit a Form ETA–9142A, *Appendix D,* that mirrors the Form ETA–9142B, *Appendix C,* used in the H–2B program, and collects information about the identity and location of the recruiter(s) and recruitment organization(s) the employer used or will use to recruit foreign workers. In addition, the Department proposed at § 655.137(c), and in corresponding language in the new assurance provision at § 655.135(p), to require the employer to update the foreign worker recruitment information disclosed in accordance with paragraphs (a) and (b) of § 655.137 with any changes to foreign labor recruiter contracts, loss or revocation of registration number, or changes to the names and locations of people involved in recruitment after filing the H–2A Application, and to continue to make these updates until the end of the work contract period. Under the proposal, the employer must maintain updates to the foreign labor recruiter information disclosed at the time of filing the H–2A Application and be prepared to submit the record to the Department, upon request. Finally, to make clear the employer's record retention obligation, proposed § 655.167(c)(8) required the employer to maintain the foreign worker recruitment information required by proposed § 655.137(a) and (b) for a period of 3 years.

The Department received several comments on this proposal. After careful consideration of the comments, the Department has decided to retain the proposal in this final rule, as explained below.

Many trade associations, individuals, employers, a State government agency, and agents opposed the collection of this information. They asserted that the proposal would impose an undue burden on employers to identify all links in a foreign recruitment chain, may lead to penalties for employers for the actions or inaccurate statements of recruiters abroad, and may expose recruiting agency employees to risks in their country of origin. Some trade associations (NHC, IFPA, TIPA, and USApple) and an employer (Titan Farms, LLC) expressed concerns regarding limited employer resources, with NHC noting specifically that employers ''do not have the resources, nor practical ability, to identify and maintain the information required under this section.'' GFVGA, USApple, IFPA, TIPA, and an employer, Titan Farms, LLC, asserted that many employers, especially small employers, ''rely on their agent's network to recruit and may not have access to the foreign recruiter's name and geographic location.'' The Western Range Association, an agent, noted disclosure would be difficult at the time of filing because employers ''may not know what country they will be requesting a worker from'' and they may ''change their minds and request workers from a different country'' than initially

[102] The Department uses all available tools to ensure that prohibited fees are not collected by employers, agents, recruiters, or facilitators. The Department has previously stated that an employer must make it abundantly clear that the recruiter and its agents are not to receive remuneration from the worker recruited in exchange for access to the job opportunity. For example, evidence showing that the employer paid the recruiter no fee or an extraordinarily low fee, or continued to use a recruiter about whom the employer had received numerous credible complaints, could be an indication that the contractual prohibition was not bona fide. *See* 2010 H–2A Final Rule, 75 FR at 6925–6926. The Department has similarly stated that, if it determines ''that the employer knew or reasonably should have known that the H–2A worker paid or agreed to pay a prohibited fee . . . to a foreign labor contractor or recruiter, the employer can still be in violation of 20 CFR 655.135(j). However, should the circumstances demonstrate that the employer made a good faith effort to ensure that prospective workers were not required to pay prohibited fees (such as inquiry of both workers and agents/recruiters/facilitators regarding payment of such fees), the Department will take the circumstances into consideration in determining whether a violation occurred.'' WHD, Field Assistance Bulletin No. 2011–2, *H–2A ''Prohibited Fees'' and Employer's Obligation to Prohibit Fees* (May 6, 2011), *https://www.dol.gov/agencies/whd/field-assistance-bulletins/2011-2.*

planned. This commenter suggested that collection of recruiter information at the DHS petition stage would be more effective. Wafla, a trade association, supported requiring the disclosure of only the foreign recruiter's name and owner on the application but opposed any further disclosure requirements. In particular, it stated that the additional disclosure requirements would be difficult because ''[s]ome recruiters have 10–100 employees'' and it could take ''two to three hours of additional preparation time'' to gather this information and then ''type it into FLAG.'' The Georgia Farm Bureau, a trade association, noted that ''any such evidence of this would take place between the prospective employee and third-party recruiters. Much of the information required to be reported by employers is not guaranteed to be provided by a foreign third-party entity.'' Fuerza Consulting Solutions incorrectly contended that the desired information was already collected during the audit process, rendering the proposed changes unnecessary.

The U.S. Chamber of Commerce, IFPA, TIPA, NHC, USApple, GFVGA, and an employer, Titan Farms, LLC, asserted that the Department provided ''no guidance on how an employer should come to identify the foreign recruiter information'' and ''no definition of what level of due diligence is required of the employer.'' Wafla expressed concern that the NPRM failed to clarify if the employer must ''vet the information'' provided by a recruiter to ensure ''the information provided by the foreign recruiter is [not] false'' or if employers must ''travel to a foreign country to verify the information'' or face potential liability or penalty. Some trade associations and employers opposed the obligation to update recruitment information throughout the contract period because the employer, in the words of NHC, ''would be relying on the foreign recruiter to communicate [updated] information to them.'' AILA, an immigration lawyers' association, asserted that the collection of information on recruiting agency employees is unnecessary because the actions of these employees are legally imputed to their employer, the recruitment agency, and thus disclosing only the recruitment agency is sufficient.

The Department appreciates these comments and understands the concerns about time and burden to collect the information; the need for employers to understand their information disclosure, retention, and production obligations; the ability to access this information and the timing of the collection, including the obligation to update information; and concerns about how the Department will safeguard confidential and sensitive information. The collection of this information adds transparency and helps in locating individuals for enforcement purposes. As GAO has explained, ''[w]ithout accurate, accessible information about employers, recruiters, and jobs during the recruitment process, potential foreign workers are unable to effectively evaluate the existence and nature of specific jobs or the legitimate parties contracted to recruit for employers, potentially making them more vulnerable to abuse.'' [103] The new provisions in this final rule are also consistent with the assessment of organizations investigating migrant worker abuse globally. For example, the United Nations Office on Drugs and Crime, in a 2015 report entitled ''The Role of Recruitment Fees and Abusive and Fraudulent Practices of Recruitment Agencies in Trafficking in Persons,'' noted that recruitment systems are often ''opaque,'' and that a ''[l]ack of evidence'' contributes to low levels of trafficking convictions for recruiters and recruitment agencies.[104]

The obligation to obtain information on recruiters and downstream employees or contractors of the recruiters is something employers or agents should already be doing. As the Department has noted, by submitting an H–2A Application, the employer ''is assuring the federal government that it has contractually forbidden those parties who will recruit workers on its behalf from seeking or receiving payments from prospective workers for costs which are to be borne by the employer.'' [105] Making this assurance necessarily requires that ''the employer (either directly or through its agent) has taken affirmative, specific action to contractually prohibit such parties from seeking or from receiving such payments.'' [106] With these actions already a part of the H–2A filing process, identifying this foreign recruiter information should not be unfamiliar to employers and collecting and maintaining records of the same would not be burdensome. The disclosure of this information to the Department, including disclosing information beyond the foreign recruiter's name and owner, should therefore also not be unduly burdensome. In response to the comment that noted disclosing only the recruitment agency is sufficient because the actions of employees are legally imputed to their employer, the Department believes that it is necessary for all parties involved in the recruiting process to be identified. Identifying each individual who will be recruiting allows for more complete disclosure as to who is legitimately recruiting for jobs and for that information to be made available to the public, including potential H–2A workers. Additionally, complete disclosure of recruiters, their employees, and any downstream recruiters will assist WHD in its investigations to identify who is collecting prohibited fees when such fees are collected.

The Department, however, understands that recruitment arrangements may not be finalized at the time of filing or may change after filing. The Department is only requiring that employers provide the information available to them at the time of filing with the understanding that an employer's recruiting arrangements may change after that. Similarly, the Department understands that it may not be possible for the employer or agent to capture everyone involved in the recruitment process and that they may receive inaccurate statements from those downstream from the employer. The Department only expects that employers or agents make reasonable efforts to obtain the requested information, and in the event of an audit or investigation, the extent of the employer's good-faith efforts may be considered. *See also* 20 CFR 655.182(e)(4) and 29 CFR 501.19(b)(4) (the OFLC and WHD Administrators already consider ''efforts made in good faith'' in other contexts).

Lastly, the Department takes seriously concerns with safeguarding confidential and sensitive information and will collect this information in accordance with the Privacy Act of 1974, the Department's SORN, FOIA disclosure requirements, and the PRA, as explained in the PRA package submitted in conjunction with this final rule. The

[103] GAO 2015 Report, at 33–34.

[104] U.N. Office on Drugs and Crime, *The Role of Recruitment Fees and Abusive and Fraudulent Recruitment Practices of Recruitment Agencies in Trafficking in Persons* 23, 47 (2015) *https://www.unodc.org/documents/human-trafficking/2015/Recruitment_Fees_Report-Final-22_June_2015_AG_Final.pdf; See also* International Labour Organization, *Fair Recruitment Initiative, https://www.ilo.org/global/topics/fair-recruitment/fri/lang-en/index.htm* (last visited Apr. 3, 2024); International Labour Organization, *General principles and operational guidelines for fair recruitment and Definition of recruitment fees and related costs* (2019), *https://www.ilo.org/global/topics/fair-recruitment/WCMS_536755.*

[105] WHD, Field Assistance Bulletin No. 2011–2, *H–2A ''Prohibited Fees'' and Employer's Obligation to Prohibit Fees* (May 6, 2011), *https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2011_2.pdf.*

[106] *Id.*

Department has collected this information in the H–2B program under the 2015 H–2B IFR without any reported incidents of privacy breach and without any indication that the requirement imposes an excessive burden on employers that would outweigh the benefits of enhanced transparency in the foreign labor recruitment process.

d. Section 635.137(d), Registry List

As in the H–2B program, the Department proposed at § 655.137(d) to publicly disclose, in a public registry, the names of the agents and foreign labor recruiters used by employers, as well as the identities and locations of all the persons or entities hired by or working for the primary recruiter in the recruitment of prospective H–2A workers, and the agents or employees of these entities. The Department also proposed to state explicitly that it may share the foreign worker recruitment information it receives from employers with any other Federal agency, as appropriate for investigative or enforcement purpose, as set forth in § 655.130(f). The Department received both comments supporting and opposing the proposal to publish a foreign labor recruiter list on the OFLC website. After full consideration of the comments, the Department has decided to retain § 655.137(d) without change in this final rule, as explained below.

Many commenters supported the concept of a public recruiter list but asserted that the Department must create a more transparent, easily searchable system that would permit workers to verify that recruiters are connected to legitimate job opportunities and do not charge illegal fees. Farmworker Justice supported the proposed public labor recruiter list to help ''enforce the removal of program access after fraud'' is identified. However, they expressed concern that the recruiter list would be inadequate if modeled after the existing recruiter list in the H–2B program. They stated that the existing recruiter list ''is an English language spreadsheet housed on an English language website that lists foreign recruiter names and their companies, recruitment regions, and a 14-digit case number for the clearance orders that they are associated with'' and thus is opaque and inaccessible to workers, who often do not speak English and typically conduct their research into recruiters and jobs using a smartphone. The commenter further claimed that worker advocacy organizations themselves were unable to match employer case numbers from the recruiter list ''to clearance orders using the Case Number search field on'' the Seasonaljobs website.

The commenter recommended changes to the Seasonaljobs website to allow workers to ''log on and view information'' about recruiters and the jobs they are connected to, in the same way they use Seasonaljobs to learn about other elements of ''specific jobs . . . , including job duties, pay, work location, expected hours, and employer information,'' which the commenter asserted would provide workers with ''real-time information that could help them avoid abusive recruiters and recruitment scams.'' This suggestion was endorsed by CDM, and largely echoed by another workers' rights advocacy organization, Migration that Works, that encouraged the Department to create ''an accessible way to verify that an individual claiming to be a recruiter represents the employer and the job offer they purport to represent,'' and suggested that the Department ''combin[e] the employment information already available on *Seasonaljobs.dol.gov* with the recruiter registry, making this information available to all prospective workers at the time of recruitment in Spanish and other languages.'' This commenter further suggested that the Department require employers to continually update recruiter information throughout the recruitment process and require disclosure in a standardized format to aid searchability.

The Department will update the H–2A Foreign Labor Recruiter List on a quarterly basis and will post an announcement on the OFLC website when updates are available. As with the H–2B recruiter list, any person with internet access, including U.S. and foreign workers, can access the public recruiter list and identify the H–2A Application numbers connected to recruiters in the list. The Department appreciates the suggestions regarding the H–2B Foreign Labor Recruiter List's format and will consider these suggestions but notes that the format of the forthcoming recruiter list is not something that would require amendments to the regulatory language in this final rule. However, as explained above, the Department will require employers in this final rule to continue to keep the foreign labor recruiter information requested in § 655.137(a) and (b) up to date until the end of the work contract period and make this updated information available in the event of a post-certification audit or upon request by the Department. 20 CFR 655.137(c). Similar to the H–2B list, the H–2A list will be posted on the Department's website in a standardized format. In addition, the H–2A Foreign Labor Recruiter List will contain the government registration number, if applicable, of agents and recruiters to further enhance transparency of the recruitment process for prospective H–2A workers.

The Department declines to publish foreign labor recruiter information using Seasonaljobs for the same reasons it declined to adopt commenter suggestions to publish foreign worker demographic data on Seasonaljobs in the 2022 H–2A Final Rule. The intended use of the information published on Seasonaljobs differs from the intended use of OFLC's forthcoming H–2A Foreign Labor Recruiter List. The Foreign Labor Recruiter List in the context of the H–2B program is ''a list of people and entities that employers have indicated that they engage or plan to engage to carry out the recruitment of prospective H–2B workers'' that facilitates information sharing and helps to ensure ''workers are better protected against fraudulent recruiting schemes by enabling them to verify whether a recruiter is in fact recruiting for legitimate H–2B job opportunities . . . .'' [107] The H–2A Foreign Labor Recruiter List will serve the same function in the H–2A context. In contrast, Seasonaljobs ''is a recruitment tool designed for broad dissemination of available temporary or seasonal job opportunities to U.S. workers . . . [that] provides information for job seekers, including work locations, duties to be performed, qualifications required, and dates of employment. . . . automate[s] the electronic advertising of H–2A job opportunities and ensures copies of H–2A job orders are promptly available for public examination.'' 2022 H–2A Final Rule, 87 FR at 61749.

An agent, másLabor, writing in opposition to the proposed change, argued that recruiters based in foreign countries often exist as alternatives to ''violence by cartels, cayotes, and other criminal enterprises'' involved in trafficking migrant workers and that making their identities public could make them the target of threats and violence by these organizations. An employer, McCorkle Nurseries, Inc., registered a similar concern.

The Department appreciates the comments and concerns expressed therein. The comments, however, were submitted without any supporting evidence. Absent more particular evidence of specific harms that will

[107] OFLC, *2015 H–2B Interim Final Rule FAQs, Round 16: Foreign Labor Recruiter List, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Round-16_Foreign_Labor_Recruiter.pdf.*

result from the Department's publishing this information, as the Department currently does in the H–2B program, the Department cannot weigh the previously noted benefits of adding transparency to the recruitment process against generalized and unsubstantiated concerns about potential consequences of disclosing this information on the H–2A Foreign Labor Recruiter List.

e. Miscellaneous Comments

The Department received a few other comments that were generally supportive of the Department's efforts but also provided suggestions for further improvement. They are discussed below.

CDM supported the Department's proposals but urged the Department to require H–2A employers ''affirmatively vet and monitor'' all recruiters used, which the commenter suggested could be accomplished by requiring employers to hire a recruitment compliance officer who would monitor recruitment efforts and investigate and address unlawful recruitment fees. The commenter suggested that the Department require that employers create and retain reports documenting the findings of the recruitment compliance officer.

Several State Attorneys General urged the Department to play a more active role in regulating the recruitment of foreign workers and counseled the Department to model the final rule provisions on regulatory schemes used in States like California and Washington. These commenters noted that California's labor commissioner administers a program charged with the registration and supervision of foreign labor contractors that includes additional requirements specific to recruiters. The commenters urged the Department to create and maintain a similar program that would require registration of foreign labor recruiters and prohibit employers from using recruiters that are not subject to registration and oversight, either by the Department or in the countries in which they operate. Finally, these commenters urged the Department to make it explicit in the final rule that the Department will share recruiter information with State-level enforcement agencies, as necessary.

The Department declines to adopt the suggestion to require that each employer hire a compliance officer and conduct compliance reporting and the suggestion to create and implement a system under which foreign labor recruiters would register with the Department. Requiring employers to hire compliance officers and conduct routine foreign labor recruitment compliance reporting would constitute a substantial change to the current regulations that was not proposed in the NPRM, and adoption in this final rule would preclude commenters from providing meaningful input. Similarly, the NPRM did not contemplate either the creation of a system to register and monitor foreign labor recruiters or the explicit sharing of recruiter information with State-level enforcement agencies. Both such proposals would require not only additional opportunity for stakeholder comment, but also a more thorough consideration of the costs, the additional information sharing requirements and monitoring systems, and the potential administrative, jurisdictional, and legal implications of their adoption; with respect to sharing recruiter information with enforcement agencies at the State level, the Department will do so as is permitted and required by law.

The Alliance to End Human Trafficking, an advocacy organization, likewise endorsed the Department's proposed rule while advocating for more changes in this area. This advocacy organization urged the Department to enhance enforcement by focusing efforts more specifically on human and labor trafficking as a ''key component'' of overall H–2A program compliance efforts. It suggested increased training for agency employees on addressing human trafficking and the creation of a mechanism to provide H–2A workers with information in multiple languages about human trafficking and how to report violations or request help. This commenter recommended that the Department sanction employers, as well as ''downstream entities/contractors and subcontractors,'' if they either falsify or withhold documents, or deceive workers about the terms and conditions of employment. This commenter further suggested that the Department issue model language for employers to include in recruitment agreements that would prohibit recruitment-related fees. This commenter also urged the Department to provide guidance for reimbursing workers who have been charged unlawful recruitment-related fees.

The Department appreciates the commenter's suggestions about additional staff training related to human trafficking and establishing requirements to provide H–2A workers with information about human trafficking and how to report violations or request help. However, these suggestions go beyond the scope of the current proposal, which focuses on increased transparency related to foreign labor worker recruitment. With respect to the request for sanctions and specific guidance regarding reimbursement for workers who have been unlawfully charged recruitment fees, the Department already cites violations, assesses penalties, and collects back wages, when appropriate, from an employer who has sought or received fees from workers in violation of § 655.135(j), or contracted with a foreign labor recruiter without contractually forbidding that foreign labor recruiter from collecting fees in violation of § 655.135(k). The Department can, and regularly does, debar employers from future participation in the program after finding that those employers have violated § 655.135(j) or § 655.135(k). *See* 29 CFR 501.20(d). Additionally, in 2011, the Department issued Field Assistance Bulletin No. 2011–2 providing further guidance on H–2A prohibited fees and the employer's obligation to prohibit fees.[108] This guidance clarifies that WHD may hold the employer responsible for fees collected by a person acting on the employer's behalf, which may include an employee of the employer (*e.g.,* a foreperson collects the fees) or a foreign labor recruiter. The Department reiterates that § 655.135(k) already requires employers to prohibit, in writing, foreign labor contractors or recruiters from receiving payments or compensation from prospective employees and includes specific language that employers must include in contracts with foreign labor contractors or recruiters.

The Department also currently cites violations and assesses penalties against employers who have misrepresented or failed to comply with the terms and working conditions that were disclosed to the workers, and against employers who have failed to provide a written copy of the work contract, in a language understood by the worker, no later than the time the worker applies for the visa or, for a corresponding worker, no later than the day the work commences, in violation of § 655.122(q). While the Department had previously prohibited the confiscation of passports, it has further clarified and made explicit at § 655.135(o) in this final rule that an employer may not hold or confiscate a worker's passport, visa, or other immigration or government identification document except for specific circumstances, and that such

[108] *See* WHD, Field Assistance Bulletin No. 2011–2, *H–2A ''Prohibited Fees'' and Employer's Obligation to Prohibit Fees* (May 6, 2011), *https://www.dol.gov/agencies/whd/field-assistance-bulletins/2011-2.*

confiscation constitutes a reason for debarment. With regard to the suggestion that the Department similarly sanction entities downstream from the employer for misrepresenting terms and working conditions or falsifying or withholding documents, the Department declines to adopt this suggestion at this time because these actions were not proposed in the NPRM and the public was not given an opportunity to provide input.

SRFA, a trade association, asked the Department to clarify what is meant by ''agent or recruiter.'' Specifically, the commenter noted that the definitions at § 655.103 do not define the term ''recruiter'' and further explained that it is unclear how the definition of ''agent'' is applied within the context of §§ 655.137(a) and 655.135(p). The commenter asked the Department to clarify if it will consider ''a fulltime employee of the applicant employer (as defined in § 655.103(b)) in a capacity that, under normal conditions and in the course of normal daily work, does not actively undertake traditional recruitment activities [as] an 'agent' or a 'recruiter' for purposes of clauses §§ 655.137(a) and 655.135(p).'' For example, the commenter asks if the employer would be required to disclose the name of one of its employees if that employee, for no fee, provided the employer names of H–2A-eligible foreign workers for potential employment and if the employer would be required to obtain an agreement from the employee that prohibits the imposition of fees and provide the Department a copy of this agreement at the time of filing.

Similarly, AILA urged the Department to revise the ''definition of foreign labor recruiters in §§ 655.137(a) and 655.135(p)'' to clarify ''whether DOL considers a full-time employee employed by the applicant employer (as defined in § 655.103(b)) in a capacity that, under normal conditions and in the course of normal daily work, does not actively undertake traditional recruitment activities [as] an 'agent' or 'recruiter' for purposes of'' §§ 655.137(a) and 655.135(p).

The Department declines to either define ''recruiter'' in the regulatory text or modify the definition of ''agent'' at this time. As the Department explained in the 2015 H–2B IFR, the duty to disclose information encompasses ''any persons or entities engaged in recruiting prospective foreign workers for the H–2B job opportunities offered by the employer, whether they are hired directly by the primary recruiter or are working indirectly for that recruiter downstream in the recruitment chain.'' 2015 H–2B IFR, 80 FR at 24057. Regarding the definition of ''agent,'' the Department believes the commenters' concerns are misplaced. The proposal requires employers to disclose the names of recruiters and downstream employees of the recruiter when the employer has ''engaged'' the recruiter ''directly or indirectly, in international recruitment.'' In cases where an *employee* of the employer has conducted recruitment on the employer's behalf, the Department will consider the *employer* to have conducted its own recruitment of foreign workers and will not require the employer to disclose the employee's contact information. The employer would remain bound by the prohibition against seeking or receiving prohibited payments from prospective employees, including recruitment-related fees at 655.135(j).

f. Foreign Government Sharing/SORN

The Department also received comments regarding whether to allow the sharing of recruitment information, including the contracts and agreements between agents or recruiters and employers, with foreign governments that have territorial jurisdiction over the agent or recruiter at issue for investigative or enforcement purpose. In particular, the Department sought comments on the potential benefits of sharing this information, the scope of the content that should be shared, whether confidential business information is often included in recruiter agreements, and whether the Department should disclose the information or agreements to foreign governments in any circumstances.

As discussed above with regard to the disclosure of information of recruiters generally, the Department believes sharing this information where appropriate would not only increase transparency throughout the international recruitment chain, but also help hold accountable those foreign labor recruiters who engage in improper conduct.

Trade associations and a couple of farmers generally opposed the sharing of foreign labor recruiter information with foreign governments, with employer Titan Farms, LLC alongside trade associations IFPA, TIPA, and GFVGA expressing concern that this could impact farmers and businesses ''beyond the purpose of this rulemaking,'' including ''food safety, trade impacts, and foreign enforcement at business operations within the foreign country,'' but did not articulate how this information would have these impacts. Another advocacy organization, the U.S. Chamber of Commerce, opposed such sharing and stated employers would be ''loathe to share such sensitive business information,'' without specifying if this information referred to those in contracts and agreements or any information-sharing with foreign governments. Farmworker Justice expressed support for sharing information with foreign governments but noted that they did not believe this would meaningfully address alleged fraud in foreign labor recruitment. Wafla believed the information should be shared only if the U.S. suspected a violation of international law, noting the information contained in the agreements needed to remain confidential otherwise.

In light of commenters' general opposition, and only limited support, the Department declines at this time to amend the regulatory text to allow for the sharing of foreign labor recruiter information, including the contracts and agreements among agents, recruiters, and employers, with foreign governments. However, the Department still believes that open lines of communication and transparency are important. Therefore, the Department intends to modify the relevant SORN, which details how the Department collects and maintains information, to allow for the sharing of foreign labor recruiter information that will be available to the public with the foreign government that has jurisdiction over a foreign labor recruiter for appropriate investigative or enforcement purposes. The Department emphasizes that the contracts and agreements between the employers and the foreign labor recruiters will not be made public, or disclosed to foreign governments, unless otherwise required by law. The Department believes this strikes a respectful balance between the privacy concerns of commenters and the need for open lines of communication with our international partners.

D. Labor Certification Determinations

1. Section 655.167, Document Retention Requirements of H–2A Employers

The Department proposed a technical change to § 655.167(c)(6) to update this paragraph's outdated cross-reference to the regulatory citation for the definition of ''work contract.'' The Department proposed another technical change to § 655.167(c)(7) to add ''to'' before ''DHS.''

As discussed above, the Department proposed a new record retention paragraph at § 655.167(c)(8) that would require the employer to maintain the foreign worker recruitment information

required by § 655.137(a) and (b) for a period of 3 years. The Department received some comments related to the burden of retaining this information and keeping the information up-to-date. The Department responded to these comments in the preamble to § 655.137 above. The Department also proposed a new § 655.167(c)(9) that would require the employer to retain the additional employment and job-related information specified in § 655.130(a)(2) and (3) for the 3-year period specified in § 655.167(b). As noted above, the Department received one comment specifically addressing this document retention requirement. The Department addressed this comment in the preamble to § 655.130. The Department is adopting this proposal with one change, consistent with § 655.130(a)(3), to clarify that the employer must retain information about all managers and supervisors of workers employed under the H–2A Application, notwithstanding whether those managers or supervisors are employed by the employer or another entity. The Department also proposed new paragraphs at § 655.167(c)(10) and (11) to require records of progressive discipline and termination for cause, as discussed more fully in the preamble to § 655.122(n).

The Department proposed a new paragraph (c)(12) that requires the employer to retain evidence demonstrating the employer complied with new § 655.175(b)(2)(i), which requires employers with an unforeseen minor start date delay to notify the SWA and each worker to be employed under the approved H–2A Application of the delay. The Department did not receive comments on this evidence of notice retention obligation and has adopted the proposal, without change, in this final rule.

E. Post-Certification

1. Section 655.175, Post-certification Changes to Applications for Temporary Employment Certification

The Department proposed a new § 655.175, as well as a related recordkeeping obligation at § 655.167(c)(12) and conforming changes to § 655.145(b), to clarify employer obligations in the event of a delay in the start of work. The changes distinguish post-certification delays to the start of work from pre-certification requests to change the total period of employment and they also extend existing compensation protections from § 653.501 to all H–2A and corresponding workers. In the current regulations, § 655.145(b) addresses both the process an employer must follow to request a minor change to the total period of employment before the CO has made a final determination and the process an employer must follow to request a post-certification delay in the start date of work. Under existing paragraph (b), an employer seeking a minor change to the period of employment must request approval from the CO, show that the delay was caused by unforeseeable circumstances, and demonstrate that the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period. Paragraph (b) also requires an employer seeking a post-certification delay in the start of work provide housing and subsistence to workers who had already begun traveling to the place of employment, and the Wagner-Peyser Act regulations at § 653.501(c) separately require the employer to provide notice of the delay to the SWA and compensation to workers where the employer failed to comply with notice requirement.

For clarity, the NPRM proposed to revise § 655.145(b) to address only pre-determination amendments to the period of employment and proposed to relocate the provisions that address post-certification delays to the start of work from § 655.145(b) to a new provision at § 655.175, within the section of the regulations that would broadly address post-certification activities. To further distinguish the topics, the Department proposed to continue to use the term ''amendment'' in § 655.145(b) to refer to minor changes requested by the employer before the CO's determination and to use the term ''delay'' in proposed § 655.175 to refer to a post-certification delay in the start of work. The Department additionally clarified that post-certification changes are not permitted unless specified in this subpart (*i.e.,* post-certification extensions continue to be permitted under § 655.170).

Proposed § 655.175 included several changes to modify the post-certification requirements for delays in the start of work and to strengthen protections for workers in the event they are not provided adequate notice of the delay. The Department proposed to define a ''minor'' delay in the start of work as a delay of 14 calendar days or fewer. Consistent with proposed § 653.501(c) and current § 655.170(a), the Department proposed to eliminate the requirement that the employer must request CO approval for a minor delay to the start of work. Instead, the Department proposed to require employers to notify the SWA and each worker to be employed under the approved H–2A Application of the delay, at least 10 business days before the certified start date, and to retain evidence of notification to workers for 3 years. As such, under this proposal, the contractual start date would not change as it would under the current process requiring CO approval to change the start date of employment.

The Department proposed to extend the compensation protections at § 653.501(c)(5) to H–2A and corresponding workers by requiring the employer to compensate workers during the delay period when the employer fails to provide notice to workers. Specifically, where the employer fails to provide timely notification to workers, proposed § 655.175(b)(2)(ii) would require the employer to compensate workers at the rate of pay required under subpart B for each hour of the offered work schedule in the job order that work is delayed, for a period up to 14 calendar days. The Department proposed to require that the employer fulfill this obligation to the worker by no later than the first date the worker would have been paid had they begun employment on time. The Department proposed to consider compensation paid to workers under paragraph (b)(2)(ii) to be hours offered to the worker when determining an employer's compliance with the § 655.122(i) three-fourths guarantee obligation. The Department also proposed to permit an employer to reduce the compensation owed under paragraph (b)(2)(ii) by an amount equal to any wages paid to the worker(s) for work performed during the delay period specified in paragraph (b)(2)(ii), provided the wages are paid timely and the work is otherwise authorized by law. However, the Department did not propose to permit the employer to credit wages for unauthorized work, including work performed by H–2A workers outside the location or duties certified in the job order. Finally, proposed § 655.175(b)(1) modified the existing subsistence obligations, which are currently outlined in § 655.145(b), by requiring employers to provide daily subsistence to all workers who are already traveling to the place of employment, upon their arrival and without cost to the workers until work commences, except for days when the employer provides workers compensation under proposed paragraph (b)(2)(ii). Proposed paragraph (b)(1) also would remind employers of their obligations under the contract, including housing as required under § 655.122(d).

The Department received many comments on these proposed changes from individuals, workers' rights advocacy organizations, labor unions,

public policy organizations, legal aid organizations, employers, trade associations, agents, Federal elected officials, SWAs, and an immigration lawyers' association. Most of these comments were generally supportive of the proposed modification of employer obligations in the event of a delay in the start of work, clarification of the definition of minor delay, and changes to the procedures to provide workers notice of the delay. Farmworker Justice requested stronger employer requirements related to notice of the delay to workers and to housing and subsistence obligations. Several trade associations and agents requested revisions to clarify an employer's obligations in the event of government processing delays and to provide additional flexibility related to post-certification delays in the start date.

A comment submitted by an agent, másLabor, and endorsed by other commenters generally supported the definition of 'minor delay' as a delay of 14 calendar days or fewer. Trade association and employer commenters like IFPA, U.S. Custom Harvesters, Inc., and Titan Farms, LLC supported ''the clear delineation of what constitutes a minor delay'' and believed the proposal struck ''a balance of the reality of agricultural production which inherently is hard to predict, subject to weather patterns, and crop growth.'' Similarly, wafla was ''generally supportive of [the] idea'' of clarifying post-certification amendments, supported defining 'minor delay' as 14 calendar days or fewer, noted it ''aligns with 'short-term' extensions of two weeks,'' supported elimination of CO review of start date delay requests, and endorsed changes that require ''employer notification . . . to the SWA and each worker at least 10-days before the certified start date.''

MásLabor urged the Department to broaden the ''unforeseeable circumstances'' definition and remove the requirement that the circumstances jeopardize crops or commodities. MásLabor asserted that circumstances may delay work before crops or commodities exist, such as where catastrophic flooding requires the employer to ''prepar[e] a new field for planting'' and delays the start date of work. MásLabor suggested the final rule should ''partially mirror the standards utilized in contract impossibility requests'' at § 655.122(o) to permit delays caused by ''external circumstances that do not directly or precisely result in the crops themselves being in jeopardy.'' MásLabor noted that a ''start date delay is far less extreme of a measure than contract impossibility'' and asserted it does not make sense to ''have a more stringent standard for the former than currently exists for the latter.'' Specifically, másLabor urged the Department to revise § 655.175(b) to replace the language ''due to circumstances that could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period'' with the broader language ''due to unforeseeable circumstances beyond the control of the employer.'' The Department received similar comments from McCorkle Nurseries, Inc.

The Department declines to adopt a broad standard that would permit a delay in the start of work in any circumstance the employer determines is unforeseeable and necessitates a delay. This final rule retains the standard OFLC has applied historically under § 655.145(b) and proposed to retain in § 655.175(b). The Department intends for post-certification delays in the start of work under § 655.175(b) to be rare and limited to situations where unforeseen circumstances necessitate a minor delay after the Department has certified the H–2A Application and the employer's crops or commodities would be in jeopardy prior to the expiration of an additional recruitment period. The Department acknowledges that the actual day work begins may vary due to such factors as travel delays or crop conditions at the time the employer expects work to begin. The need for flexibility has been accounted for by permitting minor delays in limited circumstances under § 655.175(b) and by providing for emergency filing procedures in cases where an employer faced with exigent circumstances necessitating a longer delay must withdraw the application and file a new application under § 655.134. However, such flexibilities must be measured against the need to ensure employers provide accurate start dates to the Department and the need to ensure H–2A and corresponding workers are provided employment and compensation under the terms included in the work contract.

When filing an H–2A Application, the employer represents that it has a need for full-time workers during the entire certification period. It is important to the integrity of the H–2A program to have policies in place to ensure that employers have accurately stated their temporary need and the terms and conditions of employment to prospective U.S. workers, H–2A workers, and corresponding workers. The first date the employer identifies on the job order and H–2A Application is used as the date on which work will start for purposes of recruitment and for calculating program requirements (*e.g.,* the positive recruitment period under § 655.158). As the Department has noted in prior rulemaking, ''[c]hanges to start dates, especially as the practice has become more common, also raise a concern that U.S. workers who might indeed be available for work on the new start date were not given the chance to apply originally.'' 2008 H–2B FR, 73 FR 78019, 78046 (Dec. 19, 2008). In addition, ''[t]o the extent that employers more accurately describe the amount of work available and the periods during which work is available, it gives both U.S. and foreign workers a better chance to realistically evaluate the desirability of the offered job.'' 2012 H–2B FR, 77 FR 10038, 10073 (Feb. 21, 2012); 2015 H–2B IFR, 80 FR at 24066. Accurate start dates help to ensure ''U.S. workers will not be induced to abandon employment [or] to seek full-time work elsewhere at the beginning of the season . . . because the employer overstated the number of employees it actually needed to ramp up'' operations. 2012 H–2B FR, 77 FR at 10073. Similarly, it helps to ensure U.S. workers will not be ''induced to leave employment at the beginning of the season . . . due to limited hours of work because the employer misstated the months during which it reasonably could expect to perform the particular type of work involved in that geographic area.'' *Id.* As Farmworker Justice commented—and the Department agrees—''[a]ll workers consider the dates of employment in choosing between job options and may further suffer an opportunity cost for having foregone alternative work at home in reliance on a particular start date for the new employment.''

As under the current regulations, this final rule permits an employer to delay the start of work for a brief period in a limited set of unforeseeable circumstances, instead of filing a new H–2A Application, if crops or commodities would be in jeopardy prior to an additional recruitment period. This final rule, however, does not require the employer to obtain CO approval for a minor delay request and requires compensation under § 655.175(b)(2)(ii) only where the employer fails to provide the notice required under paragraph (b)(2)(i). The current limitation on the circumstances in which an employer may delay the start of work rather than file a new application is necessary to ensure employers provide accurate start dates at the time of filing and to protect workers from the adverse effects of a delay in the start of work. The

Department has not encountered difficulties in administering this standard when adjudicating employer requests under current § 655.145(b). The Department believes this limitation remains necessary, especially given that this final rule eliminates the process for requesting and adjudicating an employer's request for a minor delay of the start date of work under § 655.175(b). Broader language permitting the employer to delay the start of work, without CO approval, in any case where an employer determines unforeseen circumstances require delaying work, would be overly broad and ambiguous and likely would make § 655.175(b) less clear to employers and more difficult for the Department to enforce. It would also be less effective in ensuring accurate start dates are indicated at the time of filing and recruitment, and it would be insufficient to protect the interests of U.S. job seekers, who may be available to accept the job on a different start date, or H–2A and corresponding workers, who expect to begin work at the time and place specified in the work contract.

The Department also disagrees with commenters' characterization of the § 655.122(o) contract impossibility standard as broader or more flexible than the standard in § 655.175(b) and disagrees with commenters' assertion that a broader or more flexible standard at § 655.175(b) is necessary or more consistent with the policy aims of § 655.175(b) and § 655.122(o). The contract impossibility provision requires the employer to not only show the ''services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God,'' but also that these specific circumstances ''make[] the fulfillment of the contract impossible.'' The Department does not believe it is necessary to specifically reference ''fire, weather, or other Act of God'' in § 655.175(b) because the language ''circumstances that could not have been foreseen'' is broad enough to encompass each type of potential circumstance. The limitation on delays under § 655.175(b) (formerly § 655.145(b)) to situations in which crops or commodities would be in jeopardy prior to an additional round of recruitment and the § 655.122(o) requirement to show that circumstances make it impossible to fulfill the work contract serve similar functions and aim to prohibit the abuse or overuse of what the Department considers to be drastic measures in response to unforeseeable exigent circumstances.

The Department disagrees as well with commenters' assertion that it is necessary to broaden § 655.175(b) to encompass all exigent circumstances that may necessitate a delay after OFLC has certified the H–2A Application. If, as hypothesized by one commenter, the employer had to undertake remedial measures to ''prepare the ground for planting activities'' after ''catastrophic flooding'' before planting crops, the employer may withdraw its application and file a new application under the emergency procedures provision at § 655.134. In fact, the extent of damage contemplated by the example in those comments is unlikely to meet the definition of ''minor delay'' in § 655.175(b) because the necessary delay would likely be greater than the maximum 2-week minor delay provided for in that regulatory provision. The emergency procedures provision at § 655.134 permits an employer to use the emergency application filing process where the employer shows there is good and substantial cause to waive the required time period for filing an H–2A Application and the CO has determined there is ''sufficient time to test the domestic labor market on an expedited basis.'' The factors that may constitute good and substantial cause are nonexclusive, but the Department has clarified that these situations involve ''the substantial loss of U.S. workers due to Acts of God or similar unforeseeable man-made catastrophic events (*e.g.,* a hazardous materials emergency or government-controlled flooding), unforeseeable changes in market conditions, pandemic health issues, or similar conditions that are wholly outside of the employer's control.'' 2019 H–2A NPRM, 84 FR at 36205. The Department has noted, for example, that ''if unusually heavy storms and rains occur after the employer submits its [H–2A Application], the employer can assess impacts on crop conditions and its temporary need and may determine it is appropriate to reduce staffing levels for the job opportunity described on the pending [Application] and file an emergency situation [Application] to address its need for labor or services under the new circumstances.'' 2022 H–2A Final Rule, 87 FR at 61768.

The Department also received comments from SWAs, trade associations, agents, elected officials, and workers' rights advocacy organizations regarding the proposed requirement that employers contact workers and the SWA, rather than the OFLC CO, to provide notice of the delay. Most comments were supportive of the proposal. Farmworker Justice supported the proposal as ''a common-sense change'' because the employer ''has been in prior contact with the workers, either directly or through agents'' and ''is much more likely than the SWA to have the most current and effective contact information.'' They added that the proposal would relieve some of the burden on SWAs that must prioritize allocation of limited resources. California LWDA supported the proposal to require employers notify workers of the delay directly, asserting it would be more effective than the current approach that requires employers and workers to contact the SWA.

Some commenters suggested specific changes to the proposal to ensure notice of the delay is timely and can be understood by the worker who receives it. Washington State expressed concern that the proposed rule did not contain a requirement to ''notify SWAs of post-certification changes'' and urged the Department to ''include a requirement that employers notify SWAs of post-certification changes at the same time they notify [the Department].'' Farmworker Justice urged the Department to strengthen the notice requirement by requiring that the notice of delay be provided in the primary language spoken by the worker; clarifying that workers ''must actually receive the notice'' and it is not sufficient for employers to show ''merely that notice be sent out;'' requiring employers ''use the most reliable or speediest form of communication'' such as requiring ''electronic or telephonic correspondence'' instead of slower methods like postal mail that workers may not receive before departing; and requiring employers ''reach out to farm labor contractors or local recruiters, if unable to reach workers themselves, to ensure workers get the message.''

A comment submitted by másLabor and endorsed by several other commenters opposed any written contact requirement because ''[m]any U.S. applicants do not provide an email address, meaning an employer would be forced to notify workers by mail[,] which may not be feasible given the time constraints.'' The commenters stated that, in many instances, ''the employer is only given a phone number and perhaps a physical address'' and in such cases the employer ''cannot satisfy the Department's [written] notice requirement.'' The commenters also asserted postal mail is not an effective means to communicate a last-minute delay to the start date because workers may not receive notice in time if the Department uses the date the employer

sends the notice by postal mail and, conversely, the employer must send the postal mailing more than 10 days prior to the delay if the Department uses the date the workers receive notice of the delay. The commenters objected to any overnight mail delivery requirement as costly and noted that it would still require employers to send the notice more than 10 days prior to the start date.

In response to Washington State, the Department notes that the NPRM and this final rule require the employer to notify both workers and the SWA that the start of work is delayed. In response to workers' rights advocacy organization commenters and a trade association, the Department agrees that electronic notice of delays will be most effective given the time-sensitive nature of the notice. This final rule requires the employer to provide notice by email, telephone, or both if the worker provides an email address and telephone number. If the worker does not provide an email address or phone number, the employer must provide written notice using the worker's postal address or other contact information. The Department also agrees that the notice to workers must be in a language that workers can read and understand. The Department has revised proposed § 655.175(b)(2)(i) to require the employer send notice to each worker in a language understood by the worker, as necessary or reasonable. This is consistent with existing work contract disclosure requirements at § 655.122(q), which the Department has noted are necessary to ensure an employer ''provide[s] the terms and conditions of employment to a prospective worker in a manner permitting the worker to understand the nature of the employment being offered and the worker's commitment under that employment.'' 2009 H–2A NPRM, 74 FR 45906, 45916 (Sept. 4, 2009). The Department is not adopting the workers' rights advocacy organization suggestion to require that the employer confirm all workers received the notice of delay by reaching out to labor contractors and recruiters to locate workers who do not respond. This would impose an undue burden on employers, in part due to the same time sensitivity concerns that necessitate an electronic notice requirement. The Department recognizes that sending a notice of delay by mail may not ensure that the worker receives notification of the delay. Late notice, however, may still be preferable to no notice at all where more expedient means are not available. For this reason, notice by mail may not be utilized if communicating via email, telephone, or both is a viable option. An employer who does not possess electronic means of contacting a worker will not be required to send a notice by mail earlier than it is required to send an electronic notification. The Department recognizes that the unexpected nature of circumstances that justify a delayed start date may not permit the employer to send postal notice that reaches a worker at least 10 days before the date of need. It may also be difficult for the Department to define the scope and level of due diligence imposed by the requirement and to later enforce such a requirement. However, the Department notes that the employer remains obligated to comply with the terms and conditions of the certified H–2A *Application for Temporary Employment Certification* beginning on the first date of need certified, including employer-provided housing, as well as subsistence under § 655.175(b)(1), if the worker does not receive the notice.

The Department also received comments both in support of and in opposition to the proposal to require that employers compensate workers, for a period of up to 14 calendar days, in the event of a delay in the start of work if the employer fails to provide the notice required by paragraph (b)(2)(i). Forty-three Federal elected officials supported the proposal to require compensation for up to 14 days in the event of a delay without proper notice, stating generally that the proposal will help to ''protect[ ] against exploitative practices commonly used by employers, especially as it relates to worker pay.'' Farmworker Justice noted that employers must provide compensation to U.S. workers in the event of a delay under § 653.501(c) and stated there is ''no legitimate reason to exclude H–2A workers, who often travel further, absorb greater costs, and have fewer alternative options such as finding interim employment elsewhere.'' They asserted this provision ''is particularly important in light of the number of complaints farmworker legal services providers have received from H–2A workers who have no food and no money for days to weeks at the start of the job when no work is available, notwithstanding the promised start date on the clearance order.'' The UFW Foundation cited accounts from eight farmworkers detailing the ways delayed start dates had caused severe financial hardship to workers and UFW, and other commenters like the North Carolina Justice Center stated the Department's proposals would help to provide ''a safety net during a particularly vulnerable time, when farmworkers have little or no savings and are awaiting their first paycheck.'' Similarly, Farmworker Justice supported the proposal as a necessary protection for foreign workers who ''incur significant incoming travel expenses and fees, sometimes while paying high interest rates, including transportation to the U.S. consulate, hotel costs while waiting for their consular appointment, transportation costs to the worksite, visa fees, border crossing fees, and daily subsistence while en route with travel sometimes taking ten or more days.'' They added that delayed start dates also burden U.S. workers who ''incur significant inbound travel expenses when traveling from their homes to remote worksites, only to find that the start of work has been delayed.'' They noted, ''[a]ll workers consider the dates of employment in choosing between job options and may further suffer an opportunity cost for having foregone alternative work at home in reliance on a particular start date for the new employment.''

Farmworker Justice also supported the Department's proposal to consider only employer offers of work that are within the scope of the approved job order, stating this is a necessary ''clarification to deter unsafe or undercompensated work'' not approved in the job order. MásLabor supported the proposal to permit employers to credit the required compensation toward the employer's three-fourths guarantee obligation at § 655.122(i) because it will help ''mitigate the financial burden associated with the requirement'' and avoid ''potential 'double dipping' that would result'' if employers are required to compensate workers for the delay and then also must provide ''compensation under the three-fourths guarantee for the same two weeks if there is a shortfall.''

In contrast, several comments submitted by trade associations, agents, and employers expressed opposition to the compensation proposal, in whole or in part. MásLabor expressed concern that the proposed changes at § 653.501(c) and new § 655.175 failed to consider that ''an employer requesting a delay to the start date is itself experiencing hardship of some sort'' and the proposal ''tip[s] the scales too heavily in favor of the workers by *dramatically* increasing the costs to employers.'' Labor Services International asserted, generally, that the proposal will create ''communication chaos'' and an ''administrative nightmare'' and expressed concern employers will be required to provide compensation for delays in the start of work caused by a government delay in processing,

especially delays in ''availability of consular appointments.'' FFVA specifically expressed concern employers will be required to compensate workers for minor delays caused by ''the government's failure to timely approve H–2A workers to cross the border,'' such as when worker entry into the U.S. is delayed ''for multiple days without any notice'' to the employer due to ''unannounced section 221g investigations'' by the State Department. The commenter urged the Department not to require compensation in cases where the delay is ''caused solely by the government.'' Alternatively, the commenter urged the Department not to require compensation ''until 7 days after the initial start date . . . , and only for those workers who have departed for the job opportunity,'' which the commenter asserted would ''allow practical flexibility for employers [and] account for the very real delay caused by the government, while considering the protections needed for workers who have already left their homes for the job.''

The Cato Institute opposed the proposal because it would provide benefits and compensation not received by workers outside of the H–2A program and asserted this would incentivize employment of undocumented workers by ''rais[ing] the cost of the H–2A program relative to illegal hiring.'' NCAE supported clarifications of the post-certification delay process, generally, but ''oppose[d] a requirement to pay for work not performed.'' The commenter provided a hypothetical in which an employer's start of work is delayed due to a hurricane pushing predators into an orange grove and it may take longer than the employer anticipated to dry the grove or clear it of predators, in which case, the commenter expressed concern, ''due to this 'Act of God' '' the proposed compensation obligation would require the employer ''to make payment for work that was never performed,'' which ''may jeopardize the enterprise.'' AILA noted that brief start date delays due to weather and other unforeseen circumstances are common in agriculture and the commenter urged the Department ''not to require additional compensation obligations for employers in this context.'' MásLabor opposed extending to H–2A and corresponding workers the compensation benefits currently provided to U.S. workers under § 653.501 because it would be a ''dramatic expansion of the existing requirements.''

As noted above, under existing regulations, if an employer seeking to employ workers under either a criteria (H–2A) or non-criteria (non-H–2A) job order fails to timely notify the SWA of a start date change it must pay hourly wages to U.S. farmworkers who followed SWA contact procedures. *See* § 653.501(c)(3)(i) and (c)(5). Section 655.175(b)(2)(ii) in this final rule extends this obligation to H–2A workers and corresponding workers under the H–2A Application to ensure workers are compensated for anticipated hours not offered at the beginning of the work contract, similar to § 653.501(c), and applies in conjunction with the existing three-fourths guarantee at § 655.122(i), which ensures workers receive compensation for anticipated hours not offered during the contract period. The obligations in § 655.175(b)(2)(ii) will apply only in circumstances where the employer's start of work is delayed due to unforeseeable circumstances and crops or commodities would be in jeopardy prior to an additional recruitment period, and the compensation obligation will apply only where the employer fails to provide workers notice of the delay under paragraph (b)(2)(i). The procedure at § 655.175(b) will not apply when a worker's arrival and start of work is delayed due to, for example, government delays in scheduling appointments and interviews at the U.S. embassy or consulate. As the Department has explained under the current regulations, the ''provision for requesting a delayed start date applies when the employer wishes to delay the start date of all workers covered by the [H–2A Application],'' and it ''does not cover minor travel delays or slower than expected processing times at USCIS or a U.S. Consulate for workers coming from outside the U.S.; however, these delays should not delay any other worker's start date or the employer's start date of work.'' [109] The same is true under new § 655.175. The provisions at § 655.175(b) will apply only where the work under the approved H–2A Application will not begin on the certified first date of need but instead will be delayed for a period of no more than 14 calendar days. In a situation where the employer faces exigent circumstances and does not know how long the start of work will be delayed, such as when the employer does not know how long it will take to prepare an orange grove after a hurricane, the employer may withdraw the application and file a new application using emergency procedures at § 655.134, if applicable.

Wafla expressed concern the proposal would require employers to compensate workers under a piece rate in some cases, which would not be possible where no work has been performed due to a delay. The commenter urged the Department to revise proposed § 655.175(b)(2)(ii) by removing the language ''same rate of pay required under this subpart B'' and adding reference to an hourly rate. The Western Range Association expressed concern the compensation proposal would impact ''employers who pay monthly salaries under the 'special procedures' in 20 CFR 655.200 *et seq.* in a way that it would not for farms that pay on an hourly basis'' and the commenter noted that where one of these employers experiences a start date delay, the employer's ''season is usually pushed back or additional hours are worked in order to catch up for the delay.''

The Department agrees with the trade association commenter that paragraph (b)(2)(ii) should not reference production-dependent compensation rates like piece rates, which cannot be calculated during a delay in the start of work, and agrees the provision should reference only an hourly rate. The Department has revised paragraph (b)(2)(ii) to require the employer provide compensation at the highest applicable hourly rate. The Department has also revised paragraph (b)(2)(ii) to provide that an employer that is subject to the wage rates at § 655.211(a) and fails to provide the required notice of delay must compensate workers during the delay at the hourly rate that is the highest of the agreed-upon collective bargaining wage rate, the applicable hourly minimum wage imposed by Federal or State law or judicial action, the monthly AEWR, or any other wage rate the employer intends to pay. If that rate is expressed as a monthly rate, such as the monthly AEWR, the employer must prorate the monthly rate as necessary to compensate the worker for each hour during the delay period in accordance with § 655.175(b)(2)(ii). Employers of workers in the herding and production of livestock on the range are subject to a monthly AEWR due to ''difficulties in tracking and paying an hourly wage rate to workers.'' 2015 H–2A Herder FR, 80 FR at 62987. Herder employers are subject to the ''standard H–2A pay frequency, and the [2015] Final Rule requires that payments be made at least twice monthly.'' *Id.* at 62986. The Department noted that ''calculating the twice-monthly payment can be easily accomplished by evenly dividing the required monthly rate into

[109] DOL, *OFLC FAQs, Round 6* (Feb. 29, 2012), *https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/h-2a_faq_round6.pdf.*

two payments.'' *Id.* In addition, prorating the monthly wage rate is already permitted in certain circumstances under § 655.210(g)(2). The Department does not believe it will be any more difficult for employers to determine the rate it must pay a worker for a period of up to 2 weeks during which the start date is delayed and to provide this compensation on this same date it would have provided workers the first of 2 monthly payments had work begun on time.

The Department also received comments from workers' rights advocacy organizations, labor unions, SWAs, individuals, and elected officials in support of the proposed changes to the housing and subsistence obligations, though some commenters suggested additional protections. Farmworker Justice supported the housing and subsistence provisions and noted this existing requirement has ''helped encourage a correct assessment of the start date.'' Washington State supported the proposal to require employer-provided housing during the delay but noted the NPRM did not require the employer to provide meals or money for meals during the delay. The SWA expressed concern this existing regulatory ''gap'' ''has caused considerable hardship for workers'' in situations where the employer provides kitchen facilities during the delay period but does not provide workers groceries or money and transportation to purchase groceries. The SWA urged the Department to require employers to provide workers meals, or provide money and transportation to buy groceries, during the delay period. An individual commenter urged the Department to go further in this final rule and require employers provide a ''minimum standard compensation package'' to workers even where the employer provides notice of the delay.

The Department declines to adopt the suggestion to require employers provide workers a daily per diem payment or a total compensation package during any delay period and is adopting the proposed housing and subsistence provision at § 655.175(b)(1) without change. The Department believes the requirements to provide or reimburse workers subsistence in the same amount required during travel, together with the notice and compensation obligations in § 655.175(b)(2) and three-fourths guarantee obligation at § 655.122(i), will ensure workers are not disadvantaged by a delay in the start of work and will place workers in the position they would have been in had work begun on time. Employers also must comply with all other requirements of the certified H–2A Application, including housing under § 655.122(d), beginning on the first date of need certified. However, the Department appreciates the comments and encourages stakeholders to review the Department's existing, extensive guidance relating to travel-related subsistence requirements under § 655.122(h) and the provision of meals under § 655.122(g).[110]

This final rule adopts the proposal to extend to H–2A and corresponding workers the existing obligation, at § 653.501(c), to compensate workers for the delay if the employer fails to provide notice of the delay to workers. These provisions will ensure that, in rare cases a worker who is already en route to the worksite despite the employer's provision of 10 business days' notice or does not receive such notice (and therefore, is not entitled to compensation under § 655.175(b)(2)), the worker will still receive subsistence costs no later than the first date the worker would have been paid had work started on time. The Department has concluded these provisions best balance the need for agricultural employers to respond to unforeseeable exigent circumstances and the need to ensure workers receive compensation and benefits under the anticipated terms and conditions of employment and do not suffer financial hardship due to a minor delay in the start of work.

The Department also received some comments that were beyond the scope of this rulemaking. MásLabor urged the Department to revise § 655.175 by adding a provision that would permit custom combine employers to ''add worksites and customers to its itinerary [after certification] provided that such worksites/customers are within the previously-approved [AIEs]'' and suggested the new provision should incorporate language from an FAQ the Department published in February 2013. Specifically, másLabor urged the Department to add a new § 655.175(c) that states an employer certified under §§ 655.300 through 655.304 that ''performs work in multiple [AIEs] . . . may augment its scheduled itinerary with additional worksites located within the previously approved [AIEs],'' provided the employer maintains an up-to-date itinerary and retains copies of contracts or agreements with previously undisclosed fixed-site businesses. These commenters also urged the Department to permit additional pre-certification amendments, such as requests to ''add, modify, or remove a job requirement from the Application after the Notice of Acceptance has been issued.'' Specifically, the commenters suggested the Department should add a new § 655.145(c) that would permit pre-certification changes ''including but not limited to changes or additions to job duties, job requirements in accordance with § 655.122(b), productivity standards, or worksite or housing locations,'' if approved by the CO.

The Department declines to adopt the commenters' suggestions. Adding provisions permitting the addition of worksites after certification would not be a regulatory change that could have been anticipated by the public and the public would therefore not have been aware it is a proposal on which comments should be offered. The comment is, therefore, beyond the scope of this rulemaking, and the Department declines to adopt the suggestion at this time. However, the Department notes that it addressed special procedures and post-certification changes to H–2A Applications for custom combine employers in the 2022 H–2A Final Rule. That rule rescinded special procedures contained in informal guidance (Training and Employment Guidance Letters), codified procedures for employers that employ workers engaged in custom combining according to a planned itinerary across multiple AIEs, and ''provide[d] appropriate flexibilities for employers engaged in these unique agricultural activities that are substantially similar to the processes formerly set out in administrative guidance letters.'' 2022 H–2A FR, 87 FR at 61663.

Similarly, revising § 655.145 to permit additional pre-certification application amendments, as suggested, would be a major change to the regulation that commenters and stakeholders could not have anticipated as an outcome of the minor proposed changes to that section or the substantive proposed changes to the provisions governing post-certification start date delays at new § 655.175, thus warranting additional public notice and opportunity for comment. As such, the Department declines to adopt the suggestion in this final rule. However, when addressing similar comments in the 2022 H–2A Final Rule, the Department concluded that ''allowing applicants to request corrections to applications without restrictions would run counter to the Department's efforts to modernize the temporary agricultural labor certification process'' and noting that employers who wish to make

[110] *See, e.g.,* OFLC, *Meal Charges and Travel Subsistence, https://www.dol.gov/agencies/eta/foreign-labor/wages/meals-travel-subsistence* (last accessed Feb. 8, 2024); DOL, *WHD Fact Sheet #26D: Meal Obligations for H–2A Employers, https://www.dol.gov/agencies/whd/fact-sheets/26d-meal-obligations-H-2A* (last accessed: Feb. 8, 2024).

application changes outside of those permitted in § 655.145 may file a new H–2A Application to accommodate the changes needed, utilizing emergency filing procedures at § 655.134, if applicable. *Id*. at 61750.

After considering all comments, the Department is adopting the proposals with some revisions to paragraphs (b)(2)(i) and (b)(2)(ii), as noted above. As under the current regulations, this final rule permits delays in the start of work only when such a delay is minor and due to unforeseen circumstances and the employer's crops or commodities will be in jeopardy prior to expiration of an additional recruitment period. Paragraph (b) limits minor delays to delays of no more than 14 calendar days from first date of need.

Paragraph (b)(2)(i) requires the employer to notify the SWA and each worker to be employed under the approved *Application for Temporary Employment Certification* of the delay at least 10 business days before the certified start date of need and § 655.167(c)(12) requires the employer to retain evidence demonstrating the employer notified the SWA and each worker of the delay for a period of 3 years. This final rule requires the employer to contact the worker in writing, in a language understood by the worker, as necessary or reasonable, using the contact information the worker provided to the employer. If the worker provides electronic contact information, such as an email address or telephone number, the employer must send notice using that email address and telephone number and must send notice using both if the worker provides contact information in both formats. The employer may provide notice to the worker telephonically, provided the employer also sends written notice to the email or postal address provided by the worker. If the worker does not provide an email address or phone number, the employer must provide written notice using the worker's postal address or other contact information.

Paragraph (b) provides that in the event of a minor delay (no more than 14 calendar days), the employer must provide to all workers who are already traveling to the place of employment, upon their arrival and without cost to the workers until work commences, daily subsistence in the same amount required during travel under § 655.122(h)(1), except for days for which the worker receives compensation under § 655.175(b)(2)(ii) of this section. The employer must fulfill this subsistence obligation to the worker no later than the first date the worker would have been paid had they begun employment on time. Paragraph (b)(1) also includes a reminder to employers that, even in the event of a minor delay in the start of work, the employer must continue to comply with all other requirements under the certified H–2A Application, including, but not limited to, the provision of housing as described in the job order. The Department has made a minor revision to this paragraph and paragraph (b)(ii) to remove introductory clauses that reference the 14-calendar-day minor delay period, as this language is necessary only in paragraph (b) and inclusion of the language in subordinate paragraphs may create confusion or uncertainty regarding an employer's obligation to provide subsistence until work commences under paragraph (b)(1) or compensation for anticipated hours during the delay under paragraph (b)(2)(ii).

Under paragraph (b)(2)(ii), if the employer fails to provide the timely notification required under paragraph (b)(2)(i) of this section to any worker(s), the employer must pay the worker(s) the highest of the hourly rates of pay at § 655.120(a) (or, if applicable, the rate required under § 655.211(a)(1)), for each hour of the offered work schedule in the job order, for each day that work is delayed, for a period up to 14 calendar days. The employer must provide this compensation on the date workers anticipated they would receive their first paycheck had the work begun on time. Under paragraph (b)(2)(ii), the employer's wage obligation will apply in any case where the employer fails to provide notice of the delayed start of work at least 10 business days prior to the certified start date. This obligation will apply in conjunction with the three-fourths guarantee at § 655.122(i), which will continue to require employers to offer workers employment for a total number of work hours equal to at least three-fourths of the workdays of the total period, beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later. However, under § 655.175(b)(2)(iii), compensation paid to a worker under paragraph (b)(2)(ii) of this section for any workday included within the time period described in § 655.122(i) will be considered hours offered to the worker when determining an employer's compliance with the § 655.122(i) three-fourths guarantee obligation. The employer may reduce the compensation owed to any worker(s) under § 655.175(b)(2)(ii) by the amount of wages paid to the worker(s) for work performed within the time period described in paragraph (b)(2)(ii), insofar as such wages are paid timely and such work is covered by the job order or otherwise authorized by law. The employer may not credit toward the three-fourths guarantee any wages for unauthorized work, including work performed by H–2A workers outside the location or duties certified in the job order.

Paragraph (a) reminds employers that post-certification changes are not permitted unless specified in this subpart (*e.g.,* post-certification extensions continue to be permitted under § 655.170). Paragraph (a) also reminds employers that they must continue to comply with the terms and conditions of employment contained in the *Application for Temporary Employment Certification* and job order with respect to all workers recruited in connection with its certification. Employers are reminded as well that sanctions and remedies for an employer's failure to comply with the obligations required under this section may include, as appropriate, the recovery of such compensation, the assessment of civil money penalties, revocation of the approved certification under § 655.181, and, if warranted, debarment of the employer under § 655.182.

The Department has determined the new start date delay process at § 655.175(b) strikes an appropriate balance between the employer's need to respond to unforeseen exigent circumstances and the needs of agricultural workers to be apprised of changes to the terms and conditions of the job opportunity and compensated in accordance with the terms of employment the workers accept. The provisions related to compensation and subsistence will effectively address the hardship concern (discussed above in the preamble to § 653.501(c)) by providing workers a source of income should the employer fail to provide such workers sufficient notice of a delay in the start of work, while continuing to allow the employer flexibility to delay the start of work for up to 14 calendar days if necessitated by circumstances that could not have been foreseen and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period. The new compensation obligation in situations where workers are not notified of a start date delay will better protect agricultural workers from financial hardship they are likely to experience should they travel or otherwise rely on the information included in the job order, only to discover upon arriving

that work is not available to them. As workers' rights advocacy organizations noted in response to the NPRM, delayed start dates are harmful to workers, who value predictability and certainty in employment start dates, particularly where they turn down other work or must travel far to make themselves available to work at the time and place advertised in the job order. Farmworkers have expenses beyond housing and meals and cannot afford to lose expected pay for up to 2 weeks, should the actual start date be later than the first date of need offered. The beginning of the certification period is a particularly vulnerable time for workers, who may have little or no savings as they await a first paycheck; delays in the start of work and resulting first paycheck exacerbate this vulnerability and can lead to financial hardships. Providing up to 2 weeks of compensation, due at the time workers anticipate receiving their first paycheck had the work begun on time, provides a safety net for workers to support themselves when work is not available. Imposing these pay obligations in the event workers are not notified of a delayed start of work also may help to ensure growers accurately disclose the first date of need in the job order. The new provisions in this final rule also will increase the likelihood that workers will receive timely notification of any delay in the start of work and that employers maintain accurate records of notices they provide.

Limiting ''minor'' delays to delays of 14 calendar days or fewer eliminates ambiguity and aligns this provision with the conceptually similar provision at § 655.170(a), which limits ''short-term'' extensions to 2 weeks and does not require CO approval. As is the case for non-minor delays, where the anticipated delay would be more than 2 weeks or indefinite and cannot be considered ''minor,'' the employer may withdraw the application and refile, using emergency processing under § 655.134, as applicable, to engage in recruitment for the job opportunity, which will begin on a newly identified start date. If the employer cannot employ workers under the terms and conditions promised beginning on the certified start date and can only offer a fraction of the work hours in the 2 weeks following the certified start date (*e.g.,* the employer can offer only a single day of work, followed by several days without work or a similar offer of only minimal hours upon the worker's arrival, followed by an extended rest period), the Department will consider the employer's start date delayed and the employer will be required to comply with proposed § 655.175(b), including all housing, subsistence, and compensation obligations and the obligation to provide notice of the delay to workers and the SWA.

F. Integrity Measures

1. Section 655.182, Debarment

The NPRM proposed to revise 20 CFR 655.182 to shorten the time to submit rebuttal evidence to OFLC as well as shorten appeal times for debarment matters. The Department proposed these changes to increase the speed with which debarments would become effective by decreasing the time for parties to submit rebuttal evidence to OFLC, appeal Notices of Debarment to the OALJ, or appeal debarment decisions to the ARB from the OALJ. The Department received over 35 comments on this section and, for the reasons explained below, has decided not to adopt the proposal to reduce rebuttal and appeal times for debarment matters.

The Department proposed to amend § 655.182(f)(1) and (2) by reducing the period to file rebuttal evidence or request a hearing in response to a Notice of Debarment from 30 calendar days to 14 calendar days. The NPRM indicated that if the party received a Notice of Debarment but did not file rebuttal evidence, the Notice of Debarment would take effect at the end of the 14-calendar-day period unless the party requested, and the Administrator granted, an extension of time to submit rebuttal evidence. The Department proposed limited circumstances for granting an extension of time. The NPRM also proposed a reduction in time from 30 calendar days to 14 calendar days for employers to appeal a final determination of debarment and for any party to request the ARB to review the decision of the ALJ. In the NPRM, the Department reasoned that reducing these timeframes would lead to faster final agency adjudications that would more efficiently prevent H–2A program violators from accessing this program. As a result of a more expedited debarment process, workers in the United States would be protected from further harm.

The Department received comments both opposed to and in favor of these proposals. The comments supporting the proposed changes expressed general agreement with the NPRM's proposals to enhance integrity measures in the H–2A program but did not offer any specific explanation.

Many trade organizations, employers, and individuals expressed concerns that the shortened time frame could negatively impact a party's ability to defend themselves and their due process rights by limiting the time to review and gather all evidence needed to prepare and submit a rebuttal or file an appeal. Most of the same commenters worried that the shortened timeframe could infringe on a party's ability to obtain new counsel or consult counsel. Some commenters went as far as to say these likely outcomes went against the main goal of the NPRM, which sought to bolster program integrity and help protect workers from further harm. These commenters, and other SWAs, employers, and trade organizations, reasoned that parties should be afforded a broader timeframe to consider options and evaluate the evidence given the gravity and severe penalty imposed with a debarment action and argued the proposal would likely increase appeal filings, thereby creating backlogs in processing times.

Several trade associations argued that due process concerns were heightened during farmers' busy season given the time-sensitive and perishable nature of agricultural operations and products. Another commenter believed the likely result of the proposed change would incentivize a greater number of appeals that would result in an additional administrative burden for all parties.

To guard against any due process concerns, the Department proposed permitting parties to request an extension of time to submit rebuttal evidence. Several commenters, including trade associations and an individual employer, believed the standard to obtain an extension was too high in the NPRM and would only be granted in limited circumstances but did not explain why. Several commenters, including trade associations and an individual employer, offered an alternative approach that would require a party to notify the Department if it planned to file rebuttal evidence or request a hearing within the 14-day period but allowed parties the full 30 days from the Notice of Debarment or final determination of debarment to provide rebuttal evidence or request a hearing.

Having carefully considered the public comments, the Department does not adopt the proposal to shorten rebuttal and appeals time for debarment matters in the final rule. Although the proposed reduction in time would expedite the debarment process, the Department recognizes the due process concerns expressed by most commenters and has decided to retain the current regulatory timeframes. Given the severe penalty imposed by a

debarment action, the Department appreciates the comments emphasizing that it is important to safeguard an employer's due process rights and allow sufficient time to hire or consult counsel, if desired, and obtain the evidence needed for a rebuttal or to request a hearing. The Department also appreciates the comments from several agricultural organizations that noted that the shortened timeframe additionally could adversely impact farmers during their busy season given the nature of their work and products. Therefore, the Department has decided not to adopt such a change at this time for the reasons described above. Similarly, the Department, as described in the discussion of 29 CFR 501.20, has decided not to adopt the proposed changes to WHD's regulations governing the timeframe to appeal WHD debarment determinations.

After considering the commenters' alternative approach requiring notice to be filed within the 14-day period, but allowing 30 days to file a rebuttal or request a hearing, the Department declines to adopt the alternative approach for two reasons. First, since the Department is not adopting the NPRM proposal, there is no need to consider the alternative offered by several commenters. Second, the Department believes the alternative approach would unnecessarily complicate the rebuttal and debarment appeals process by increasing the administrative burden in tracking and processing these cases. Specifically, the alternative suggestion would increase the administrative burden on the Department, and potentially delay OFLC processing of these cases, by requiring additional tracking of: (1) employers who notify the Department of their intent to file rebuttals and a subsequent determination of whether the rebuttals were timely filed or not filed; and (2) employers who notify the Department of their intent to request a hearing and a determination of whether the requests were timely filed or not ultimately filed. The suggestion also would require modifications to the Department's electronic processing system, which currently does not have the functionality to track such notifications.

VII. Discussion of Revisions to 29 CFR Part 501

The Department proposed various revisions to the regulations at 29 CFR part 501, which set forth the responsibilities of WHD to enforce the obligations of employers under the H–2A program. The Department proposed these amendments concurrent with and to complement the changes ETA proposes to its regulations in 20 CFR part 655, subpart B, governing the certification of temporary employment of nonimmigrant workers employed in temporary or seasonal agricultural employment. As with the proposed revisions to ETA's regulations, the proposed revisions to 29 CFR part 501 focused on strengthening protections for agricultural workers and enhancing the Department's capabilities to monitor program compliance and take necessary enforcement actions against program violators.

A. Section 501.3, Definitions

In the NPRM, the Department proposed to define the terms *key service provider* and *labor organization* in § 501.3(a) to conform to the proposed definitions of these terms in 20 CFR 655.103(b) and for the reasons set forth in the discussion of proposed 20 CFR 655.135(h). The Department also proposed to remove the definition of the term *successor in interest* from § 501.3(a), to conform to and for the reasons described in the discussion of proposed 20 CFR 655.104. Finally, the Department proposed to add a new § 501.3(d), defining the term *single employer,* to conform to and for the reasons described in the discussion of proposed 20 CFR 655.103(e).

For the reasons described in the preamble discussion of 20 CFR 655.103(b), this final rule adopts the definition of *labor organization* as proposed. This final rule also adopts the definition of *key service provider* in 29 CFR 501.3(a) with the same modification as explained in the preamble discussing 20 CFR 655.103(b). For the reasons described in the discussion of 20 CFR 655.104, this final rule removes the definition of the term *successor in interest* from 29 CFR 501.3(a) as proposed. Additionally, this final rule adopts new § 501.3(d) as proposed, defining the term *single employer* to conform to and for the reasons described in the above discussion of 20 CFR 655.103(e).

B. Section 501.4, Discrimination Prohibited

In the NPRM, the Department proposed to revise § 501.4(a) to conform to the changes proposed to 20 CFR 655.135(h) that would expand and strengthen the Department's existing anti-retaliation provisions. The reasons for this proposal are described fully in the preamble discussion of 20 CFR 655.135(h). The Department did not propose any revisions to § 501.4(b) regarding WHD investigations and enforcement of § 501.4.

For the reasons described in the preamble discussion of the revisions to 20 CFR 655.135(h), this final rule adopts the proposed revisions to 29 CFR 501.4(a) with the same modifications as outlined in the preamble discussion of 20 CFR 655.135(h).

C. Section 501.10, Severability

As set forth in the discussion of proposed 20 CFR 655.190, the Department proposed a new § 501.10 stating that if any provision is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law. The proposed regulatory text further stated that where such holding is one of total invalidity or unenforceability, the provision will be severable from the corresponding part and will not affect the remainder thereof.

As the NPRM explained, the Department believes that a severability provision is appropriate because each provision within the H–2A regulations can operate independently from one another, including where the Department proposed multiple methods to strengthen worker protections and to enhance the Department's capabilities to conduct enforcement and monitor compliance. The NPRM also emphasized that it is important to the Department and the regulated community that the H–2A program continue to operate consistent with the expectations of employers and workers, even if a portion of the H–2A regulations is held to be invalid or unenforceable.

For the reasons described in the preamble discussion of the revisions to 20 CFR 655.190, the Department adopts the severability provision at § 501.10 with minor modifications.

D. Sections 501.20, 501.33, 501.42, Debarment and Revocation

The Department proposed revisions to WHD's debarment and revocation regulations at §§ 501.20, 501.33, and 501.42, to align with the proposed changes to ETA's revocation and debarment regulations at 20 CFR 655.181 and 655.182. These proposals and the Department's final determinations in this rule are described briefly here, and are described fully in the section-by-section analysis of 20 CFR part 655, subpart B.

1. Timeline To Appeal

For consistency with and conformance to the Department's

proposal under 20 CFR 655.182 to expedite debarment processing, the Department proposed to shorten the timeframe to appeal any WHD determination seeking debarment from 30 calendar days to 14 calendar days. In shortening the appeal timeframes for matters involving debarments, the Department sought to bolster program integrity and help protect workers from further harm they might suffer as a result of substantial violations.

The Department received comments both in favor of and opposed to this proposal. The comments supporting the proposal expressed general agreement with the provision to enhance integrity measures in the H–2A program but did not offer any specific explanation for their support of this proposal.

The Department received several comments from agricultural employers, agricultural associations, agents, think tanks, and others opposing this proposal. Commenters in opposition expressed concern that this shortened appeals period would not allow adequate time for employers to secure counsel and gather rebuttal evidence. Many of these same commenters stated that during busier times of the year, some agricultural employers may not be available to receive or respond to a notice in a timely fashion. Some commenters raised concerns that shortening the timeline may impact employers' due process rights. In light of these challenges and the severe implications of debarment, commenters urged the Department to abandon this proposal. Other commenters recommended that the Department consider implementing a staggered approach, whereby employers would be required to request a hearing within 14 calendar days of receiving notice but, under 20 CFR 655.182, would have a full 30 calendar days from the date of the notice to gather evidence and present a rebuttal. Additionally, one commenter suggested that, as an alternative to a reduction in appeal times for all of WHD's determinations seeking debarment, the Department consider reducing the amount of time an employer has to respond to a notice only for certain egregious cases, such as those involving forced labor, trafficking, or other criminal violations.

After consideration of the comments received, the Department will not make this change to the appeals process at this time and will not finalize the proposal. As discussed in the preamble to 20 CFR 655.182, the Department is sensitive to commenters' assertions that some agricultural employers may face challenges in receiving and responding to notices of debarment within the proposed expedited timeline. The Department is committed to ensuring that respondents have an adequate opportunity to prepare and present appeals and is mindful of the need to balance this commitment with its interest in streamlining the debarment process. Therefore, this final rule retains the 30-day appeals period for all WHD determinations, including those determinations that include a notice of debarment.

2. Passport Withholding

The Department proposed adding a new paragraph (o) to § 655.135 to better protect workers from potential labor trafficking by directly prohibiting an employer from confiscating a worker's passport, visa, or other immigration or government identification documents. The Department also proposed to include the failure to comply with this prohibition among the violations that may subject an employer to debarment under § 655.182 and 29 CFR 501.20. As explained fully in the preamble discussion of new 20 CFR 655.135(o), the Department received numerous comments in response to its proposal to directly prohibit an employer from confiscating a worker's passport, the vast majority of which were in support of the proposal. For the reasons set forth in the preamble discussion of new 20 CFR 655.135(o), the Department adopts this provision as proposed, and includes a violation of the new § 655.135(o) as a violation for which the Department may seek debarment under § 655.182 and 29 CFR 501.20.

3. Successors in Interest

The Department proposed revisions to existing § 501.20(a) and (b) to conform to proposed 20 CFR 655.104 and 655.182 regarding the effect of debarment on successors in interest. The Department also proposed a new § 501.20(j). As explained fully in the preamble discussion of new 20 CFR 655.104, the Department received several comments both for and against its proposals relating to successors in interest, including the proposed new § 501.20(j). For the reasons set forth in the preamble discussion of new 20 CFR 655.104, the Department adopts the proposed revisions to 29 CFR 501.20(a) and (b), and new paragraph (j), as proposed. Under this final rule, a WHD debarment of an employer, agent, or attorney applies to any successor in interest to that debarred entity, and WHD need not issue a new notice of debarment to a successor in interest to a debarred employer, agent, or attorney. However, as reflected in new § 501.20(j), WHD is permitted, but not required, to identify any known successor(s) in interest in a notice of debarment issued to an employer, agent, or attorney.

E. Section 501.33, Request for Hearing

As the Department explained in the NPRM, the current regulations at 29 CFR 501.33(b) provide that the party requesting a hearing before the OALJ must ''[s]pecify the issue or issues stated in the notice of determination giving rise to such request'' and ''[s]tate the specific reason or reasons the person requesting the hearing believes such determination is in error.'' 29 CFR 501.33(b)(2) and (3). Despite these provisions, parties frequently attempt to raise new issues at later stages of proceedings, whether before the OALJ, the ARB, or a Federal court, that were not raised in the party's request for a hearing. Under relevant case law, however, issue exhaustion requirements are applicable and appropriate under the H–2A administrative review procedures and, as a result, issues not raised in a request for hearing to the OALJ may be deemed waived. *See* 88 FR at 63809. Under the current regulatory framework, the Department and courts expend significant resources considering or defending against newly raised issues that are ultimately deemed to have been waived. Similarly, parties have asserted that they lacked notice that issues not raised in a request for hearing before the OALJ may be deemed waived.

Accordingly, the Department proposed to revise § 501.33(b)(2) to state that any issue not raised in a party's request for a hearing before the OALJ ''ordinarily will be deemed waived'' in any further proceedings. The proposed revisions were intended to clarify that issue exhaustion requirements apply to H–2A enforcement proceedings, to better inform parties of the potential consequences of failing to raise an issue in a request for review, and to better preserve agency and judicial resources. The proposed language was modeled on similar provisions in OSHA's whistleblower regulations governing the procedures for administrative review of OSHA's findings in those contexts. *See, e.g.,* 29 CFR 1982.110(a).

The Department received only one comment on this specific proposal, from an H–2A agent, másLabor. MásLabor acknowledged that ''[t]he Department may impose reasonable limitations to avoid expending significant issues or preserving judicial resources'' but ''urge[d] the Department to reconsider'' the proposal to allow for some mechanism by which parties may raise new issues after the filing of an initial request for hearing, consistent with

principles of due process, fairness, and equity.

The Department adopts the proposed revisions to § 501.33(b)(2) with one modification to clarify the appropriate standard for issue exhaustion under these regulations. As explained in the NPRM, issue exhaustion requirements already are applicable and appropriate under the H–2A administrative review procedures. *See WHD* v. *Sun Valley Orchards, LLC,* ARB No. 2020–018, 2021 WL 2407468, at *7 (ARB May 27, 2021), *aff'd sub nom. Sun Valley Orchards, LLC* v. *Dep't of Labor,* No. 1:21–cv–16625, 2023 WL 4784204 (D.N.J. July 27, 2023), *appeal filed* No. 23–2608 (3d Cir. Sept. 5, 2023); *In re Sandra Lee Bart,* ARB No. 2018–0004, 2020 WL 5902444, at *4 (ARB Sept. 22, 2020); *see also Carr* v. *Saul,* 141 S. Ct. 1352, 1358 (2021) (''Typically, issue-exhaustion rules are creatures of statute or regulation'' but where the ''regulations are silent, . . . courts decide whether to require issue exhaustion based on an analogy to the rule that appellate courts will not consider arguments not raised before trial courts.'') (quotation omitted). Absent a statutory or regulatory mandate that issues not exhausted will or must be deemed waived, however, reviewing tribunals regularly exercise discretion to determine whether ''exceptional'' or ''special'' circumstances permit consideration of a newly raised issue. *See Ross* v. *Blake,* 578 U.S. 632, 639 (2016) (comparing mandatory and discretionary issue exhaustion requirements). Likewise, under OSHA's whistleblower regulations governing issue exhaustion, the ARB regularly considers whether to permit consideration of newly raised issues under special circumstances. *See, e.g., Williams* v. *QVC, Inc.,* ARB No. 2020–0019, 2023 WL 1927097, at *4 n.43 (ARB Jan. 17, 2023) (construing pro se litigant's petition for review broadly to include issues not specified in petition despite issue exhaustion requirements under parallel provision at 29 CFR 1980.110); *Furland* v. *Am. Airlines, Inc.,* ARB Nos. 09–102, 10–130, 2011 WL 3413364, at *7 n.5 (ARB July 27, 2011) (ARB retained authority under parallel regulation at 29 CFR 1979.110(a) to hear issue on appeal not specifically listed in petition for review but consistently advanced before ALJ).

In the NPRM, the Department intended to make explicit the existing application of discretionary issue exhaustion principles to H–2A enforcement proceedings. 88 FR at 63809. This revision was intended to better inform parties of the potential consequences of failing to include issues for review in a request for hearing, and thus ultimately to reduce the instances in which parties attempt to raise new issues in later stages of the proceedings. *Id.* By use of the language ''ordinarily will be deemed waived'' in the NPRM, the Department intended to retain the discretion currently afforded reviewing tribunals in determining whether a particular issue may be raised at a later stage in the proceeding, consistent with the principles of due process and equity raised in the comment. The Department did not intend to propose a mandatory waiver rule. However, considering másLabor's comment, the Department recognizes it may have suggested otherwise in the NPRM and therefore replaces the phrase ''ordinarily will'' with ''may'' in this final rule. The revised language better reflects the discretionary nature of issue exhaustion under these regulations, whereby waiver is the general rule, though tribunals, in their discretion, may consider whether ''special'' or ''exceptional'' circumstances exist. *Ross,* 578 U.S. at 640. In addition, the Department notes that this revised language is more consistent with the language used in OSHA's more recently promulgated whistleblower regulations, which OSHA adopted to address similar concerns as raised here by másLabor. *See, e.g.,* 89 FR. 69115 (Nov. 9, 2015); 77 FR 40494 (July 10, 2012).

VIII. Administrative Information

A. Executive Order 12866: Regulatory Planning and Review, Executive Order 14094: Modernizing Regulatory Review, and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order (E.O.) 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and review by OMB. Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Section 3(f) of E.O. 12866, as amended by E.O. 14094, defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) has an annual effect on the economy of $200 million or more, or adversely affects in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal governments or communities; (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive Order. Modernizing Regulatory Review, 88 FR 21879, 21879 (Apr. 11, 2023). OIRA has reviewed this rule and designated it a significant regulatory action under E.O. 12866. The Secretary of Homeland Security, in consultation with the Secretary of Labor and Secretary of Agriculture, has approved this rule consistent with section 301(e) of the Immigration Reform and Control Act of 1986, 8 U.S.C. 1188 note.[111]

E.O. 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Improving Regulation and Regulatory Review, 76 FR 3821, 3821 (Jan. 21, 2011). E.O. 13563 recognizes that some costs and benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. *Id.*

Outline of the Analysis

Section VIII.A.1 describes significant issues raised in the public comments. Section VIII.A.2 describes the need for the rule. Section VIII.A.3 describes the process used to estimate the costs of the rule and the general inputs used, such as wages and number of affected entities. Section VIII.A.4 explains how the provisions of the rule will result in quantified costs and transfer payments and presents the calculations the Department used to estimate them. In addition, Section VIII.A.4 describes the unquantified transfer payments and unquantified cost savings of the rule and a description of qualitative benefits. Section VIII.A.5 summarizes the estimated first-year and 10-year total and annualized costs and transfer payments of the rule. Section VIII.A.6 describes the regulatory alternatives that were considered during the development of the rule.

[111] Although this provision vests approval authority in the ''Attorney General,'' the Secretary of Homeland Security now may exercise this authority. *See* 6 U.S.C. 202(3)–(4), 251, 271(b), 291, 551(d)(2), 557; 8 U.S.C. 1103(c) (2000).

Summary of the Analysis

The Department estimates that the rule will result in costs and transfer payments. As shown in Exhibit 1, the rule is expected to have an annualized quantifiable cost of $1.96 million and a total 10-year quantifiable cost of $13.74 million, each at a discount rate of 7 percent.[112] The rule is estimated to result in annualized quantifiable transfer payments from H–2A employers to H–2A employees of $12.66 million and total 10-year transfer payments of $88.92 million at a discount rate of 7 percent.[113]

EXHIBIT 1—ESTIMATED MONETIZED COSTS AND TRANSFER PAYMENTS OF THE FINAL RULE

[2022 $millions]

	Costs	Transfer payments
Undiscounted 10-Year Total	$18.35	$123.42
10-Year Total with a Discount Rate of 3%	16.08	106.46
10-Year Total with a Discount Rate of 7%	13.74	88.92
10-Year Average	1.84	12.34
Annualized at a Discount Rate of 3%	1.89	12.48
Annualized with at a Discount Rate of 7%	1.96	12.66

The total quantifiable cost of the rule is associated with rule familiarization and the provisions requiring additional information disclosure on the H–2A Applications. Transfer payments are the results of the elimination of the effective date delay for updated AEWRs. See the ''Costs'' and ''Transfer Payments'' subsections of Section VIII.A.4 (Subject-by-Subject Analysis) below for a detailed explanation.

The Department was unable to quantify some costs, transfer payments, cost savings, and benefits of the rule. Unquantified costs include costs to employers to reinstall or repair seat belts in vehicles used for worker transportation to comply with this final rule and costs to newly included entities whose ES services can be discontinued. Unquantified transfer payments include compensation to workers under § 655.175(b)(2)(i)–(ii) in cases where the start of work is delayed without sufficient notice and clarifying that applicable prevailing piece rates and other non-hourly wage rates should be included in the job order where such rates have the potential to be the highest wage rate of those listed at § 655.120(a), § 653.501(c), or § 655.210(g). Unquantified cost savings include the Department's ability to deny labor certification applications filed by or on behalf of successors in interest to debarred employers, agents, or attorneys. Unquantified benefits include better protection from inappropriate termination, protection for worker advocacy, reduction in risk of injury during employer-sponsored transportation, and reduction in improper holding of passports or other immigration documents. The Department describes them qualitatively in Section VIII.A.4 (Subject-by-Subject Analysis).

1. Significant Issues Raised in Public Comments

Several commenters submitted feedback in response to the NPRM's regulatory impact analysis or otherwise addressing the potential impact of this rulemaking on affected entities. Commenters, including IFPA, GFVGA, and the Michigan Asparagus Advisory Board, contended that the Department did not quantify benefits. As explained in Section VIII.A.4.d, the Department considered various benefits of this rule, but due to data limitations, the Department was not able to quantitatively estimate the benefits. The commenters that requested additional robust benefit quantification did not provide any information or data that would help the Department quantitatively assess the benefits of this rule, either. As a result, the Department qualitatively discusses the benefits, but nonetheless believes that the benefits outweigh the costs of this rule.

Several commenters, such as trade associations and individual employers, submitted feedback that the estimate of the time burden for rule familiarization was an underestimate. As explained in Section VIII.A.4.a, the Department considered these comments and has increased the time burden associated with rule familiarization cost to 4 hours on average. The Department used the words per minute (WPM) approach to estimate the time to read and understand the regulatory text by assuming a reading speed of 238 words per minute.[114] Because the regulatory text contains over 12,500 words, the Department estimates that employers will need about 1 hour to read and understand this text.[115] The Department assumes that not all employers will read the entire final rule preamble, although some may review portions of it in an effort to better understand particular provisions. As such, the Department quadrupled the time required to read the regulatory text to account for the fact that some employers will read some sections of the preamble, as relevant, in addition to the regulatory text, alongside compliance assistance materials provided by the Department.

Several commenters, including trade associations and individual employers, submitted feedback that the time burden costs of the rule were underestimated, including those related to wage costs, labor contractors, rule familiarization, and application additions. The Department notes that, while some H–2A employers may not directly employ an HR specialist to conduct these tasks, many use HR service providers for consulting on regulatory and HR matters and, therefore, using the wage rate for an HR specialist is appropriate. As explained in Section VIII.A.4.a, the Department considered all of the comments received on this cost component and, as discussed above, revised the time burden associated with rule familiarization cost.

These commenters also stated that the time burden estimate of the provisions requiring additional information disclosure on the H–2A Applications

[112] The rule will have an annualized quantifiable cost of $1.89 million and a total 10-year quantifiable cost of $16.08 million at a discount rate of 3 percent in 2022 dollars.

[113] The rule will have annualized quantifiable transfer payments from H–2A employers to H–2A employees of $12.48 million and total 10-year transfer payments of $106.46 million at a discount rate of 3 percent in 2022 dollars.

[114] Marc Brysbaert, *How Many Words Do We Read Per Minute? A Review and Meta-Analysis of Reading Rate,* PsyArXiv (Apr. 12, 2019), *https://doi.org/10.31234/osf.io/xynwg.* We use the average speed for silent reading of English nonfiction by adults.

[115] 12,500 ÷ 238 = 53 minutes, and the Department used 1 hour for employers to read and understand the regulatory text.

was underestimated but did not provide any information or data that would help the Department assess how to modify the time costs of the provisions. The Department did not change its estimate of time burden for these provisions because most of the information required should be readily available to employers and they should likely maintain and update them in their personnel records system or files. Given the data available and the lack of additional information from commenters, the Department did its best to quantify costs, transfers, and benefits. For costs, transfers, and benefits that were not quantifiable, the Department provided qualitative discussions and sought public comments and input. The Department believes that these time burden estimates are appropriate because they represent an average impact across all impacted employers.

American Farm Bureau Federation submitted feedback that the estimated growth rates regarding the H–2A program were low, which reduced the estimated costs of the rule. The Department has updated the growth rate analyses with 2022 H–2A certification data, and the corresponding estimates of H–2A program growth metrics have increased. The Department believes that these growth rate estimates are appropriate because they utilize the most recently available data on the H–2A program.

NHC submitted feedback that the estimated time burdens of the rule for employers were underestimated because they did not consider time costs of revising payroll systems, worker productivity tracking, productivity loss from third-party participation in disciplinary meetings, losses due to more injured workers, and costs of retrofitting employer transportation. The trade association stated that employee contract changes would cost a large grower more than 275 hours per year. The Department quantifies average costs, transfers, and benefits for all impacted entities, not just large employers. For costs and benefits that were not quantifiable, the Department provided qualitative discussions and sought public comments and input. Neither this commenter nor other commenters, however, provided any information or data that would help the Department better quantitatively assess the relevant costs.

Wafla submitted feedback that the estimated time burden for application additions, specifically the additional disciplinary steps, was underestimated. However, it did not provide any information or data that would help the Department better quantitatively assess the average time costs for all impacted entities. The Department contends that the progressive disciplinary process to terminate H–2A workers for cause may not occur for every employer and, as a result, has sought to quantify the average time burden for application additions across all employers using available data.

2. Need for Regulation

The Department adopts provisions in this final rule that will strengthen protections for agricultural workers and enhance the Department's enforcement capabilities against fraud and program violations. The Department has determined that these revisions will help prevent exploitation and abuse of agricultural workers and ensure that unscrupulous employers do not gain from their violations or contribute to economic and workforce instability by circumventing the law. It is the policy of the Department to maintain robust protections for workers and to vigorously enforce all laws within its jurisdiction governing the administration and enforcement of nonimmigrant visa programs. As set forth above in detail in sections V through VII, the Department has determined through program experience, recent litigation, comments on prior rulemaking, and reports from various workers' rights advocacy organizations that the provisions in this final rule are necessary to strengthen protections for agricultural workers; ensure that employers, agents, attorneys, and labor recruiters comply with the law; and enhance the Department's ability to monitor compliance and investigate and pursue remedies from program violators. For example, in 421 investigations of agricultural employers using the H–2A program in FY 2022, the Department assessed more than $3.6 million in back wages and more than $6.3 million in civil money penalties. Evidence revealed in recent Department investigations suggests that H–2A workers continue to be vulnerable to human trafficking.[116] H–2A workers also continue to be vulnerable to retaliation when asserting their rights or engaging in self-advocacy.[117] Meanwhile, recent vehicle crashes involving agricultural workers demonstrate the need for transportation safety reform.[118]

The rule aims to address some of the comments that were beyond the scope of the 2022 H–2A Proposed Rule and concerns expressed by workers' rights advocacy groups, labor unions, and organizations that combat human trafficking. It also seeks to respond to recent court decisions and program experience indicating a need to enhance the Department's ability to enforce regulations related to foreign labor recruitment, to improve accountability for successors in interest and employers who use various methods to attempt to evade the law and regulatory requirements, and to enhance worker protections for a vulnerable workforce, as explained further in the section-by-section discussion above. The Department has also made adjustments to the proposed regulations after consideration of the comments received, including declining to adopt the proposals to reduce submission periods for appeal requests for OFLC and WHD debarment matters and submittal of rebuttal evidence to OFLC, to require employers to provide labor organizations with employee contact information and access to employer-furnished housing, and to require employers to attest to whether they will bargain in good faith over the terms of a proposed labor neutrality agreement.

The Department intends for this rulemaking to better protect the rights,

[116] *See, e.g.,* DOJ, Press Release, *Owner of Farm Labor Contracting Company Pleads Guilty in Racketeering Conspiracy Involving the Forced Labor of Mexican Workers* (Sept. 27, 2022), *https://www.justice.gov/opa/pr/owner-farm-labor-contracting-company-pleads-guilty-racketeering-conspiracy-involving-forced;* DOJ, Press Release, *Three Defendants Sentenced in Multi-State Racketeering Conspiracy Involving Forced Labor of Mexican Agricultural H–2A Workers* (Oct. 27, 2022), *https://www.justice.gov/opa/pr/three-defendants-sentenced-multi-state-racketeering-conspiracy-involving-forced-labor-mexican.*

[117] *See, e.g.,* DOL, News Release, *Federal Court Orders Louisiana Farm, Owners to Stop Retaliation After Operator Denied Workers' Request for Water, Screamed Obscenities, Fired Shots* (Oct. 28, 2021), *https://www.dol.gov/newsroom/releases/whd/whd20211028-0;* DOL, News Release, *US Department of Labor Fines North Carolina Employers $139K After They Shortchanged Farmworkers; Seized Passports, Visas to Intimidate Them* (Nov. 16, 2023), *https://www.dol.gov/newsroom/releases/whd/whd20231116;* DOL, News Release, *Department of Labor Debars Labor Contractor Who Threatened, Intimidated Farmworkers; Assesses $62K in Penalties for Abuses of Agricultural Workers* (Oct. 23, 2023), *https://www.dol.gov/newsroom/releases/whd/whd20231023;* DOL, News Release, *US Department of Labor Investigation Results in Judge Debarring North Carolina Farm Labor Contractor for Numerous Guest Worker Visa Program Violations* (Mar, 16, 2021), *https://www.dol.gov/newsroom/releases/whd/whd20210316;* DOL, News Release, *Corrected: US Department of Labor Investigations of Labor Contractors, Vineyard Yield $231K in Penalties, Recover $129K in Back Wages for 353 Agricultural Workers* (Jun. 1, 2023), *https://www.dol.gov/newsroom/releases/whd/whd20230601-0.*

[118] *See, e.g.,* DOL, News Release, *U.S. Department of Labor Urges Greater Focus on Safety by Employers, Workers as Deaths, Injuries in Agricultural Transportation Incidents Rises Sharply* (Sept. 20, 2022), *https://www.dol.gov/newsroom/releases/whd/whd20220920-0.*

health, and safety of agricultural workers as well as to prevent adverse effect on workers similarly employed in the United States and to safeguard the integrity of the H–2A program, while continuing to ensure that responsible employers have access to willing and available agricultural workers and are not unfairly disadvantaged by employers that exploit workers and attempt to evade the law.

3. Analysis Considerations

The Department estimated the costs and transfer payments of this final rule relative to the existing baseline (*i.e.,* the current practices for complying, at a minimum, with the H–2A program as currently codified at 20 CFR part 655, subpart B, and 29 CFR part 501).

In accordance with the regulatory analysis guidance articulated in OMB's Circular A–4 [119] and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences of the rule (*i.e.,* costs, benefits, and transfer payments that accrue to entities affected). The analysis covers 10 years (from 2025 through 2034) to ensure it captures major costs, benefits, and transfer payments that accrue over time. The Department expresses all quantifiable impacts in 2022 dollars and uses discount rates of 3 and 7 percent, pursuant to Circular A–4 published on October 9, 2003.

Exhibit 2 presents the number of affected entities that are expected to be impacted by this final rule.[120] The average number of affected entities is calculated using OFLC H–2A certification data from FY 2016 through FY 2022. Exhibit 3 presents the number of workers who are expected to be impacted by this final rule. The exhibit contains the number of certified H–2A workers from FY 2012 through FY 2022.

EXHIBIT 2—NUMBER OF UNIQUE EMPLOYERS BY YEAR

FY	Number
2016	6,713
2017	7,187
2018	7,902
2019	8,391
2020	7,785
2021	9,442
2022	10,571
Average	8,284

EXHIBIT 3—HISTORICAL H–2A PROGRAM DATA

FY	Workers certified
2012	85,248
2013	98,814
2014	116,689
2015	139,725
2016	165,741
2017	199,924
2018	242,853
2019	258,446
2020	275,430
2021	317,619
2022	371,619

a. Growth Rate

The Department estimated growth rates for certified H–2A workers based on program data presented in Exhibit 3 and estimated growth rates for unique H–2A employers based on program data presented in Exhibit 2.

The compound annual growth rate (CAGR) for certified H–2A workers using the program data in Exhibit 3 is calculated as 15.9 percent. This growth rate, applied to the analysis timeframe of 2025 to 2034, would result in more H–2A certified workers than projected employment of workers in the relevant H–2A SOC codes by BLS.[121] Therefore, to estimate realistic growth rates for the analysis, the Department applied the growth rate for unique employers, assuming the growth rate for unique employers and workers should be similar. The Department used FY 2016–2022 data on unique employers, where the use of FY 2016 as the first year is due to data availability on calculated unique employers. The Department calculated a CAGR based on FY 2016 unique employers (6,713) and the FY 2022 unique employers (10,571). The result is an estimate of 7.9 percent.[122]

The estimated annual growth rates for unique employers (7.9 percent) and workers (7.9 percent) were applied to the estimated costs and transfers of this final rule to forecast participation in the H–2A program.[123]

b. Compensation Rates

In Section VIII.A.4 (Subject-by-Subject Analysis), the Department presents the costs, including labor, associated with the implementation of the provisions of the rule. Exhibit 4 presents the hourly compensation rates for the occupational categories expected to experience a change in the number of hours necessary to comply with the rule. The Department used the mean hourly wage rate for a private sector HR Specialist (SOC code 13–1701).[124] Wage rates are adjusted to reflect total compensation, which includes nonwage factors such as overhead and fringe benefits (*e.g.,* health and retirement benefits). We use an overhead rate of 17 percent [125] and a fringe benefits rate based on the ratio of average total compensation to average wages and salaries in 2022.[126] We then multiply the loaded wage factor by the wage rate to calculate an hourly compensation rate. The Department used the hourly compensation rates presented in Exhibit 4 throughout this analysis to estimate the labor costs for each provision.

[119] OMB Circular No. A–4, *Regulatory Analysis* (2023).

[120] OFLC, *Performance Data, https://www.dol.gov/agencies/eta/foreign-labor/performance* (last visited Feb. 8, 2024).

[121] Comparing BLS 2032 projections for combined agricultural workers (SOC 45–2000) with a 14.8-percent growth rate of H–2A workers yields estimated H–2A workers about 178 percent greater than BLS 2032 projections. The projected workers for the agricultural sector were obtained from BLS's Occupational Projections and Worker Characteristics, *https://www.bls.gov/emp/tables/occupational-projections-and-characteristics.htm.*

[122] Calculation: $7.9\% = (10{,}571 \div 6{,}713)^{(1 \div 6)} - 1$.

[123] Proposed forecasted estimates of H–2A employer participation: 11,419 in 2023; 12,335 in 2024; 13,325 in 2025; 14,394 in 2026; 15,548 in 2027; 16,796 in 2028; 18,143 in 2029; 19,599 in 2030; 21,171 in 2031; and 22,869 in 2032.

[124] BLS, *National Occupational Employment and Wage Estimates: 13–1701* (May 2021), *https://www.bls.gov/oes/current/oes131701.htm* (last visited Feb. 8, 2024).

[125] Cody Rice, U.S. Envtl. Prot. Agency, *Wage Rates for Economic Analyses of the Toxics Release Inventory Program* 7 (June 10, 2002), *https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005.*

[126] BLS, News Release, *Employer Costs for Employee Compensation—December 2022* (Mar. 17, 2023), *https://www.bls.gov/news.release/archives/ecec_03172023.pdf.* Ratio of total compensation to wages and salaries for all private industry workers: $40.23 \div 28.37 = 1.418$.

EXHIBIT 4—COMPENSATION RATES

[2022 dollars]

Position	Grade level	Base hourly wage rate	Loaded wage factor	Overhead costs	Hourly compensation rate
	(a)	(b)	(c)	(d)	(d = a + b + c)
HR Specialist	N/A	$35.13	$14.75 ($35.13 × 0.42)	$5.97 ($35.13 × 0.17)	$55.79

4. Subject-by-Subject Analysis

The Department's analysis below covers the estimated costs, transfer payments, and qualitative benefits of this final rule. In accordance with Circular A–4, the Department considers transfer payments as payments from one group to another that do not affect total resources available to society. This final rule estimated the cost of rule familiarization and application additions and transfer payments associated with the elimination of the delayed effective date for updated AEWRs.

a. Costs

The following section describes the quantified and unquantified costs of this final rule.

i. Quantified Costs

The following sections describe the quantified costs of rule familiarization and the provisions requiring additional information disclosure on the H–2A Application.

A. Rule Familiarization

When the rule takes effect, H–2A employers will need to familiarize themselves with the new regulations. Consequently, this will impose a one-time cost in the first year. New employers in each subsequent year will need to familiarize themselves with current regulations regardless of this final rule.

To estimate the cost of rule familiarization, the Department applied the growth rate of H–2A employers (7.9 percent) to the number of unique H–2A employers (8,284) to determine the number of unique H–2A applicants impacted in the first year. For subsequent years, the number of new employers was estimated by multiplying the previous year's employer count by the growth rate of H–2A employers (7.9 percent) and then subtracting that value from the previous year's total employer count. Exhibit 5 details the number of new employers for each year of the analysis.

EXHIBIT 5—NUMBER OF NEW EMPLOYERS BY YEAR

FY	Total employers	New employers
2025	8,938	N/A
2026	9,645	706
2027	10,406	762
2028	11,229	822
2029	12,116	887
2030	13,073	957
2031	14,106	1,033
2032	15,220	1,114
2033	16,422	1,202
2034	17,720	1,297

The number of unique H–2A employers in the first year (8,947), and the new H–2A employers in subsequent years (see Exhibit 5), was multiplied by the estimated amount of time required to review the rule (4 hours). This number was then multiplied by the hourly compensation rate of an HR specialist ($35.13 per hour) and the loaded wage factor and the overhead rate for the private sector (1.59). This calculation results in a total undiscounted cost of $3,954,528 over the 10 years after the rule takes effect. The annualized cost over the 10-year period is $429,662 and $479,217 at discount rates of 3 and 7 percent, respectively.

B. Additional Information Disclosure on the H–2A Application

Once the rule takes effect, H–2A employers will need to submit additional information on the H–2A Application, which will impose a yearly cost as the time associated with filling out this information is required for every application for certification. The additional information includes the names, addresses, business phone numbers, and dates of birth for the owner(s) of each employer, each operator of the place(s) of employment, and all managers and supervisors of workers employed under the H–2A Application; DBA information; and information about the identity and location of any foreign labor recruiter the employer engaged, directly or indirectly, in international recruitment, as well as all persons and entities hired by or working for the recruiter or agent, and any of the agents or employees of those persons and entities.

To estimate the yearly cost of the application additions, the Department applied the growth rate of H–2A employers (7.9 percent) to the current number of unique certified H–2A employers (8,284) to determine the number of unique H–2A employers in the first year (8,938). The number of unique certified H–2A employers in the first year is then multiplied by the growth rate again to determine the number of unique certified H–2A employers in the second year. This process is repeated each year to determine the total number of unique certified H–2A employers every year during the study period. Since it is assumed that only a single HR specialist per employer will incur the additional time investment, the estimated total yearly cost can be calculated by multiplying the total number of unique certified H–2A employers (8,938) by the HR specialist hourly wage rate ($35.13 per hour), the loaded wage factor and the overhead rate for the private sector (1.59), and the estimated additional time taken to gather and enter the information on a yearly basis (2 hours on average). Lastly, this value is multiplied by the growth rate of unique employers (7.9 percent) to the *n*th power, with *n* being equal to the period year. The result is $999,543 in the first year, an undiscounted average cost over a 10-year period of $1,439,694, and discounted annualized costs of $1,455,791, and $1,476,738 at rates of 3 and 7 percent, respectively.

ii. Unquantified Costs

A. Transportation: Seat Belts for Drivers and Passengers

As part of this final rule, employers will have to ensure seat belts are provided for drivers and passengers in transportation vehicles used to transport H–2A and corresponding workers that were required by U.S. DOT's FMVSS to be manufactured with seat belts. This could impose both a one-time and annual cost to those employers who had previously lawfully modified or removed seat belts in such vehicles and

would be required to reinstall or repair seat belts to comply with this final rule through the cost of reinstalling or repairing the necessary seat belts and the decreased fuel efficiency of transportation vehicles caused by the additional weight of the seat belts. The Department estimates the cost of installing a driver's seat belt to be $26.60 per seat belt and the cost of installing a passenger seat belt to be $17.44 per seat belt.[127] The Department does not have data to estimate the number of seat belts to be reinstalled or repaired, or (in the alternative) vehicles that would need to be purchased, to provide seat belts for drivers and passengers in the above scenario. The Department requested public comments on data and information that would support estimating the cost of reinstalling or repairing seat belts but received no responses.

B. Discontinuation of Services to Employers by the ES System

The final rule clarifies and expands the scope of entities whose ES services can be discontinued to include agents, farm labor contractors, joint employers, and successors in interest. Because the final rule expands the scope of applicable entities that may experience discontinuation of services, the Department does not have preexisting data available on costs to those entities, and the Department is not able to quantify potential increased costs for them. However, the Department recognizes that some commenters contend that employers might incur costs related to delays in processing clearance orders, including administrative costs, legal fees, and productivity losses. The Department cannot quantify these specific costs because each employer's circumstances will be unique. Additionally, it is possible that the number of discontinuation-of-services actions SWAs initiate might increase due to the changes in the final rule that clarify when and how the procedures apply. However, because the procedures were not frequently used previously and because the number of actions will depend on actual employer compliance, it is not possible to estimate the related potential burden.

b. Unquantified Cost Savings

The following section describes the unquantified cost savings of this final rule.

i. Successors in Interest

Once this final rule takes effect, the Department will be able to deny labor certification applications filed by or on behalf of successors in interest to debarred employers, agents, or attorneys. Currently, the Department must first issue a separate notice of debarment to the successor in interest, and go through a lengthy administrative hearing and review process, before it may deny an application filed by or on behalf of a successor. The rule will, therefore, result in cost savings to the Department from not having to go through the process to debar successors in interest but instead applying the predecessor's debarment to the successor. The Department lacks detailed data on the length of time necessary to enter a proposed order of debarment against successors under the current regulations, as well as the annual number of successor debarments, and as a result is unable to accurately quantify this cost savings.[128]

c. Transfer Payments

The following section describes the transfer payments of this final rule.

i. Quantified Transfer Payments

This section discusses the quantifiable transfer payments related to the elimination of the 2-week effective date delay for AEWR publication. The Department considers transfers as payments from one group to another that do not affect total resources available to society. The transfers measured in this analysis are wage transfers from U.S. employers to H–2A workers. H–2A workers are migrant workers who will spend some of their earnings on consumption goods in the U.S. economy but likely send a large fraction of their earnings to their home countries.[129] Therefore, the Department considers the wage transfers in the analysis as transfer payments within the global economic system.

A. Elimination of the effective date delay for updated AEWRs

Currently, the Department publishes the AEWR as soon as data are available, typically in the middle of December for AEWRs based on FLS data.[130] There is then a 2-week delay until the AEWR is effective, typically January 1st of the following year. Once the rule takes effect, the 2-week delay until the AEWR is effective will be removed and the AEWR will be effective immediately upon publication in the **Federal Register**. Therefore, employers that employ workers during the 2-week period from mid-December to early January will see a transfer to employees

[127] These costs were calculated by inflation-adjusting the 2008 cost of types of seat belts listed in NHTSA, *Final Regulatory Impact Analysis: FMVSS No. 208, Lap/Shoulder Belts for All Over-The-Road Buses, and Other Buses with GVWRs Greater Than 11,793 kg (26,000 lb)* (Sept. 2013), *https://www.regulations.gov/document/NHTSA-2013-0121-0002.*

[128] The Department lacks such information because each debarment action is unique and the facts of each situation dictate how long a debarment action will take. At the time of drafting this final rule, there are currently 35 debarred H–2A entities and 59 debarred H–2B entities, which, as a result of the cross-program debarment provisions at 20 CFR 655.73(i), also debar those entities from filing applications in any other DOL-administered immigration programs such as the H–2A program. Any of those entities could potentially file one or more applications each year for one or more successor in interest employers or as successor in interest agents or attorneys or both. Due to the variables mentioned above, the Department is unable to estimate how many such filings may be submitted in any given period of time nor to estimate how complex each debarment action would be if the Department were to seek debarment against the successor.

[129] Elimination of the effective date delay for updated AEWRs will also result in wage transfers from U.S. employers to workers in corresponding employment, but the Department is not able to quantify this transfer due to the lack of data for workers in corresponding employment and their wages. In particular, the Department does not collect or possess sufficient information about the number of corresponding workers affected and their wage payment structures to reasonably measure the transfers to corresponding workers. Employers are not required to provide the Department, on any application or report, the estimated or actual total number of workers in corresponding employment. Although each employer, as a condition of being granted a temporary agricultural labor certification, must provide the Department with a report of its initial recruitment efforts for U.S. workers, including the name and contact information of each U.S. worker who applied or was referred to the job, such information typically reflects only a very small portion of the total recruitment period, which runs through 50 percent of the certified work contract period, and does not account for any other workers who may be considered in corresponding employment and already working for the employer. Because the report of initial recruitment efforts for U.S. workers only captures information from a limited portion of the recruitment period and does not account for workers already employed by the employer who may be in corresponding employment, the Department is not able to draw on this information to meaningfully assess the total number of corresponding workers affected or their wage payment structures, without which the Department is unable to reasonably measure the transfers to corresponding workers. The Department sought public comment on how these wage transfer impacts can be calculated but received no comments.

[130] New AEWRs based on OEWS data currently become effective on or around July 1st for the small percentage of job opportunities that cannot be encompassed within the SOC codes for AEWRs that are based on the FLS field and livestock workers (combined) data. The use of OEWS data to calculate AEWRs in limited circumstances was the result of a change made under the Department's 2023 AEWR Final Rule. *See* 88 FR 12760, 12764–65 (Feb. 28, 2023). The analysis here is limited to FY 2020 and FY 2021 H–2A certification data, during which period the AEWR was calculated based only on FLS data, and thus, the analysis focuses on the 2-week period from mid-December to early January that is associated with the publication and effective dates of FLS-based AEWRs under current practice.

due to the elimination of the 2-week delay of wage increases from the publication date of updated AEWRs.

To estimate the transfer, the Department first uses FY 2020 and FY 2021 H–2A certification data to calculate the weighted average increase in AEWR from one year to the next.[131] The Department weights the average by the number of workers in each State with employment between December 14th and the end of the year to account for regional differences in employment during December. The result is an average increase in the AEWR by $1.09.[132] The Department then calculates the average number of days worked between December 14th and the end of the year (11.87) using the FY 2020 and FY 2021 H–2A certification data. The Department estimates the average annual number of workers with work during this period using the H–2A certification data (89,208).[133]

The Department determines the total amount of the transfers by multiplying the 2-year weighted AEWR difference for end-of-year employment (1.09), the 2-year average number of days worked between December 14th and the end of year (11.87), the average number of work hours in a day (7.4),[134] and the number of H–2A workers during this period (89,208). To determine the transfers for every year in the 10-year period, the total number of H–2A workers during the period is multiplied by the growth rate of H–2A workers (7.9 percent). The same process is repeated for every year in the period. The total undiscounted average annual transfers associated with this provision is $12,342,109 and the discounted annualized transfers are $12,480,377 and $12,660,319 at discount rates of 3 and 7 percent, respectively. The Department also conducted a sensitivity analysis using the CAGR of 15.9 percent for H–2A workers. The resulting total undiscounted average annual transfers is $18,135,595, and the discounted annualized transfers are $18,037,709 and $17,901,328 at discount rates of 3 and 7 percent, respectively.

ii. Unquantified Transfer Payments

This section discusses the unquantifiable transfer payments related to compensation during a minor delay in the start of work and piece rates.

A. Compensation During a Minor Delay in the Start of Work Under §§ 655.175(b)(2)(ii) and 653.501(c)(5)

Currently, if an employer fails to notify the SWA of a start date change at least 10 days ahead of the originally anticipated date of need, it must offer work hours and pay the first week's wages to each farmworker referred through the ARS who followed the procedure to contact the SWA for updated start date information. If an H–2A employer delays the start of work after workers have departed for the place of employment, the employer must provide housing and subsistence to these workers until work commences. After this final rule takes effect, employers that do not notify both the SWA and the workers at least 10 business days before the anticipated start date will also be required to pay workers the hourly rate for the hours listed on the job order for each day work is delayed for a period of up to 14 calendar days, and, for workers placed on clearance orders via the ARS, will be required to provide housing to placed migrant workers until work commences, and to provide or pay workers all other benefits and expenses described on the clearance order, in addition to wages at the applicable rate, for up to 14 days, or provide alternative work approved on the clearance order, resulting in a transfer from employers to employees. The Department is unable to quantify this transfer because it lacks detailed data on the prevalence of job delays, the number of employees impacted by these delays, and the number of hours impacted by the delays on average, or the number of hours employers must spend contacting employees, and as a result is unable to accurately quantify this transfer.

B. Piece Rates

This final rule clarifies language within 20 CFR 655.120(a) and 655.122(l) to make clear that the employer is required to advertise and pay the highest of the AEWR, prevailing hourly wage or piece rate, CBA rate, Federal or State minimum wage, or any other wage rate the employer intends to pay. The final rule makes analogous changes to 20 CFR 653.501(c) and 655.210–655.211, which govern the required wage rates for non-H–2A (non-criteria) clearance orders and clearance orders for herding and range livestock production occupations, respectively. The Department is unable to quantify these transfers because it lacks data on the frequency of instances when employers will have to pay higher wages as a result of including and considering applicable piece rates or other non-hourly wage rates in job offers. Specifically, from the comments received in response to the substantive proposal, it appears that some employers are already paying the applicable prevailing piece rates to be in compliance with the requirements of 20 CFR 655.120(a) and 655.122(l); in such cases, there would be no transfer. The Department sought public comment on how these wage transfer impacts can be calculated but did not receive comments on this issue.

d. Unquantified Benefits

i. Termination for Cause

This final rule requires that workers only be terminated for cause for failure to comply with employer policies or rules or to satisfactorily perform job duties in accordance with reasonable expectations based on criteria listed in the job offer, and only if the termination was justified and reasonable. The designation of a termination as being for cause strips workers of essential rights to which they would otherwise be entitled—specifically, the three-fourths guarantee, payment for outbound transportation, and, if a U.S. worker, the right to be contacted for re-hire in the following season—and, therefore, it is essential that workers not be deprived of these rights using inconsistent or unfair procedures. This final rule will require fairness in disciplinary and termination proceedings if the termination were to be designated as being for cause, which will prevent workers from being unjustly stripped of certain rights under the H–2A program. The Department

[131] OFLC, *Performance Data, https://www.dol.gov/agencies/eta/foreign-labor/performance* (last visited Feb. 8, 2024).

[132] Because FY 2020 and FY 2021 H–2A certification data do not reflect the wage increases due to the 2023 AEWR Final Rule, as explained in a previous footnote, the transfer payments estimated in the analysis are likely understated in that they may not account for the main change under that rule, namely the limited job opportunities that would be subject to updated AEWRs based on the OEWS data. *See* 88 FR at 12764–65. The 2023 AEWR Final Rule became effective on March 30, 2023, and, therefore, the Department does not have any readily available FY H–2A certification data to estimate wage transfer payments after the publication of the 2023 AEWR Final Rule. The Department, moreover, sought public comment on how these wage transfer impacts can be calculated but received no comments. However, the 2023 AEWR Final Rule explained that the Department anticipates a very limited number of H–2A job opportunities would be subject to the OEWS-based AEWR, as the majority of H–2A job opportunities are and will continue to remain subject to FLS-based AEWRs. *See* 88 FR at 12766, 12799. As such, the Department considers the impacts of the potential underestimation here to be *de minimis* because of the low incidence of job opportunities assigned the OEWS AEWR pursuant to the 2023 AEWR Final Rule.

[133] The Department uses the growth rate of H–2A workers (7.9 percent) to produce proposed forecasted estimates of H–2A workers: 96,247 in 2023; 103,840 in 2024; 112,033 in 2025; 120,873 in 2026; 130,410 in 2027; 140,699 in 2028; 151,800 in 2029; 163,777 in 2030; 176,699 in 2031; and 190,641 in 2032.

[134] The Department analyzed FY 2020 and FY 2021 certification data for end-of-year employers that reported anticipated hours per day, resulting in an average of 7.4 hours per day.

lacks data on the numbers of terminations for cause each year and whether those terminations were justified and reasonable, and the number of hours required by employers to document termination proceedings as defined by this rule.

ii. Protections for Worker Advocacy and Self-Organization

The Department's final rule will provide stronger protections for workers covered by the H–2A program to advocate regarding their working conditions on behalf of themselves and their coworkers and will prevent employers from suppressing this activity. These protections will help prevent adverse effect on the working conditions of similarly employed agricultural workers in the United States and will increase the likelihood of worker advocacy and organizing while protecting those workers from intimidation and retaliation by employers. Worker advocacy organizations may also complement the Department's enforcement efforts in preventing wage-related violations and in ensuring workplace safety and health. In sum, protection for worker advocacy and self-organization provides unquantifiable benefits to workers under the H–2A program.

Although the Department lacks data on how to quantify the benefits of such improved compliance with existing worker protections, the final regulations should increase workers' dignity and safety and should help ensure that workers under the H–2A program can assert their rights without the unique risks associated with retaliation, thus helping to avoid an adverse effect from the H–2A program on similarly employed workers in the United States.

iii. Transportation: Seat Belts for Drivers and Passengers

Once this final rule takes effect, employer-provided transportation will be required to have seat belts available for all workers transported, if those vehicles were required by U.S. DOT's FMVSS to be manufactured with seat belts. Seat belt use reduces the severity of crash-related injuries and deaths. The Department lacks data on the baseline number of crashes, whether those vehicles involved in crashes were equipped with seat belts and the occupants were using seat belts, and subsequent injuries or fatalities involving vehicles transporting H–2A workers, and, therefore, is not able to estimate the benefit from reduced fatalities or injuries.[135] The benefit from reducing even a single fatality or serious injury is significant. The value of a statistical life (VSL) that would measure the benefit of avoiding a fatality is estimated to be $11.8 million.[136] Recent NHTSA reports suggest avoiding injury crashes can be highly beneficial, with estimates that avoiding a critical injury crash is worth $3.8 million (32 percent of a fatality) and avoiding minor injuries is worth $63,000 (0.5 percent of a fatality), respectively.[137]

iv. Protection Against Passport and Other Immigration Document Withholding

To better protect this vulnerable workforce from potential labor trafficking, the Department adopts revisions to flatly prohibit an employer, including through its agents or attorneys, from taking or withholding a worker's passport, visa, or other immigration or identification documents against the worker's wishes, independent of any other requirements under other Federal, State, or local laws, in a new provision at 20 CFR 655.135(o). This new provision will help ensure that H–2A workers are less likely to be subject to labor exploitation and, thus, it safeguards the health, safety, and dignity of those workers and also prevents the depression of working conditions for the local agricultural workforce.

5. Summary of the Analysis

Exhibit 6 summarizes the estimated total costs and transfer payments of this final rule over the 10-year analysis period. The Department estimates the annualized costs of the rule at $1.96 million and the annualized transfer payments (from H–2A employers to employees) at $12.66 million, each at a discount rate of 7 percent. Unquantified transfer payments include the clarified employer obligation to include in the job order applicable prevailing piece rates and other non-hourly wage rates where such rates have the potential to be the highest wage rate of those listed at § 655.120(a), as well as the employer's obligation to compensate workers for a period of up to 14 calendar days where the employer delays the start date and fails to provide at least 10 business days' notice, as required under §§ 655.175(b)(2)(i)-(ii) and 653.501(c)(5). Unquantified cost savings include the Department's ability to deny labor certification applications filed by or on behalf of successors in interest to debarred employers, agents, or attorneys. Unquantified benefits include better protection from inappropriate termination, protection for worker advocacy, reduction in risk of injury during employer-sponsored transportation, reduction in improper holding of passports or immigration documents, and enhanced integrity and enforcement.

[135] BLS reported that 271 of 589 fatal workplace injuries suffered by agricultural workers in 2022 were caused by transportation-related incidents. However, the Department lacks data on the number of fatal workplace injuries that were caused by not wearing a seat belt or the number of vehicles involved in transportation-related incidents that were not equipped with seat belts.

[136] The VSL is used by U.S. DOT to value fatalities associated with vehicle crashes. The VSL is based upon the base year's VSL adjusted for the annual change in the Consumer Price Index. U.S. DOT, *Departmental Guidance on Valuation of a Statistical Life in Economic Analysis* (2021), *https://www.transportation.gov/office-policy/transportation-policy/revised-departmental-guidance-on-valuation-of-a-statistical-life-in-economic-analysis* (last visited Feb. 8, 2024).

[137] These figures are based on MAIS4 (severe) and MAIS1 (minor) injury-per-crash costs estimated by NHTSA in Table 1–9 Summary of Comprehensive Unit Costs. NHTSA, *The Economic and Societal Impact of Motor Vehicle Crashes,* 2019 (Revised) (Feb. 2023), *https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813403.*

EXHIBIT 6—ESTIMATED MONETIZED COSTS AND TRANSFER PAYMENTS OF THE FINAL RULE

[2022 $millions]

	Costs	Transfer payments
2024	$2.99	$8.56
2025	1.24	9.24
2026	1.33	9.97
2027	1.44	10.76
2028	1.55	11.60
2029	1.67	12.52
2030	1.81	13.51
2031	1.95	14.57
2032	2.10	15.72
2033	2.27	16.96
Undiscounted 10-Year Total	18.35	123.42
10-Year Total with a Discount Rate of 3%	16.08	106.46
10-Year Total with a Discount Rate of 7%	13.74	88.92
10-Year Average	1.84	12.34
Annualized with a Discount Rate of 3%	1.89	12.48
Annualized with a Discount Rate of 7%	1.96	12.66

6. Regulatory Alternatives

The Department considered two regulatory alternatives to provisions adopted in this final rule. The Department discusses below the advantages and disadvantages of these regulatory alternatives.

First, the Department considered a regulatory alternative to this final rule's provision in 20 CFR 655.120(b) to make updated AEWRs effective on the date of publication in the **Federal Register**. Under the alternative proposal, the AEWRs would become effective 7 calendar days after publication in the **Federal Register**. This proposal would have been a compromise between the immediate effective date finalized in this rule and the current effective date, which can be as many as 14 calendar days after the Department publishes the updated AEWR in the **Federal Register**. The benefit of the alternative proposal is that it would continue to provide employers a short window of time to adjust payroll or recordkeeping systems or make any other adjustments that may be necessary after the Department's announcement of updated AEWRs, while providing a shorter adjustment window than under the current rule.

However, the Department has determined the disadvantages of a 7-calendar-day implementation period for updated AEWRs outweighed any potential benefits. Although this alternative would require employers to begin paying agricultural workers at least the newly required higher wage within a calendar week of the date the updated AEWRs are published in the **Federal Register**, it would not require the employer to pay the updated AEWR for work performed during the 7-calendar-day delayed implementation period. Further, unlike the up to 14-day period in the current rule, the 7-calendar-day period would not correspond with a typical 2-week pay period; potentially creating more logistical challenges than it avoids. As the Department has explained in prior rulemaking, the duty to pay an updated AEWR during the employment period if it is higher than other required wage sources is not a new employer obligation. The Department recognizes that AEWR adjustments may alter employer budgets, but the Department believes the difference in the impact [138] on budget and payroll planning between the immediate effective date and a 7-day period after publication is outweighed by the benefits to agricultural workers noted above. Moreover, as the Department noted in the 2010 H–2A Rule, employers are aware of the annual AEWR adjustment, and the Department encourages employers to continue to include the annual adjustment in their contingency planning to allow flexibility to account for any possible wage adjustments.[139]

Second, the Department considered a regulatory alternative to the application filing requirements. Under this regulatory alternative, H–2A employers would not be required to fill out additional information about owners, operators, managers, and supervisors on the H–2A Application. Instead, this alternative would have required the employer to attest that it will collect this information and retain it for a period of 3 years from the date of certification or final determination and would provide the information upon request by the Department. This alternative would have been slightly less burdensome to H–2A employers because the employer would not need to provide this information at the time of filing each H–2A Application; rather, they would need to retain the information and produce it if requested during an audit or investigation.

However, the Department has determined the application filing and information disclosure requirements in this final rule, combined with the existing requirement to disclose information like the identity of the agent and point of contact, address(es), occupation, and period of need, will be necessary to assist the Department for reasons explained in the preamble discussion of § 655.130 above. This information will also assist the Department in ensuring employers do not evade penalties or regulatory requirements and will permit the Department to more effectively hold employers accountable for failures to comply with the law.

B. Regulatory Flexibility Analysis, Small Business Regulatory Enforcement Fairness Act, Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by SBREFA, Public Law 104–121, requires agencies to determine whether regulations will have a significant economic impact on a substantial number of small entities. The Department certifies that this final rule does not have a significant economic

[138] The wage transfer under this alternative would be approximately up to half of the impact of this final rule's provision to make updated AEWRs effective on the date of publication in the **Federal Register** ($13.69 million at a discount rate of 7 percent).

[139] *See* 2022 H–2A Final Rule, 87 FR at 61688 (quoting 2010 H–2A Final Rule, 75 FR at 6901).

impact on a substantial number of small entities. Therefore, a final regulatory flexibility analysis is not required. The factual basis for this certification is set forth below.

1. Significant Issues Raised in Public Comments, Including by the Small Business Administration Office of Advocacy

Several commenters, like Willoway Nurseries, Michigan Farm Bureau, and American Farm Bureau Federation, submitted feedback that the estimate of time burden for rule familiarization for small businesses was an underestimate, suggesting that small businesses lack HR specialists and that the time burdens were underestimated. The Department notes that while some H–2A small business employers may not directly employ an HR specialist to conduct these tasks, many use HR service providers for consulting on regulatory and HR matters and, therefore, the wage rate for an HR specialist is appropriate for H–2A small business employers. As explained in Section VIII.A.4.a, the Department has increased the time burden associated with rule familiarization to 4 hours. The Department believes these changes to the time estimate are appropriate because they represent more accurately the costs incurred by small businesses.

American Farm Bureau Federation submitted feedback that the number of small businesses and impacted industries was not accurately captured in the NPRM's RFA analysis. As explained in Section VIII.B.2 below, the Department has revised its RFA analysis methodology to include data from the Census Bureau's Statistics of U.S. Businesses (SUSB) [140] to add additional evidence on the scope of impact to small businesses in agriculture industries. The Department notes that a broader industry level (2-digit North American Industry Classification System (NAICS)) was used due to limitations in the publicly available data of 4-digit NAICS industries cited by the commenter (1112, 1113, 1114, 1121, 1122, 1123, 1125, and 1129).[141]

2. Description of the Number of Small Entities to Which This Final Rule Will Apply

a. Definition of Small Entity

The RFA defines a ''small entity'' as a: (1) small not-for-profit organization; (2) small governmental jurisdiction; or (3) small business.[142] The Department used the entity size standards defined by the Small Business Administration (SBA), in effect as of December 19, 2022, to classify entities as small.[143] SBA establishes separate standards for individual 6-digit NAICS industry codes, and standard cutoffs are typically based on either the average number of employees or the average annual receipts. Small governmental jurisdictions are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people.[144]

b. Number of Small Entities

The Department collected employment and annual revenue data from the business information provider Data Axle [145] and merged those data into the estimated costs for small businesses from the H–2A certification data for FY 2020 and FY 2021. This process allowed the Department to identify the number and type of small entities in the H–2A certification data as well as their annual revenues. The Department determined the number of unique employers in the FY 2020 and FY 2021 certification data based on the employer name and city. Using these data allows the Department to estimate the per-provision cost of this final rule as a percent of revenue by firm size. The Department identified 9,927 unique employers (excluding labor contractors). Of those 9,927 employers, the Department was able to obtain data matches of revenue and employees for 2,615 H–2A employers in the FY 2020 and FY 2021 certification data. Of those 2,615 employers, the Department determined that 2,159 were small (82.5 percent). These unique small entities had an average of 11 employees and average annual revenue of approximately $3.6 million. Of these small unique entities, 2,139 of them had revenue data available from Data Axle. The Department's analysis of the impact of this proposed rule on small entities is based on the number of small unique entities (2,139 with revenue data).

To provide clarity on the agricultural industries impacted by this regulation, Exhibit 7 shows the number of unique H–2A small employers with certifications in the FY 2020 and FY 2021 certification data within each NAICS code at the 6-digit level.

EXHIBIT 7—NUMBER OF H–2A SMALL EMPLOYERS BY NAICS CODE

6-Digit NAICS	Description	Number of employers	Percent	Size standard
111998	All Other Miscellaneous Crop Farming	611	29	$2.5 million.
444240	Nursery, Garden Center, and Farm Supply Stores	162	8	$21.5 million.
561730	Landscaping Services	135	6	$9.5 million.
445230	Fruit and Vegetable Markets	127	6	$9.0 million.
424480	Fresh Fruit and Vegetable Merchant Wholesalers	78	4	100 employees.
111339	Other Noncitrus Fruit Farming	78	4	$3.5 million.
112990	All Other Animal Production	57	3	$2.75 million.
424930	Flower, Nursery Stock, and Florists' Supplies Merchant Wholesalers	47	2	100 employees.
424910	Farm Supplies Merchant Wholesalers	39	2	200 employees.
484230	Specialized Freight (except Used Goods) Trucking, Long-Distance	37	2	$34.0 million.
	All Other	768	36	
	Total	2,139	100	

[140] *See* U.S. Census Bureau, *Statistics of U.S. Businesses* (Sept. 19, 2023). *https://www.census.gov/programs-surveys/susb/data.html.*

[141] *See* U.S. Census Bureau, *Economic Census: NAICS Codes & Understanding Industry Classification Systems* (Sept. 28, 2023), *https://www.census.gov/programs-surveys/economic-census/year/2022/guidance/understanding-naics.html.*

[142] 5 U.S.C. 601(6).

[143] SBA, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Dec. 19, 2022), *https://www.sba.gov/document/support—table-size-standards.*

[144] 5 U.S.C. 601(5).

[145] *See* Data Axle, *Business Data, https://www.data-axle.com/our-data/business-data* (last visited Apr. 4, 2024).

The Department also collected employment and annual revenue data for the NAICS Agricultural major industry [146] from SUSB [147] and merged those data into the estimated costs for small businesses from the H–2A certification data for FY 2020 and FY 2021. The Department assumes that NAICS sectors related to H–2A employment (1112, 1113, 1114, 1121, 1122, 1123, 1124, 1125, and 1129) have similar representation in size distribution as the broader 2-digit industry. The Department believes it is a reasonable assumption for the analysis because the broader 2-digit industry completely covers the 4-digit NAICS industries (1112, 1113, 1114, 1121, 1122, 1123, and 1129). The size distribution in the broader 2-digit industry mirrors the average size distribution in the 4-digit NAICS industries (1112, 1113, 1114, 1121, 1122, 1123 and 1129). No small businesses are left out for estimating impact on small entities in the affected NAICS industries. This assumption allows the Department to conduct a robust analysis of the most inclusive set of small businesses, which includes the number of firms, number of employees, and annual revenue by firm size. Using these data allows the Department to estimate the per-provision cost of this final rule as a percent of revenue by firm size.

3. Projected Impacts to Affected Small Entities

The Department has estimated the incremental costs for small entities from the baseline (*i.e.,* the current practices for complying, at a minimum, with the H–2A program as currently codified at 20 CFR part 655, subpart B, and 29 CFR part 501) to this final rule. As discussed in previous sections, the Department estimates impacts using historical certification data and, therefore, simulates the impacts of this final rule to each actual employer in the H–2A program rather than using representative data for employers within a given sector. The Department estimated the costs of (a) time to read and review this final rule, (b) time required to collect and maintain additional information for the application additions provision and add that information to H–2A applications, and (c) wage transfers due to the removal of the 2-week effective date delay from the AEWR publication. The estimates included in this analysis are consistent with those presented in the E.O. 12866 section.

The Department estimates that 2,139 unique small entities will incur a one-time cost of $223.43 to familiarize themselves with the rule and an annual cost of $111.71 to collect and maintain information due to the additional disclosure requirements associated with this final rule.[148]

In addition to the cost of rule familiarization and the cost of information and record keeping due to application additions, each small entity may have an increase in wage costs due to the revisions to the effective date of the AEWR. To estimate the wage impact for each small entity, we followed the methodology presented in the E.O. 12866 section. For each certification of a small entity, the Department calculated total wage impacts of this final rule in calendar year (CY) 2020 and CY 2021 based on each certification for employment between December 14th and the end of the year and the annual increase in the AEWR. The Department estimates the wage impact to all small entities is $826 on average in the first year.[149] Many of the small entities have no wage impact from this final rule because they do not have workers employed at the end of December.

Exhibit 8 shows the estimated cost per small entity for each year of the analysis. The first-year cost per small entity is estimated at $1,143 at a discount rate of 7 percent. The annualized cost per small entity is estimated at $1,553 at a discount rate of 7 percent. These estimates are *average costs,* meaning that some small entities will have higher costs while other small entities will have lower costs, regardless of firm size.

EXHIBIT 8—ESTIMATED COST TO SMALL ENTITIES

Year	Rule familiarization	Application additions	End of year wage impact	Average total cost per employer
1	$223.43	$111.71	$808	$1,143
2	223.43	111.71	872	1,207
3	223.43	111.71	941	1,276
4	223.43	111.71	1,015	1,350
5	223.43	111.71	1,095	1,430
6	223.43	111.71	1,181	1,516
7	223.43	111.71	1,264	1,610
8	223.43	111.71	1,375	1,710
9	223.43	111.71	1,483	1,819
10	223.43	111.71	1,600	1,936
	First-year cost ($), 7% discount rate			1,143

[146] Due to omissions in collected data, 6-digit and 4-digit NAICS code data were not available. *See* U.S. Census Bureau, *Economic Census: NAICS Codes & Understanding Industry Classification Systems* (Sept. 28, 2023). *https://www.census.gov/programs-surveys/economic-census/year/2022/guidance/understanding-naics.html.*

[147] *See* U.S. Census Bureau, *Statistics of U.S. Businesses* (Sept. 19, 2023). *https://www.census.gov/programs-surveys/susb/data.html.*

[148] Calculation: ($35.13 + $35.13(0.42) + $35.13(0.17)) × 4 = $223.43. $35.13 (1.59) × 1 = $55.86. $35.13 (1.59) × 2 = $111.71.

[149] In CY 2020 the average wage impact to all small entities is $620, and in CY 2021 it is $1,032. Because CY 2020 and CY 2021 H–2A certification data do not reflect the wage increases due to the 2023 AEWR Final Rule, the transfer payments estimated in the analysis are likely understated. As explained in a previous footnote, the transfer payments are likely understated in that they may not account for the main change under the 2023 AEWR Final Rule, namely the limited job opportunities that would be subject to updated AEWRs based on OEWS data. *See* 88 FR at 12764–12765. Because the 2023 AEWR Final Rule became effective on March 30, 2023, the Department does not have readily available calendar year H–2A certification data to estimate wage transfer payments after the publication of that rule. While the Department sought public comment on how these wage transfer impacts can be calculated, it received no comments. However, the 2023 AEWR Final Rule explained that the Department anticipates a very limited number of H–2A job opportunities would be subject to the OEWS-based AEWR, as the majority of H–2A job opportunities are and are estimated to continue to remain subject to FLS-based AEWRs. *See* 88 FR at 12766, 12799. The Department therefore considers the impacts of the potential underestimation to be *de minimis* because of the low incidence of job opportunities assigned the OEWS AEWR under the 2023 AEWR Final Rule.

EXHIBIT 8—ESTIMATED COST TO SMALL ENTITIES—Continued

Year	Rule familiarization	Application additions	End of year wage impact	Average total cost per employer
	Annualized cost ($), 7% discount rate			1,553

The Department used the following steps to estimate the cost of this final rule per small entity as a percentage of annual receipts. First, the Department used SBA's Table of Small Business Size Standards to determine the size thresholds for small entities within the agricultural industry.[150] Next the Department obtained data on the number of firms, number of employees, and annual revenue by industry and firm size category from SUSB.[151] The Department used the Gross Domestic Product deflator to convert revenue data from 2017 dollars to 2022 dollars.[152] Then, the Department divided the estimated first-year cost and the annualized cost per small business (discounted at a 7-percent rate) by the average annual receipts per firm to determine whether this final rule will have a significant or substantial economic impact on small businesses in each size category. The Department used a total cost estimate of 3 percent of revenue as the threshold for a significant individual impact and set a total of 20 percent of small entities incurring a significant impact as the threshold for a substantial impact on small entities. A threshold of 3 percent of revenues has been used in prior rulemakings for the definition of significant economic impact.[153] This threshold is also consistent with that sometimes used by other agencies.[154]

Exhibit 9 provides a breakdown of small entities by the proportion of revenue affected by the costs of this final rule. Of the 2,139 unique small entities with revenue data in the FY 2020 and FY 2021 certification data, only 0.7 percent of employers are estimated to have more than 3 percent of their total revenue impacted in the first year based on 2020 data and only 2.0 percent of employers are estimated to have more than 3 percent of their total revenue impacted in the first year based on 2021 data. In addition, no individual NAICS code sector has 20 percent or more of entities with an impact greater than 3 percent of revenue.

EXHIBIT 9—COST IMPACTS AS A PROPORTION OF TOTAL REVENUE FOR SMALL ENTITIES

Proportion of revenue impacted	111998	444240	561730	445230	All Other	Total
2020, by NAICS Code						
<1%	593 (97.1%)	162 (100.0%)	132 (98.5%)	127 (100.0%)	1,078 (97.6%)	2,093 (97.8%)
1%–2%	13 (2.1%)	0 (0.0%)	2 (1.5%)	0 (0.0%)	13 (1.2%)	28 (1.3%)
2%–3%	2 (0.3%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	2 (0.2%)	4 (0.2%)
3%–4%	1 (0.2%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (0.1%)	2 (0.1%)
4%–5%	1 (0.2%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	4 (0.4%)	5 (0.2%)
>5%	1 (0.2%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	6 (0.5%)	7 (0.3%)
Total >3%	3 (0.5%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	11 (1.0%)	14 (0.7%)
2021, by NAICS Code						
<1%	561 (91.8%)	161 (99.4%)	129 (96.3%)	127 (100.0%)	1,059 (95.9%)	2,038 (95.3%)
1%–2%	23 (3.8%)	1 (0.6%)	4 (3.0%)	0 (0.0%)	18 (1.6%)	46 (2.2%)
2%–3%	7 (1.1%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	5 (0.5%)	12 (0.6%)
3%–4%	4 (0.7%)	0 (0.0%)	1 (0.7%)	0 (0.0%)	4 (0.4%)	9 (0.4%)
4%–5%	5 (0.8%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	3 (0.3%)	8 (0.4%)
>5%	11 (1.8%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	15 (1.4%)	26 (1.2%)
Total >3%	20 (3.3%)	0 (0.0%)	1 (0.7%)	0 (0.0%)	22 (2.0%)	43 (2.0%)

Exhibit 10, below, presents results of the analysis using the SUSB data, which show that for the first-year and annualized costs, small businesses in the agriculture industry are not estimated to have a significant economic impact (3 percent or more) for any entities. The largest proportion of revenue from first-year costs is estimated to be 1.91 percent of the average receipts per firm and the annualized costs are estimated to be 2.60 percent of the average receipts per firm for the smallest firms with revenue below $100,000. Furthermore, it is very unlikely that agricultural employers with revenue below $100,000 will request H–2A workers as their small revenue will not be sufficient to pay the H–2A worker(s) and cover other operating costs.

[150] SBA, *Table of Small Business Size Standards* Matched to North American Industry Classification System Codes, (Mar. 17, 2023), *https://www.sba.gov/document/support-table-size-standards.* The size standards, which are expressed in either average annual receipts or number of employees, indicate the maximum allowed for a business in each subsector to be considered small.

[151] U.S. Census Bureau, *Statistics of U.S. Businesses* (May 10, 2022), *https://www.census.gov/programs-surveys/susb/data.html.*

[152] U.S. Bureau of Economic Analysis, *Table 1.1.9. Implicit Price Deflators for Gross Domestic Product, https://apps.bea.gov/iTable/?reqid=19&step=2&isuri=1&categories=survey* (last visited May 30, 2023).

[153] *See, e.g.,* Final Rule, *Increasing the Minimum Wage for Federal Contractors,* 79 FR 60634, 60706 (Oct. 7, 2014); Final Rule, *Discrimination on the Basis of Sex,* 81 FR 39108, 39151 (June 15, 2016); NPRM, *National Apprenticeship System Enhancements,* 89 FR 3118, 3252 (Jan. 17, 2024).

[154] *See, e.g.,* Final Rule, *Medicare and Medicaid Programs; Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction; Part II,* 79 FR 27106, 27151 (May 12, 2014) (Department of Health and Human Services rule stating that under its agency guidelines for conducting regulatory flexibility analyses, actions that do not negatively affect costs or revenues by more than 3 percent annually are not economically significant).

EXHIBIT 10—AGRICULTURE, FORESTRY, FISHING, AND HUNTING INDUSTRY
[Small business size standard: $2.25 million–$34.0 million]

	Number of firms [1]	Number of firms as percent of small firms in industry [2]	Annual receipts ($ million) [3]	Average receipts per firm ($) [4]	First-year cost per firm with 7% discounting	First-year cost per firm as percent of receipts [5]	Annualized cost per firm with 7% discounting	Annualized cost per firm as percent of receipts [6]
Enterprises with receipts below $100,000	4,042	18.03	$242	$59,803	$1,143	1.91	$1,553.04	2.60
Enterprises with receipts of $100,000 to $499,999	8,582	38.27	2,592	302,003	1,143	0.38	1,553	0.51
Enterprises with receipts of $500,000 to $999,999	3,703	16.51	3,127	844,419	1,143	0.14	1,553	0.18
Enterprises with receipts of $1,000,000 to $2,499,999	3,686	16.44	6,781	1,839,700	1,143	0.06	1,553	0.08
Enterprises with receipts of $2,500,000 to $4,999,999	1,370	6.11	5,634	4,112,289	1,143	0.03	1,553	0.04
Enterprises with receipts of $5,000,000 to $7,499,999	455	2.03	3,153	6,929,380	1,143	0.02	1,553	0.02
Enterprises with receipts of $7,500,000 to $9,999,999	208	0.93	2,101	10,101,550	1,143	0.01	1,553	0.02
Enterprises with receipts of $10,000,000 to $14,999,999	193	0.86	2,545	13,188,869	1,143	0.01	1,553	0.01
Enterprises with receipts of $15,000,000 to $19,999,999	79	0.35	1,520	19,242,856	1,143	0.01	1,553	0.01
Enterprises with receipts of $20,000,000 to $24,999,999	60	0.27	1,357	22,619,811	1,143	0.01	1,553	0.01
Enterprises with receipts of $25,000,000 to $29,999,999	28	0.12	710	25,343,408	1,143	0.00	1,553	0.01
Enterprises with receipts of $30,000,000 to $34,999,999	17	0.08	475	27,948,978	1,143	0.00	1,553	0.01

[1] Source: U.S. Census Bureau, Statistics of U.S. Businesses.
[2] Number of firms ÷ Small firms in industry.
[3] Source: U.S. Census Bureau, Statistics of U.S. Businesses.
[4] Annual receipts ÷ Number of firms.
[5] First-year cost per firm with 7% discounting ÷ Average receipts per firm.
[6] Annualized cost per firm with 7% discounting ÷ Average receipts per firm.

Based on the above analysis and results provided in both Exhibit 9 and Exhibit 10, the Department certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

In order to meet its statutory responsibilities under the INA, the Department collects information necessary to render determinations on requests for temporary agricultural labor certification that allow employers to bring foreign labor into the United States on a seasonal or other temporary basis under the H–2A program. The Department uses the collected information to determine if employers satisfy their statutory and regulatory obligations. This information is subject to the PRA, 44 U.S.C. 3501 *et seq.* A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The Department has OMB approval for its H–2A program information collection under Control Number 1205–0466.

In accordance with the PRA, the information collection requirements that must be implemented as a result of this regulation must receive approval from OMB. Therefore, the Department submitted a clearance package in connection with the NPRM that contained proposed revisions to the information collection pending OMB approval under 1205–0466.

In this package, the Department proposed changes to the forms used to collect required information (*i.e.,* Form ETA–9142A and appendices; Form ETA–790/790A and addenda) to conform to proposed revisions to the Department's H–2A regulations. The Department also introduced new appendices to the *Application for Temporary Labor Certification,* Form ETA–9142A. Appendix C will facilitate satisfaction of additional filing requirements by identifying information, such as name, location, and contact information, for owners and operators of places where work is performed and the people who manage and supervise workers under the H–2A Application, as discussed above. Additionally, employers must continue to keep this information updated throughout the work contract period, and in the event of audit will provide the updated information to the Department. Appendix D will satisfy new filing requirements for foreign labor recruiters. Specifically, the Department now requires the employer to disclose the identity (*i.e.,* name and, if applicable, identification/registration number) and geographic location of persons and entities hired by or working for the foreign labor recruiter that the employer engages or plans to engage in the recruitment of prospective H–2A

workers, regardless of whether the agent or recruiter is located in the United States or abroad. Additionally, the Department has revised Form ETA–790A, *Addendum B,* to collect more detailed information about employers and the places of employment at which workers will provide the agricultural labor or services described in the job order. More information about the Department's changes to the H–2A information collection instruments and the Department's collection and use of this information is available in supporting documentation in the PRA package the Department has prepared for this rulemaking.

These modifications reflect the regulatory changes proposed in the NPRM and adopted in this final rule, such as consistent use and clarification of defined terms and revised assurances.[155] The public was given 60 days to comment on the information collection and the comment period closed on November 14, 2023.[156]

During the 60-day comment period, the Department received some comments on the proposed form revisions. A farm owner and many trade associations, including Michigan Farm Bureau and NCFC, indicated that the burden numbers presented by the Department were low; however, none of those commenters provided an alternative burden number or a justification as to why the Department's burden numbers were inaccurate. Therefore, in this final rule, the Department's estimates of the time burden to complete the information collection will remain the same as estimated in the NPRM. Commenters primarily addressed aspects of the information collection while discussing the proposed regulations. After considering public comments submitted in response to the NPRM, the Department has adopted certain proposals, with some changes, as discussed in the preamble above, but has retained the proposed changes for the information collection in this final rule.

In response to comments, as described below, the Department has made additional modifications to the forms implemented with this final rule to clarify certain requirements, reflect the provisions of this final rule (*e.g.,* collection of additional employer information), and conform to similar collections (*e.g.,* manner of collecting name information). In addition to editing language on the forms, the Department has modified some data collection fields after considering public comments. Many commenters addressed the Department's proposal to collect information about owners, operators, managers, and supervisors, which is now reflected in this final rule and will be implemented using *Appendix C,* and will require an employer to submit contact information (address, phone, and email, if applicable) about owners, operators, managers, and supervisors. Although many commenters questioned the necessity of this requirement at the filing stage, the Department will retain this requirement because, as noted in the preamble to § 655.130 above, gathering this information at the time of filing, rather than only in the event of an investigation or audit, will assist the Department to gain a more accurate and detailed understanding of the scope and structure of the employer's agricultural operation, which is essential to the Department's fulfillment of various obligations in the administration and enforcement of the H–2A program. The information will assist the Department in determining whether two ostensibly separate employers are in fact one entity filing multiple applications, and whether they have demonstrated a bona fide temporary or seasonal need as required by the INA, 8 U.S.C. 1101(a)(15)(H)(ii)(a). Collection at the time of filing also will assist the Department in determining whether an employer has filed as a single employer with a debarred entity, as the Department will already have the debarred entity's data on record. Obtaining this information at the time of filing also enables OFLC and WHD to search across applications within a filing system database to identify instances in which employers have changed names, or roles, to avoid complying with program regulations or avoid monetary penalties or program debarment. Furthermore, the information collected about owners, operators, and supervisors at the application stage may assist the Department to identify whether an individual or successor in interest should be named on any determination and, therefore, subject to any sanctions or remedies assessed. Finally, as noted above, collecting this information from all applicants at the time of filing, rather than only collecting the information during an audit or investigation, can be useful for other similar purposes as well, such as identifying instances when an H–2ALC Application indicates that an applicant intends to supply an H–2A workforce to a debarred employer during the debarment period.

Additionally, commenters expressed concerns about publication of the required contact information of an owner, operator, manager, or supervisor. The Department, as discussed in the above preamble, will only collect, store, and disseminate all information and records in accordance with the Department's information sharing agreements and SORN, principles set forth by OMB, and applicable laws, including the Privacy Act of 1974 (Pub. L. 93–579, 7, 88 Stat. 1896, 1909), Federal Records Act of 1950 (Pub. L. 81–754, 64 Stat. 583, 585 [codified as amended in scattered sections of 44 U.S.C.]), the PRA (44 U.S.C. 3501 *et seq.*), and the E-Government Act of 2002 (Pub. L. 107–347 (2002)).

As a result, the forms implemented with this final rule align information collection requirements with the Department's regulation and continue its ongoing efforts to provide greater clarity to employers on regulatory requirements, and to standardize information collection to reduce employer time and burden preparing applications. Overall, the revisions discussed above place no undue public burden to respond to the information collection required under this final rule from that proposed in connection with the NPRM.

The information collection change in requirements associated with this final rule are summarized as follows:

Title: H–2A Temporary Agricultural Employment Certification Program.

Agency: DOL–ETA.

Type of Information Collection: OMB Control Number 1205–0466.

Affected Public: Individuals or Households, Private Sector—businesses or other for-profits, Government, State, Local and Tribal Governments.

Form(s): ETA–9142A, *H–2A Application for Temporary Employment Certification;* ETA–9142A—*Appendix A;* ETA–9142A—*Appendix B, H–2A Labor Contractor Surety Bond; Appendix C,* ETA–9142A; *Appendix D,* ETA–9142A*;* ETA–9142A—*H–2A Approval Final Determination: Temporary Agricultural Labor Certification;* ETA–790/790A, *H–2A Agricultural Clearance Order;* ETA–790/790A—*Addendum A;* ETA–790/790A—

[155] *See* 2023 NPRM, 88 FR 63750.

[156] On October 26, 2023, in response to several requests, the Department published a letter on regulations.gov declining to extend the 60-day comment period for the NPRM that expired on November 14, 2023. The Department found that 60 days would be a reasonable and adequate amount of time to provide notice and an opportunity to comment on the NPRM to this rule. As a result, the Department encouraged all interested parties to submit comments electronically on *https://www.regulations.gov* (RIN 1205–AC12) by 11:59 p.m. ET on November 14, 2023. Letter from Rajesh D. Nayak, Asst. Sec'y for Pol'y, DOL (Oct. 16, 2023), *https://www.regulations.gov/document/ETA-2023-0003-0040.*

Addendum B; ETA–790/790A—*Addendum C;* ETA–232, *Domestic Agricultural In-Season Wage Report.*

Obligation to Respond: Required to Obtain or Retain Benefits.

Total Annual Respondents: 467,843.

Annual Frequency: On Occasion.

Total Annual Responses: 14,586.

Estimated Time per Response (averages):

—Forms ETA–9142A, Appendix A, Appendix B, Appendix C, and Appendix D—3.63 hours per response.

—Forms ETA–790/790A—.70 hours per response.

—Form ETA–232—3.30 hours per response.

Estimated Total Annual Burden Hours: 102,864.74.

Total Annual Burden Cost for Respondents: $0.

Title of Collection: Agricultural Recruitment System Forms Affecting Migrant and Seasonal Farmworkers.

Type of Review: Revision of a Currently Approved Information Collection.

OMB Control Number: 1205–0134.

Description: The NPRM proposed to revise Agricultural Clearance Order Form, Form ETA–790B, which will be attached to the Agricultural Clearance Order Form, Form ETA–790 (see OMB Control Number 1205–0466). Form ETA–790B is only used for employers who submit clearance orders requesting U.S. workers for temporary agricultural jobs that are not attached to requests for foreign workers through the H–2A visa program (non-criteria clearance orders). ETA included the estimated burden to the public for the completion of Form ETA–790 as it relates to those employers seeking to place non-criteria job orders through the ARS in addition to the estimated burden for Form ETA–790B because employers would fill out both forms. The Department must update Form ETA–790B to implement changes at § 653.501(c)(3)(iv) regarding assurances that employers must make on clearance orders. The Department has also made changes to align Form ETA–790B with the structure of Form ETA–790A. *Affected Public:* State Governments, Private Sector: Business or other for-profits, not-for-profit institutions, and farms.

Obligation to Respond: Required to Obtain or Retain Benefits.

Estimated Total Annual Respondents: 7,568.

Estimated Total Annual Responses: 7,568.

Estimated Total Annual Burden Hours: 6,622.

Estimated Total Annual Other Burden Costs: $0.

Regulations Sections: Subpart F of part 653.

Agency: DOL–ETA.

Interested parties may obtain a copy of the information collection revisions submitted to OMB on the OIRA website at *https://www.reginfo.gov/public/do/PRAMain.* From that page, select Department of Labor from the ''Currently under Review'' dropdown menu, click the ''Submit'' button, and find the applicable control number among the ICRs displayed, or use the search bar at the top right of the page and type in the OMB Control Number (1205–0134).

D. Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act)

The Congressional Review Act (CRA) was included as part of SBREFA, Public Law 104–121, 110 Stat. 847, 868 (codified at 5 U.S.C. 801 *et seq.*). OIRA has determined that this final rule does not meet the criteria set forth in 5 U.S.C. 804(2). DOL has complied with the CRA's reporting requirements and has sent this rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1).

E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4, codified at 2 U.S.C. 1501 *et seq.*) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. UMRA requires Federal agencies to assess a regulation's effects on State, local, and Tribal governments, as well as on the private sector, except to the extent the regulation incorporates requirements specifically set forth in law. Title II of the UMRA requires each Federal agency to prepare a written statement assessing the effects of any regulation that includes any Federal mandate in a proposed or final agency rule that may result in $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector. A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or Tribal governments, or upon the private sector, except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program.

This final rule does not result in unfunded mandates for the public or private sector because private employers' participation in the program is voluntary, and State governments are reimbursed for performing activities required under the program. The requirements of title II of the UMRA, therefore, do not apply, and the Department has not prepared a statement under the UMRA.

F. Executive Order 13132 (Federalism)

This final rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with sec. 6 of E.O. 13132,[157] it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

The Department has reviewed this final rule in accordance with E.O. 13175 [158] and has determined that it does not have Tribal implications. This rule does not 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 Tribal governments.

List of Subjects

20 CFR Part 651

Employment, Grant programs—labor.

20 CFR Part 653

Agriculture, Employment, Equal employment opportunity, Grant programs—labor, Migrant labor, Reporting and recordkeeping requirements.

20 CFR Part 655

Administrative practice and procedure, Foreign workers, Employment, Employment and training, Enforcement, Forest and forest products, Fraud, Health professions, Immigration, Labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

20 CFR Part 658

Administrative practice and procedure, Employment, Grant programs—labor, Reporting and recordkeeping requirements.

[157] E.O. 13132, *Federalism,* 64 FR 43255 (Aug. 10, 1999).

[158] E.O. 13175, Consultation and Coordination with Indian Tribal Governments, 65 FR 67249 (Nov. 9, 2000).

29 CFR Part 501

Administrative practice and procedure, Agricultural, Aliens, Employment, Housing, Housing standards, Immigration, Labor, Migrant labor, Penalties, Transportation, Wages.

For the reasons stated in the preamble, the Department of Labor amends 20 CFR parts 651, 653, 655, and 658 and 29 CFR part 501 as follows:

Title 20: Employees' Benefits

Employment and Training Administration

PART 651—GENERAL PROVISIONS GOVERNING THE WAGNER-PEYSER ACT EMPLOYMENT SERVICE

■ 1. The authority citation for part 651 continues to read as follows:

Authority: 29 U.S.C. 49a; 38 U.S.C. part III, 4101, 4211; Secs. 503, 3, 189, Pub. L. 113–128, 128 Stat. 1425 (Jul. 22, 2014).

■ 2. Amend § 651.10 by:

■ a. Adding definitions of ''Agent'', ''Criteria clearance order'', and ''Discontinuation of services'', in alphabetical order;

■ b. Revising the definition for ''Employment-related laws''; and

■ c. Adding definitions for ''Farm labor contractor'', ''Joint employer'', ''Non-criteria clearance order'', ''Successor in interest'', and ''Week'' in alphabetical order.

The additions and revision read as follows:

§ 651.10 Definitions of terms used in this part and parts 652, 653, 654, and 658 of this chapter.

* * * * *

Agent means a legal entity or person, such as an association of employers, or an attorney for an association, that is authorized to act on behalf of the employer for purposes of recruitment of workers through the clearance system and is not itself an employer or joint employer, as defined in this section, with respect to a specific job order.

* * * * *

Criteria clearance order means a clearance order that is attached to an application for foreign temporary agricultural workers pursuant to part 655, subpart B, of this chapter.

* * * * *

Discontinuation of services means that an employer, agent, farm labor contractor, joint employer, or successor in interest, as defined in this section, cannot participate in or receive any Wagner-Peyser Act employment service provided by the ES to employers pursuant to parts 652 and 653 of this chapter.

* * * * *

Employment-related laws means those laws and implementing rules, regulations, and standards that relate to the employment relationship, such as those enforced by the Department's WHD, OSHA, or by other Federal, State, or local agencies.

* * * * *

Farm labor contractor means any person or entity, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal farmworker (MSFW).

* * * * *

Joint employer means where two or more employers each have sufficient definitional indicia of being an employer of a worker as defined in this section, they are, at all times, joint employers of that worker. An employer that submits a job order to the ES clearance system as a joint employer, is a joint employer of any worker placed and employed on the job order during the period of employment anticipated, amended, or otherwise extended in accordance with the order.

* * * * *

Non-criteria clearance order means a clearance order that is not attached to an application for foreign temporary agricultural workers pursuant to part 655, subpart B, of this chapter.

* * * * *

Successor in interest—The following factors, including those as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer, agent, or farm labor contractor is a successor in interest; however, these factors are not exhaustive, and no one factor is dispositive, but all of the circumstances will be considered as a whole:

(1) Substantial continuity of the same business operations;

(2) Use of the same facilities;

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

(6) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(7) Similarity in machinery, equipment, and production methods;

(8) Similarity of products and services;

(9) The ability of the predecessor to provide relief; and

(10) For purposes of discontinuation of services, the involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

* * * * *

Week means 7 consecutive calendar days.

* * * * *

PART 653—SERVICES OF THE WAGNER-PEYSER ACT EMPLOYMENT SERVICE SYSTEM

■ 3. The authority citation for part 653 continues to read as follows:

Authority: Secs. 167, 189, 503, Public Law 113–128, 128 Stat. 1425 (Jul. 22, 2014); 29 U.S.C. chapter 4B; 38 U.S.C. part III, chapters 41 and 42.

■ 4. Amend § 653.501 by:

■ a. Adding paragraph (b)(4);

■ b. Revising paragraph (c)(1)(iv)(E);

■ c. Revising paragraphs (c)(3) introductory text, (c)(3)(i) and (iv), and (c)(5); and

■ d. Removing and reserving paragraphs (d)(4), (7), and (8).

The additions and revisions read as follows:

§ 653.501 Requirements for processing clearance orders.

* * * * *

(b) * * *

(4) Prior to placing a job order into intrastate or interstate clearance, ES staff must consult the Department's Office of Foreign Labor Certification and Wage and Hour Division debarment lists, and the Department's Office of Workforce Investment discontinuation of services list.

(i) If the employer requesting access to the clearance system is currently debarred from participating in the H–2A or H–2B foreign labor certification programs, the SWA must initiate discontinuation of services pursuant to part 658, subpart F, of this chapter.

(ii) If the employer requesting access to the clearance system is currently discontinued from receiving ES services under § 658.503 of this chapter by any State, the SWA must not approve the clearance order for placement into intrastate or interstate clearance. Employers may submit written requests to the OWI Administrator to determine whether they are on the OWI discontinuation of services list. If the OWI Administrator indicates that the employer is not on the discontinuation of services list then the SWA must

approve the clearance order, as long as all other requirements have been met.

(iii) For purposes of this paragraph (b)(4), ''employer'' has the meaning given in § 658.500(b) of this chapter.

(c) * * *

(1) * * *

(iv) * * *

(E) The hourly wage rate, if applicable, and any non-hourly wage rate offered, including a piece rate or base rate and bonuses and, for any non-hourly wage rate, an estimate of its hourly wage rate equivalent for each activity and unit size;

* * * * *

(3) SWAs must ensure that the employer makes the following assurances in the clearance order:

(i) The employer will provide to workers placed through the clearance system the number of hours of work cited in paragraph (c)(1)(iv)(D) of this section for the 14 calendar days beginning with the anticipated date of need, unless the employer has amended the date of need at least 10 business days prior to the original date of need (pursuant to paragraph (c)(3)(iv) of this section).

* * * * *

(iv) The employer will notify the order-holding office or SWA immediately upon learning that a crop is maturing earlier or later, or that weather conditions, over-recruitment, or other factors have changed the terms and conditions of employment. If there is a change to the date of need, the employer will notify the order-holding office or SWA, and each worker who has been placed on the clearance order using the contact information the worker provided to the employer, in writing (email and other forms of electronic written notification are acceptable) at least 10 business days prior to the original date of need. Notification to workers must be made in accordance with the language access requirements of 29 CFR 38.9 for workers with limited English proficiency. If a worker provides electronic contact information, such as an email address or telephone number, the employer will send notice using one of the electronic contact methods provided. If the employer provides non-written telephonic notice, such as a phone call, voice message, or an equivalent, the employer will also send written notice using the email or postal address provided by the worker at least 10 business days prior to the original date of need. The employer will maintain records of the notification and the date notification was sent to the order-holding office or SWA and workers for 3 years. Consistent with paragraph (c)(5) of this section, if the employer does not properly send notification to the order-holding office or SWA and workers at least 10 business days prior to the original date of need, the employer will provide the housing described on the clearance order to all migrant workers placed on the clearance order who are already traveling to the place of employment, without cost to the workers, until work commences. The employer will pay all placed workers for the hours listed on the clearance order and will provide or pay all other benefits and expenses described on the clearance order for each day work is delayed up to 14 calendar days or provide alternative work.

* * * * *

(5) If there is a change to the anticipated date of need and the employer fails to notify the order-holding office or SWA and all workers placed on the clearance order at least 10 business days prior to the original date of need, as assured in paragraph (c)(3)(iv) of this section, the employer must provide housing to all migrant workers placed on the clearance order who are already traveling to the place of employment, without cost to the workers, until work commences, and must pay all placed workers the specified hourly rate of pay, or if the pay is piece-rate, the higher of the Federal or State minimum wage, or an applicable prevailing wage, or for criteria orders the rate of pay required under part 655, subpart B, of this chapter, and must provide or pay all other benefits and expenses described on the clearance order for each day work is delayed up to 14 calendar days starting with the originally anticipated date of need or provide alternative work if such alternative work is stated on the approved clearance order. If an employer fails to comply under this paragraph (c)(5) the order-holding office must process the information as an apparent violation pursuant to § 658.419 of this chapter and may refer an apparent violation of the employer's payment obligation under this paragraph (c)(5) to the Department's Wage and Hour Division.

* * * * *

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 5. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107–296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n), and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 6. Amend § 655.103 by:

■ a. In paragraph (b), adding the definitions of ''Key service provider'' and ''Labor organization'' in alphabetical order and removing the definition of ''Successor in interest''; and

■ b. Adding paragraph (e).

The additions read as follows:

§ 655.103 Overview of this subpart and definition of terms.

* * * * *

(b) * * *

Key service provider. A health-care provider; a community health worker; an education provider; a translator or interpreter; an attorney, legal advocate, or other legal service provider; a government official, including a consular representative; a member of the clergy; an emergency services provider; a law enforcement officer; and any other provider of similar services.

Labor organization. Any organization of any kind, or any agency or employee representation committee or plan, in which workers participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * * * *

(e) *Definition of single employer for purposes of temporary or seasonal need and contractual obligations.* Separate

entities will be deemed a single employer (sometimes referred to as an ''integrated employer'') for purposes of assessing temporary or seasonal need and for enforcement of contractual obligations if they meet the definition of single employer in this paragraph (e). Under the definition of single employer, a determination of whether separate entities are a single employer is not determined by a single factor, but rather the entire relationship is viewed in its totality. Factors considered in determining whether two or more entities consist of a single employer include:

(1) Common management;

(2) Interrelation between operations;

(3) Centralized control of labor relations; and

(4) Degree of common ownership/financial control.

■ 7. Add § 655.104 to read as follows:

§ 655.104 Successors in interest.

(a) *Liability of successors in interest.* Where an employer, agent, or attorney has violated 8 U.S.C. 1188, 29 CFR part 501, or this subpart, a successor in interest to that employer, agent, or attorney may be held liable for the duties and obligations of the violating employer, agent, or attorney in certain circumstances, regardless of whether such successor in interest has succeeded to all the rights and liabilities of the predecessor employer, agent, or attorney.

(b) *Definition of successors in interest.* The following factors, including those as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer, agent, or attorney is a successor in interest; however, these factors are not exhaustive, and no one factor is dispositive, but all of the circumstances will be considered as a whole:

(1) Substantial continuity of the same business operations;

(2) Use of the same facilities;

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

(6) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(7) Similarity in machinery, equipment, and production methods;

(8) Similarity of products and services;

(9) The ability of the predecessor to provide relief; and

(10) For purposes of debarment, the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

(c) *Effect of debarment on successors in interest.* When an employer, agent, or attorney is debarred under § 655.182 or 29 CFR 501.20, any successor in interest to the debarred employer, agent, or attorney is also debarred. No application for H–2A workers may be filed by or on behalf of a successor in interest to a debarred employer, agent, or attorney, subject to the term limits set forth in § 655.182(c)(2). If the CO determines that an application for H–2A workers was filed by or on behalf of a successor in interest to a debarred employer, agent, or attorney during the period of debarment as set forth in § 655.182(c)(2), the CO will issue a Notice of Deficiency (NOD) pursuant to § 655.141 or deny the application pursuant to § 655.164, as appropriate depending upon the status of the H–2A application, solely on the basis that the entity is a successor in interest to a debarred employer, agent, or attorney. If the OFLC Administrator determines that a certification for H–2A workers was issued to a successor in interest to a debarred employer, the OFLC Administrator may revoke the certification pursuant to § 655.181(a). The employer, agent, or attorney may appeal its status as a successor in interest to the debarred entity, pursuant to the procedures for appeals of CO determinations at § 655.171.

■ 8. Amend § 655.120 by revising paragraphs (a) and (b)(2) and (3) to read as follows:

§ 655.120 Offered wage rate.

(a) *Employer obligation.* (1) Except for occupations covered by §§ 655.200 through 655.235, to comply with its obligation under § 655.122(l), an employer must offer, advertise in its recruitment, and pay a wage that is at least the highest of:

(i) The AEWR;

(ii) A prevailing wage rate, whether expressed as a piece rate or other unit of pay, if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity, meeting the requirements of paragraph (c) of this section;

(iii) The agreed-upon collective bargaining wage;

(iv) The Federal minimum wage;

(v) The State minimum wage; or

(vi) Any other wage rate the employer intends to pay.

(2) Where the wage rates set forth in paragraph (a)(1) of this section are expressed in different units of pay (including piece rates or other pay structures), the employer must list the highest applicable wage rate for each unit of pay in its job order and must offer and advertise all of these wage rates in its recruitment. The employer's obligation to pay the highest of these wage rates is set forth at § 655.122(l)(2).

(b) * * *

(2) The OFLC Administrator will publish a notice in the **Federal Register**, at least once in each calendar year, on a date to be determined by the OFLC Administrator, establishing each AEWR. The updated AEWR will be effective as of the date of publication of the notice in the **Federal Register**.

(3) If an updated AEWR for the occupational classification and geographic area is published in the **Federal Register** during the work contract, and the updated AEWR is higher than the highest of the previous AEWR; a prevailing wage for the crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity and geographic area; the agreed-upon collective bargaining wage; the Federal minimum wage; or the State minimum wage, the employer must pay at least the updated AEWR beginning on the date the updated AEWR is published in the **Federal Register**.

* * * * *

■ 9. Amend § 655.122 by revising paragraphs (h)(4), (i)(1)(i) and (ii), (l), and (n) to read as follows:

§ 655.122 Contents of job offers.

* * * * *

(h) * * *

(4) *Employer-provided transportation.* (i) All employer-provided transportation must comply with all applicable local, State, or Federal laws and regulations, and must provide, at a minimum, the same transportation safety standards, driver's licensure, and vehicle insurance required under 29 U.S.C. 1841, 29 CFR 500.104 or 500.105, and 29 CFR 500.120 through 500.128.

(ii) The employer must not operate, or allow any other person to operate, any employer-provided transportation that is required by the U.S. Department of Transportation's Federal Motor Vehicle Safety Standards, including 49 CFR 571.208, to be manufactured with seat belts, unless all passengers and the driver are properly restrained by seat belts meeting standards established by the U.S. Department of Transportation, including 49 CFR 571.209 and 571.210.

(iii) The job offer must include a description of the modes of transportation (*e.g.,* type of vehicle) that will be used for inbound, outbound, daily, and any other transportation.

(iv) If workers' compensation is used to cover transportation in lieu of vehicle insurance, the employer must either ensure that the workers' compensation covers all travel or that vehicle insurance exists to provide coverage for travel not covered by workers' compensation and it must have property damage insurance.

(i) * * *

(1) * * *

(i) For purposes of this paragraph (i)(1), a workday means the number of hours in a workday as stated in the job order and excludes the worker's Sabbath and Federal holidays. The employer must offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract.

(ii) In the event the worker begins working later than the specified beginning date of the contract, the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the work contract and all extensions thereof are in effect.

* * * * *

(l) *Rates of pay.* Except for occupations covered by §§ 655.200 through 655.235, the employer must pay the worker at least the highest wage rate set forth in § 655.120(a)(1).

(1) The employer must calculate workers' wages using the wage rate that will result in the highest wages for each worker in each pay period. When calculating wages based on an hourly wage rate, the calculation must reflect every hour or portion thereof worked during a pay period. The wages actually paid cannot be lower than the wages that would result from the wage rate(s) guaranteed in the job order.

(2) Where the wage rates set forth in § 655.120(a)(1) include both hourly and non-hourly wage rates, the employer must calculate each worker's wages, in each pay period, using the highest wage rate for each unit of pay, and pay the worker the highest of these wages for that pay period. The wage actually paid cannot be lower than the wages that would result from the wage rate(s) guaranteed in the job offer.

(3) If the employer requires one or more minimum productivity standards of workers as a condition of job retention, such standards must be specified in the job offer and be no more than those required by the employer in 1977, unless the OFLC Administrator approves a higher minimum, or, if the employer first applied for temporary agricultural labor certification after 1977, such standards must be no more than those normally required (at the time of the first *Application for Temporary Employment Certification*) by other employers for the activity in the area of intended employment.

(4) If applicable, the employer must state in the job order:

(i) That overtime hours may be available;

(ii) The wage rate(s) to be paid for any such overtime hours;

(iii) The circumstances under which the wage rate(s) for overtime hours will be paid, including, but not limited to, after how many hours in a day or workweek the overtime wage rate will be paid, and whether overtime wage rates will vary between places of employment; and

(iv) Where the overtime pay is required by law, the applicable Federal, State, or local law requiring the overtime pay.

* * * * *

(n) *Termination for cause or abandonment of employment.* (1) If a worker is terminated for cause or voluntarily abandons employment before the end of the contract period, and the employer notifies the NPC, and DHS in the case of an H–2A worker, in writing or by any other method specified by the Department in a notice published in the **Federal Register** or specified by DHS not later than 2 working days after such termination for cause or abandonment occurs, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (i) of this section, and, in the case of a U.S. worker, the employer will not be obligated to contact that worker under § 655.153.

(2) A worker is terminated for cause when the employer terminates the worker for failure to comply with employer policies or rules or to satisfactorily perform job duties in accordance with reasonable expectations based on criteria listed in the job offer.

(i) An employer may terminate a worker for cause only if all of the following conditions are satisfied:

(A) The employee has been informed (in a language understood by the worker), or reasonably should have known, of the policy, rule, or performance expectation;

(B) Compliance with the policy, rule, or performance expectation is within the worker's control;

(C) The policy, rule, or performance expectation is reasonable and applied consistently to the employer's H–2A workers and workers in corresponding employment;

(D) The employer undertakes a fair and objective investigation into the job performance or misconduct; and

(E) The employer corrects the worker's performance or behavior using progressive discipline, which is a system of graduated and reasonable responses to an employee's failure to satisfactorily perform job duties or comply with employer policies or rules. Disciplinary measures should be proportional to the misconduct or failure to meet performance expectations but may increase in severity if misconduct or failure to meet performance expectations is repeated, and may include immediate termination for egregious misconduct, meaning intentional or reckless conduct that is plainly illegal, poses imminent danger to physical safety, or that a reasonable person would understand as being outrageous. Prior to each disciplinary measure, the employer must notify the worker of the infraction and allow the worker to present evidence in their defense. Following each disciplinary measure, except where the appropriate disciplinary measure is termination, the employer must provide relevant and adequate instruction to the worker, and must afford the worker reasonable time to correct the behavior or to meet the performance expectation following such instruction. The employer must document each infraction and corresponding disciplinary measure, evidence the worker presented in their defense, and resulting instruction, and provide a copy of this documentation to the worker (in a language understood by the worker) within 1 week of the implementation of the disciplinary measure.

(ii) A worker is not terminated for cause where the termination is: contrary to a Federal, State, or local law; for an employee's refusal to work under conditions that the employee reasonably believes will expose them or other employees to an unreasonable health or safety risk; because of discrimination on the basis of race, color, national origin, age, sex (including sexual orientation or gender identity), religion, disability, familial status or citizenship status; or, where applicable, where the employer failed to comply with its obligations under § 655.135(m) in an investigatory interview that contributed to the termination.

(iii) The employer bears the burden of demonstrating that any termination for

cause meets the requirements in paragraph (n)(2).

(3) Abandonment will be deemed to begin after a worker fails to report to work at the regularly scheduled time for 5 consecutive working days without the consent of the employer.

(4) The employer is required to maintain records described in this section for not less than 3 years from the date of the certification.

(i) Records of notification to the NPC, and to DHS in the case of an H–2A worker, of termination for cause or abandonment.

(ii) Disciplinary records, including the infraction and each step of progressive discipline, any evidence the worker presented in their defense, any investigation related to the termination, and any subsequent instruction afforded the worker.

(iii) Records indicating the reason(s) for termination of any worker, including disciplinary records as described in paragraph (n)(4)(ii) of this section and § 655.167.

* * * * *

■ 10. Amend § 655.130 by revising paragraph (a) to read as follows:

§ 655.130 Application filing requirements.

* * * * *

(a) *What to file.* (1) An employer that desires to apply for temporary agricultural labor certification of one or more nonimmigrant workers must file a completed *Application for Temporary Employment Certification,* all supporting documentation and information required at the time of filing under §§ 655.131 through 655.137, and, unless a specific exemption applies, a copy of Form ETA–790/790A, submitted as set forth in § 655.121(a).

(2) The *Application for Temporary Employment Certification* must include the employer's legal name, trade name(s), and a valid FEIN as well as a valid place of business (physical location) in the United States and a means by which it may be contacted by prospective U.S. applicants for employment. For each employer of any H–2A worker sponsored under the *Application for Temporary Employment Certification* or any worker in corresponding employment, the *Application for Temporary Employment Certification* must include the identity, location, and contact information of all persons who are the owners of that entity.

(3) For each place of employment identified in the job order, the *Application for Temporary Employment Certification* must include the identity, location, and contact information of all persons and entities, if different than the employer(s), who are the operators of the place of employment, and of all persons who manage or supervise any H–2A worker sponsored under the *Application for Temporary Employment Certification* or any worker in corresponding employment, regardless of whether those managers or supervisors are employed by the employer or another entity.

(4) If the information specified in paragraphs (a)(2) and (3) of this section changes during the work contract period, the employer must update its records to reflect the change. The employer must continue to keep this information up to date until the end of the work contract period, including any extensions. The employer must retain the updated information in accordance with § 655.167(c)(9) and must make this updated information available in the event of a post-certification audit or upon request by the Department. The Department may share the information it receives from employers with any other Federal agency, as appropriate for investigative or enforcement purpose, as set forth in paragraph (f) of this section.

* * * * *

■ 11. Amend § 655.132 by revising paragraph (e)(1) to read as follows:

§ 655.132 H–2A labor contractor filing requirements.

* * * * *

(e) * * *

(1) All housing used by workers and owned, operated, or secured by the fixed-site agricultural business complies with the applicable standards as set forth in § 655.122(d) and certified by the SWA and that the fixed-site agricultural business has agreed to comply with the requirements at § 655.135(n); and

* * * * *

■ 12. Amend § 655.135 by revising the introductory text and paragraph (h) and adding paragraphs (m) through (p) to read as follows:

§ 655.135 Assurance and obligations of H–2A employers.

An employer seeking to employ H–2A workers must agree as part of the *Application for Temporary Employment Certification* and job offer that it will abide by the requirements of this subpart and of 29 CFR part 501 and must make each of the following additional assurances:

* * * * *

(h) *No unfair treatment.* (1) The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has:

(i) Filed a complaint under or related to 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188;

(ii) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188;

(iii) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188;

(iv) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188;

(v) Consulted with a key service provider on matters related to 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188;

(vi) Exercised or asserted on behalf of themself or others any right or protection afforded by 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188; or

(vii) Filed a complaint, instituted, or caused to be instituted any proceeding; or testified, assisted, or participated (or is about to testify, assist, or participate) in any investigation, proceeding, or hearing under or related to any applicable Federal, State, or local laws or regulations, including safety and health, employment, and labor laws.

(2) With respect to any person engaged in agriculture as defined and applied in 29 U.S.C. 203(f), the employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person because such person:

(i) Has engaged in activities related to self-organization, including any effort to form, join, or assist a labor organization; or has engaged in other concerted activities for the purpose of mutual aid or protection relating to wages or working conditions; or has refused to engage in any or all of such activities; or

(ii) Has refused to attend an employer-sponsored meeting with the employer or its agent, representative or designee, if the primary purpose of the meeting is to communicate the employer's opinion concerning any activity protected by this subpart; or has refused to listen to employer-sponsored speech or view employer-sponsored communications, the primary purpose of which is to communicate the employer's opinion concerning any activity protected by this subpart.

* * * * *

(m) *Designation of representative.* With respect to any H–2A worker or worker in corresponding employment engaged in agriculture as defined and applied in 29 U.S.C. 203(f), employed at the place(s) of employment included in the *Application for Temporary Employment Certification,* the employer must permit a worker to designate a representative to attend any investigatory interview that the worker reasonably believes might result in disciplinary action and must permit the worker to receive advice and active assistance from the designated representative during any such investigatory interview. Where the designated representative is present at the worksite at the time of the investigatory interview, the employer must permit the representative to attend the investigatory interview in person. Where the designated representative is not present at the time and place of the investigatory interview, the employer must permit the representative to attend the investigatory interview remotely, including by telephone, videoconference, or other means.

(n) *Access to worker housing.* Workers residing in employer-furnished housing must be permitted to invite, or accept at their discretion, guests to their living quarters and/or the common areas or outdoor spaces near such housing during time that is outside of the workers' workday subject only to reasonable restrictions designed to protect worker safety or prevent interference with other workers' enjoyment of these areas. Because workers' ability to accept guests at their discretion depends on the ability of potential guests to contact and seek an invitation from those workers, restrictions impeding this ability to contact and seek an invitation will be evaluated as restrictions on the workers' ability to accept guests.

(o) *Passport withholding.* During the period of employment that is the subject of the *Application for Temporary Labor Certification,* the employer may not hold or confiscate a worker's passport, visa, or other immigration or government identification document *except* where the worker states in writing that: the worker voluntarily requested that the employer keep these documents safe, the employer did not direct the worker to submit such a request, and the worker understands that the passport, visa, or other immigration or government identification document will be returned to the worker immediately upon the worker's request.

(p) *Foreign worker recruitment.* The employer, and its attorney or agent, as applicable, must comply with § 655.137(a) by providing a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H–2A workers, and the identity and location of the persons and entities hired by or working for the agent or recruiter and any of the agents and employees of those persons and entities, to recruit foreign workers. Pursuant to § 655.130(a), the agreements and information must be filed with the *Application for Temporary Employment Certification.* The employer must update this documentation in accordance with § 655.137(c).

■ 13. Add § 655.137 to read as follows:

§ 655.137 Disclosure of foreign worker recruitment.

(a) If the employer engages or plans to engage an agent or foreign labor recruiter, directly or indirectly, in international recruitment, the employer, and its attorney or agent, as applicable, must provide copies of all contracts and agreements with any agent and/or recruiter, executed in connection with the job opportunity, as specified in § 655.135(p). These agreements must contain the contractual prohibition against charging fees as set forth in § 655.135(k).

(b) The employer, and its attorney or agent, as applicable, must provide all recruitment-related information required in the *Application for Temporary Employment Certification,* as defined in § 655.103(b), which includes the identity and location of all persons and entities hired by or working for the recruiter or agent, and any of the agents or employees of those persons and entities, to recruit prospective foreign workers for the H–2A job opportunity.

(c) The employer must continue to keep the foreign labor recruiter information referenced in paragraphs (a) and (b) of this section up to date until the end of the work contract period. The employer must retain the updated information in accordance with § 655.167(c)(8) and must make this updated information available in the event of a post-certification audit or upon request by the Department. The Department may share the foreign worker recruitment information it receives from employers with any other Federal agency, as appropriate for investigative or enforcement purpose, as set forth in § 655.130(f).

(d) The Department of Labor will maintain a publicly available list of agents and recruiters (including government registration numbers, if any) who are party to the agreements employers submit, as well as the persons and entities the employer identified as hired by or working for the recruiter and the locations in which they are operating.

■ 14. Amend § 655.145 by revising the section heading and paragraph (b) to read as follows:

§ 655.145 Pre-determination amendments to applications for temporary employment certification.

* * * * *

(b) *Minor changes to the period of employment.* The *Application for Temporary Employment Certification* may be amended to make minor changes in the total period of employment before the CO issues a final determination. Changes will not be effective until submitted in writing and approved by the CO. In considering whether to approve the request, the CO will review the reason(s) for the request, determine whether the reason(s) are on the whole justified, and take into account the effect any change(s) would have on the adequacy of the underlying test of the domestic labor market for the job opportunity. An employer must demonstrate that the change to the period of employment could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period. Upon acceptance of an amendment, the CO will submit to the SWA any necessary modification to the job order.

■ 15. Amend § 655.167 by revising paragraphs (c)(6) and (7) and adding paragraphs (c)(8) through (12) to read as follows:

§ 655.167 Document retention requirements of H–2A employers.

* * * * *

(c) * * *

(6) The work contract or a copy of the *Application for Temporary Employment Certification* as defined in § 655.103(b) and specified in § 655.122(q).

(7) If applicable, records of notice to the NPC and to DHS of the abandonment of employment or

termination for cause of a worker as set forth in § 655.122(n).

(8) Written contracts with agents or recruiters as specified in § 655.137(a) and the identities and locations of persons hired by or working for the agent or recruiter and the agents and employees of these agents and recruiters, as specified in § 655.137(b).

(9) The identity, location, and contact information of all persons who are the owners of each employer, as specified in § 655.130(a)(2), and the identity, location, and contact information of all persons and entities who are the operators of the place of employment (if different than the employers) and of all persons who manage or supervise any H–2A worker sponsored under the *Application for Temporary Employment Certification* or any worker in corresponding employment, as specified in § 655.130(a)(3).

(10) If applicable, disciplinary records, including each step of progressive discipline, any evidence the worker presented in their defense, any investigation related to the termination, and any subsequent instruction afforded the worker.

(11) If applicable, records indicating the reason(s) for termination of any worker, including disciplinary records described in § 655.122(n)(4)(ii) and this section, relating to the termination as set forth in § 655.122(n).

(12) If applicable, evidence demonstrating the employer notified the SWA and each worker of an unforeseen minor delay in the start date of need, as specified in § 655.175(b)(2)(i).

* * * * *

■ 16. Add § 655.175 to read as follows:

§ 655.175 Post-certification changes to applications for temporary employment certification.

(a) *No post-certification changes.* The *Application for Temporary Employment Certification* may not be changed after certification, except where authorized in this subpart. The employer is obligated to comply with the terms and conditions of employment contained in the *Application for Temporary Employment Certification* and job order with respect to all workers recruited in connection with its certification.

(b) *Post-certification changes to the first date of work.* Where the work under the approved *Application for Temporary Employment Certification* will not begin on the first date of need certified and will be delayed for a period of no more than 14 calendar days, due to circumstances that could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period, the employer need not withdraw an approved *Application for Temporary Employment Certification,* provided the employer complies with the obligations at paragraphs (b)(1) and (2) of this section.

(1) In the event of a delay, the employer must provide to all workers who are already traveling to the place of employment, upon their arrival and without cost to the workers until work commences, daily subsistence in the same amount required during travel under § 655.122(h)(1), except for days for which the worker receives compensation under paragraph (b)(2)(ii) of this section. The employer must fulfill this subsistence obligation to the worker no later than the first date the worker would have been paid had they begun employment on time. Employers must comply with all other requirements of the certified *Application for Temporary Employment Certification* beginning on the first date of need certified, including but not limited to housing under § 655.122(d).

(2)(i) In the event of a delay, the employer must notify the SWA and each worker to be employed under the job order associated with the approved *Application for Temporary Employment Certification* of the delay at least 10 business days before the certified start date of need. The employer must notify the worker in writing, in a language understood by the worker, as necessary or reasonable, using the contact information the worker provided to the employer. If the worker provides electronic contact information, such as an email address or telephone number, the employer must send notice using that email address and telephone number. The employer may provide telephonic notice, provided the employer also sends written notice using the email or postal address provided by the worker. The employer must retain evidence of such notification under § 655.167(c)(12).

(ii) If the employer fails to provide timely notification required under paragraph (b)(2)(i) of this section to any worker(s), the employer must pay such worker(s) the highest of the hourly rates of pay at § 655.120(a), or, if applicable, the rate required under § 655.211(a)(1), for each hour of the offered work schedule in the job order, for each day that work is delayed, for a period up to 14 calendar days. The employer must fulfill this obligation to the worker no later than the first date the worker would have been paid had they begun employment on time.

(iii) For purposes of an employer's compliance with the three-fourths guarantee under § 655.122(i), any compensation paid to a worker under paragraph (b)(2)(ii) of this section for any workday included within the time period described in § 655.122(i) will be considered hours offered to the worker.

■ 17. Amend § 655.181 by revising paragraph (a)(1) to read as follows:

§ 655.181 Revocation.

(a) * * *

(1) The issuance of the temporary agricultural labor certification was not justified due to fraud or misrepresentation in the application process, including because the certification was issued in error to a debarred employer, including a successor in interest, during the period of debarment as set forth in § 655.182(c)(2);

* * * * *

■ 18. Amend § 655.182 by revising paragraphs (a), (b), and (d)(1)(viii) to read as follows:

§ 655.182 Debarment.

(a) *Debarment of an employer, agent, or attorney.* The OFLC Administrator may debar an employer, agent, or attorney from participating in any action under 8 U.S.C. 1188, this subpart, or 29 CFR part 501 subject to the time limits set forth in paragraph (c) of this section, if the OFLC Administrator finds that the employer, agent, or attorney substantially violated a material term or condition of the temporary agricultural labor certification, with respect to H–2A workers; workers in corresponding employment; or U.S. workers improperly rejected for employment, or improperly laid off or displaced.

(b) *Effect on future applications.* (1) No application for H–2A workers may be filed by or on behalf of a debarred employer, or by an employer represented by a debarred agent or attorney, subject to the term limits set forth in paragraph (c)(2) of this section. If such an application is filed, it will be denied without review.

(2) No application for H–2A workers may be filed by or on behalf of a successor in interest to a debarred employer, agent, or attorney, subject to the term limits set forth in paragraph (c)(2) of this section. If the CO determines that such an application is filed, the CO will issue a NOD pursuant to § 655.141 or deny the application pursuant to § 655.164, as appropriate depending upon the status of the *Application for Temporary Employment Certification,* solely on the basis that the entity is a successor in interest to a debarred employer, agent, or attorney. The employer, agent, or attorney may appeal its status as a successor in

interest to the debarred entity, pursuant to the procedures for appeals of CO determinations at § 655.171.

* * * * *

(d) * * *

(1) * * *

(viii) A violation of the requirements of § 655.135(j), (k), or (o);

* * * * *

■ 19. Add § 655.190 to read as follows:

§ 655.190 Severability.

If any provision of this subpart is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision will be severable from this part and shall not affect the remainder thereof.

■ 20. Amend § 655.210 by revising paragraph (g) to read as follows:

§ 655.210 Contents of herding and range livestock job orders.

* * * * *

(g) *Rates of pay.* (1) The employer must offer, advertise in its recruitment, and pay a wage that is at least the highest of the following rates in effect at the time work is performed, whichever is highest, for every month of the job order period or portion thereof:

(i) The monthly AEWR, as specified in § 655.211;

(ii) The agreed-upon collective bargaining wage;

(iii) The applicable minimum wage imposed by Federal or State law or judicial action; or

(iv) Any other wage rate the employer intends to pay.

(2) The offered wage shall not be based on commissions, bonuses, or other incentives, unless the employer guarantees a wage that equals or exceeds the monthly AEWR, the agreed-upon collective bargaining wage, the applicable minimum wage imposed by Federal or State law or judicial action, any agreed-upon collective bargaining rate, or any other wage rate the employer intends to pay, whichever is highest, and must be paid to each worker free and clear without any unauthorized deductions.

(3) The employer may prorate the wage for the initial and final pay periods of the job order period if its pay period does not match the beginning or ending dates of the job order. The employer also may prorate the wage if a worker is voluntarily unavailable to work for personal reasons.

(4) If applicable, the employer must state in the job order:

(i) That overtime hours may be available;

(ii) The wage rate(s) to be paid for any such overtime hours;

(iii) The circumstances under which the wage rate(s) for overtime hours will be paid, including, but not limited to, after how many hours in a day or workweek the overtime wage rate will be paid, and whether overtime wage rates will vary between-place(s) of employment; and

(iv) Where the overtime pay is required by law, the applicable Federal, State, or local law requiring the overtime pay.

* * * * *

■ 21. Amend § 655.211 by revising paragraph (a) to read as follows:

§ 655.211 Herding and range livestock wage rate.

(a) *Compliance with rates of pay.* (1) To comply with its obligation under § 655.210(g), an employer must offer, advertise in its recruitment, and pay each worker employed under §§ 655.200 through 655.235 a wage that is at least the highest of the monthly AEWR established under this section, the agreed-upon collective bargaining wage, the applicable minimum wage imposed by Federal or State law or judicial action, or any other wage rate the employer intends to pay. The employer must list all potentially applicable wage rates in the job order and must offer and advertise all of these wage rates in its recruitment.

(2) If the monthly AEWR established under this section is adjusted during a work contract, and is higher than the agreed-upon collective bargaining wage, the applicable minimum wage imposed by Federal or State law or judicial action in effect at the time the work is performed, and any other wage rate the employer offered to pay, the employer must pay at least that adjusted monthly AEWR upon the effective date of the updated monthly AEWR published by the Department in the **Federal Register**.

* * * * *

PART 658—ADMINISTRATIVE PROVISIONS GOVERNING THE WAGNER-PEYSER ACT EMPLOYMENT SERVICE

■ 22. The authority citation for part 658 continues to read as follows:

Authority: Secs. 189, 503, Pub. L. 113–128, 128 Stat. 1425 (Jul. 22, 2014); 29 U.S.C. chapter 4B.

■ 23. Revise § 658.500 to read as follows:

§ 658.500 Scope and purpose of subpart.

(a) This subpart contains the regulations governing the discontinuation of services provided by the ES to employers pursuant to parts 652 and 653 of this chapter.

(b) For purposes of this subpart only, where the term ''employer'' is used, it refers to employers, agents, farm labor contractors, joint employers, and successors in interest to any employer, agent, farm labor contractor, or joint employer, as defined at § 651.10 of this chapter. A successor in interest to an employer, agent, or farm labor contractor may be held liable for the duties and obligations of that employer, agent, or farm labor contractor for purposes of recruitment of workers through the ES clearance system or enforcement of ES regulations, regardless of whether such successor in interest has succeeded to all the rights and liabilities of the predecessor entity.

■ 24. Revise and republish § 658.501 to read as follows:

§ 658.501 Basis for discontinuation of services.

(a) SWA officials must initiate procedures for discontinuation of services to employers who:

(1) Submit and refuse to correct or withdraw job orders containing terms and conditions that are contrary to employment-related laws;

(2) Submit job orders and refuse to provide assurances, or refuse to withdraw job orders that do not contain assurances, required pursuant to the Agricultural Recruitment System for U.S. Workers at part 653, subpart F, of this chapter;

(3) Are found through field checks or otherwise to have either misrepresented the terms or conditions of employment specified on job orders or failed to comply fully with assurances made on job orders;

(4) Are found by a final determination by an appropriate enforcement agency to have violated any employment-related laws and notification of this final determination has been provided to the Department or the SWA by that enforcement agency, including those who are currently debarred from participating in the H–2A or H–2B foreign labor certification programs pursuant to § 655.73 or § 655.182 of this chapter or 29 CFR 501.20 or 503.24;

(5) Are found to have violated ES regulations pursuant to § 658.411 or § 658.419;

(6) Refuse to accept qualified workers referred through the clearance system for criteria clearance orders filed pursuant to part 655, subpart B, of this chapter;

(7) Refuse to cooperate in field checks conducted pursuant to § 653.503 of this chapter; or

(8) Repeatedly cause the initiation of the procedures for discontinuation of services pursuant to paragraphs (a)(1) through (7) of this section.

(b) If an ES office or SWA has information that an employer participating in the ES may have committed fraud or misrepresentation in connection with its current or prior temporary labor certification or may not have complied with the terms of such certification, under, for example the H–2A and H–2B visa programs, SWA officials must notify the OFLC National Processing Center and the Wage and Hour Division of the alleged noncompliance as applicable under § 655.185 and 29 CFR 501.2, 501.6, 503.3, and 503.7. If the circumstances occurred within the previous 3 years, SWA officials must determine whether there is a basis under paragraph (a) of this section for which the SWA must initiate procedures for discontinuation of services.

(c) [Reserved]

■ 25. Revise § 658.502 to read as follows:

§ 658.502 Notification to employers of intent to discontinue services.

(a) Except as provided in paragraph (b) of this section, where the SWA determines that there is an applicable basis for discontinuation of services under § 658.501(a)(1) through (8), the SWA must notify the employer in writing that it intends to discontinue the provision of ES services in accordance with this section and must provide the reasons for proposing discontinuation of services.

(1) Where the decision is based on § 658.501(a)(1), the SWA must specify the date the order was submitted, the job order involved, and the terms and conditions contrary to employment-related laws and the laws involved. The SWA must notify the employer in writing that all ES services will be terminated unless the employer within 20 working days:

(i) Provides adequate evidence that the terms and conditions are not contrary to employment-related laws;

(ii) Withdraws the terms and conditions and resubmits the job order in compliance with all employment-related laws; or

(iii) If the job is no longer available, makes assurances that all future job orders submitted will be in compliance with all employment-related laws.

(2) Where the decision is based on § 658.501(a)(2), the SWA must specify the date the order was submitted, the job order involved, the assurances involved, and explain how the employer refused to provide the assurances. The SWA must notify the employer that all ES services will be terminated unless the employer within 20 working days:

(i) Resubmits the order with the required assurances; or

(ii) If the job is no longer available, makes assurances that all future job orders submitted will contain all assurances required pursuant to the Agricultural Recruitment System for U.S. Workers at part 653, subpart F, of this chapter.

(3) Where the decision is based on § 658.501(a)(3), the SWA must specify the terms and conditions the employer misrepresented or the assurances with which the employer did not fully comply, and explain how the employer misrepresented the terms or conditions or failed to comply with assurances on the job order. The SWA must notify the employer that all ES services will be terminated unless the employer within 20 working days:

(i) Provides adequate evidence that terms and conditions of employment were not misrepresented;

(ii) Provides adequate evidence that there was full compliance with the assurances made on the job orders; or

(iii) Provides adequate evidence that it has resolved the misrepresentation of terms and conditions of employment or noncompliance with assurances and provides adequate assurance that specifications on future orders will accurately represent the terms and conditions of employment and that there will be full compliance with all job order assurances.

(4) Where the decision is based on § 658.501(a)(4), the SWA must provide evidence of the final determination, including debarment. For final determinations, the SWA must specify the enforcement agency's findings of facts and conclusions of law as to the employment-related law violation(s). For final debarment orders, the SWA must specify the time period for which the employer is debarred from participating in one of the Department's foreign labor certification programs. The SWA must notify the employer that all ES services will be terminated unless the employer within 20 working days:

(i) Provides adequate evidence that the enforcement agency's determination is not final because, for example, it has been stayed pending appeal, overturned, or reversed; or

(ii) Provides adequate evidence that, as applicable:

(A) The Department's debarment is no longer in effect; and

(B) The employer has completed all required actions imposed by the enforcement agency as a consequence of the violation, including payment of any fines or restitution to remediate the violation; and

(iii) Provides assurances that any policies, procedures, or conditions responsible for the violation have been corrected and the same or similar violations are not likely to occur in the future.

(5) Where the decision is based on § 658.501(a)(5), the SWA must specify which ES regulation, as defined in § 651.10, the employer has violated and must provide basic facts to explain the violation. The SWA must notify the employer that all ES services will be terminated unless the employer within 20 working days:

(i) Provides adequate evidence that the employer did not violate ES regulations; or

(ii) Provides adequate evidence that appropriate restitution has been made or remedial action taken; and

(iii) Provides assurances that any policies, procedures, or conditions responsible for the violation have been corrected and the same or similar violations are not likely to occur in the future.

(6) Where the decision is based on § 658.501(a)(6), the SWA must indicate that the employer filed the job order pursuant to part 655, subpart B, of this chapter, and specify the name of each worker the SWA referred and the employer did not accept. The SWA must notify the employer that all ES services will be terminated unless the employer within 20 working days:

(i) Provides adequate evidence that the workers were accepted; or

(ii) Provides adequate evidence that the workers were not available to accept the job; or

(iii) Provides adequate evidence that the workers were not qualified; or

(iv) Provides adequate evidence that the workers were referred after the time period described in § 655.135(d) of this chapter elapsed; or

(v) Provides adequate evidence that:

(A) After refusal, the employer accepted the qualified workers referred; or

(B) Appropriate restitution has been made or other remedial action taken; and

(vi) Provides assurances that qualified workers referred in the future will be accepted or, if the time period described in § 655.135(d) of this chapter has lapsed, provides assurances that qualified workers referred on all future criteria clearance orders will be accepted.

(7) Where the decision is based on § 658.501(a)(7), the SWA must explain how the employer did not cooperate in the field check. The SWA must notify the employer that all ES services will be terminated unless the employer within 20 working days:

(i) Provides adequate evidence that it did cooperate; or

(ii) Immediately cooperates in the conduct of field checks; and

(iii) Provides assurances that it will cooperate in future field checks.

(8) Where the decision is based on § 658.501(a)(8), the SWA must list and provide basic facts explaining the prior instances where the employer has repeatedly caused initiation of discontinuation proceedings. The SWA must notify the employer that all ES services will be terminated unless the employer within 20 working days provides adequate evidence that the SWA's initiation of discontinuation in prior proceedings was unfounded.

(b) SWA officials must discontinue services immediately in accordance with § 658.503, without providing the notice described in this section, if an employer has met any of the bases for discontinuation of services under § 658.501(a) and, in the judgment of the State Administrator, exhaustion of the administrative procedures set forth in this section would cause substantial harm to workers.

■ 26. Revise § 658.503 to read as follows:

§ 658.503 Discontinuation of services.

(a) Within 20 working days of receipt of the employer's response to the SWA's notification under § 658.502(a), or at least 20 working days after the SWA's notification has been received by the employer if the SWA does not receive a response, the SWA must notify the employer in writing of its final determination. If the SWA determines that the employer did not provide a satisfactory response in accordance with § 658.502(a), the SWA's notification must specify the reasons for its determination and state that the discontinuation of services is effective 20 working days from the date of the notification. The notification must also state that the employer may request reinstatement or appeal the determination by requesting a hearing pursuant to § 658.504, and that a request for a hearing stays the discontinuation pending the outcome of the hearing. If the employer does not request a hearing, the SWA must also notify the ETA Office of Workforce Investment of any final determination to discontinue ES services within 10 working days of the date the determination becomes effective.

(b) Where the SWA discontinues services immediately under § 658.502(b), the SWA's written notification must specify the facts supporting the applicable basis for discontinuation under § 658.501(a), the reasons that exhaustion of the administrative procedures would cause substantial harm to workers, and that services are discontinued as of the date of the notification. The notification must also state that the employer may request reinstatement or appeal the determination by requesting a hearing pursuant to § 658.504, and that a request for a hearing relating to immediate discontinuation does not stay the discontinuation pending the outcome of the hearing. Within 10 working days of the date of issuance, the SWA must also notify the ETA Office of Workforce Investment of any determination to immediately discontinue ES services.

(c) If the SWA discontinues services to an employer that is subject to Federal Contractor Job Listing Requirements, the SWA must notify the ETA regional office immediately.

(d) If the SWA discontinues services to an employer based on a complaint filed pursuant to § 658.411, the SWA must notify the complainant of the employer's discontinuation of services.

(e) If the SWA discontinues services to an employer, the employer cannot participate in or receive Wagner-Peyser Act ES Services provided by the ES, including by any SWA, to employers pursuant to parts 652 and 653 of this chapter. From the date of discontinuance, the SWA that issued the determination must remove the employer's active job orders from the clearance system. No SWA may process any future job orders from the employer or provide any other services pursuant to parts 652 and 653 of this chapter to the employer unless services have been reinstated under § 658.504.

(f) SWAs must continue to provide the full range of ES and other appropriate services to workers whose employers experience discontinuation of services under this subpart.

■ 27. Revise § 658.504 to read as follows:

§ 658.504 Reinstatement of services.

(a) Where the SWA discontinues services to an employer under § 658.502(b) or § 658.503, the employer may submit a written request for reinstatement of services to the SWA or may, within 20 working days of receiving notice of the SWA's final determination, appeal the discontinuation by submitting a written request for a hearing.

(b) If the employer submits a written request for reinstatement of services to the SWA:

(1) Within 20 working days of receipt of the employer's request for reinstatement, the SWA must notify the employer of its decision to grant or deny the request. If the SWA denies the request for reinstatement, it must specify the reasons for the denial and notify the employer that it may request a hearing, in accordance with paragraph (c) of this section, within 20 working days.

(2) The SWA must reinstate services if:

(i) The employer provides adequate evidence that the policies, procedures, or conditions responsible for the previous discontinuation of services have been corrected and that the same or similar circumstances are not likely to occur in the future; and

(ii) The employer provides adequate evidence that it has responded to all findings of an enforcement agency, SWA, or ETA, including payment of any fines or restitution to remediate the violation, that were the basis of the discontinuation of services, if applicable.

(c) If the employer submits a timely request for a hearing:

(1) The SWA must follow the procedures set forth in § 658.417; and

(2) The SWA must reinstate services to the employer if ordered to do so by a State hearing official, Regional Administrator, or Federal Administrative Law Judge as a result of a hearing offered pursuant to paragraph (c)(1) of this section.

(d) Within 10 working days of the date of issuance, the SWA must notify the ETA Office of Workforce Investment of any determination to reinstate ES services, or any decision on appeal upholding a SWA's determination to discontinue services.

Title 29: Labor

Wage and Hour Division

PART 501—ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY ALIEN AGRICULTURAL WORKERS ADMITTED UNDER SECTION 218 OF THE IMMIGRATION AND NATIONALITY ACT

■ 28. The authority citation for part 501 continues to read as follows:

Authority: 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; 28 U.S.C. 2461 note; and sec. 701, Pub. L. 114–74, 129 Stat. 584.

■ 29. Amend § 501.3 by:

■ a. In paragraph (a), adding the definitions of ''Key service provider'' and ''Labor organization'' in alphabetical order and removing the definition of ''Successor in interest''; and
■ b. Adding paragraph (d).
The additions read as follows:

§ 501.3 Definitions.

(a) * * *

Key service provider. A health-care provider; a community health worker; an education provider; a translator or interpreter; an attorney, legal advocate, or other legal service provider; a government official, including a consular representative; a member of the clergy; an emergency services provider; a law enforcement officer; and any other provider of similar services.

Labor organization. Any organization of any kind, or any agency or employee representation committee or plan, in which workers participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * * * *

(d) *Definition of single employer for purposes of temporary or seasonal need and contractual obligations.* Separate entities will be deemed a single employer (sometimes referred to as an ''integrated employer'') for purposes of assessing temporary or seasonal need and for enforcement of contractual obligations if they meet the definition of single employer in this paragraph (e). Under the definition of single employer, a determination of whether separate entities are a single employer is not determined by a single factor, but rather the entire relationship is viewed in its totality. Factors considered in determining whether two or more entities consist of a single employer include:

(1) Common management;

(2) Interrelation between operations;

(3) Centralized control of labor relations; and

(4) Degree of common ownership/financial control.

■ 30. Amend § 501.4 by revising paragraph (a) to read as follows:

§ 501.4 Discrimination prohibited.

(a)(1) A person may not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has:

(i) Filed a complaint under or related to 8 U.S.C. 1188 or this part;

(ii) Instituted or causes to be instituted any proceedings related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(iii) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(iv) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(v) Consulted with a key service provider on matters related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(vi) Exercised or asserted on behalf of themselves or others any right or protection afforded by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; or

(vii) Filed a complaint, instituted, or caused to be instituted any proceeding, or testified, assisted, or participated (or is about to testify, assist or participate) in any investigation, proceeding or hearing under or related to any applicable Federal, State, or local laws or regulations, including safety and health, employment, and labor laws.

(2) With respect to any person engaged in agriculture as defined and applied in 29 U.S.C. 203(f), a person may not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and may not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person because such person:

(i) Has engaged in activities related to self-organization, including any effort to form, join, or assist a labor organization; has engaged in other concerted activities for the purpose of mutual aid or protection relating to wages or working conditions; or has refused to engage in any or all of such activities; or

(ii) Has refused to attend an employer-sponsored meeting with the employer or its agent, representative or designee, the primary purpose of which is to communicate the employer's opinion concerning any activity protected by this subpart; or listen to speech or view communications, the primary purpose of which is to communicate the employer's opinion concerning any activity protected by this subpart.

* * * * *

■ 31. Add § 501.10 to subpart A to read as follows:

§ 501.10 Severability.

If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of total invalidity or unenforceability, in which event the provision will be severable from this part and will not affect the remainder thereof.

■ 32. Amend § 501.20 by revising paragraphs (a), (b), (d)(1)(viii), and adding paragraph (j) to read as follows:

§ 501.20 Debarment and revocation.

(a) *Debarment of an employer, agent, or attorney.* The WHD Administrator may debar an employer, agent, or attorney from participating in any action under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, subject to the time limits set forth in paragraph (c) of this section, if the WHD Administrator finds that the employer, agent, or attorney substantially violated a material term or condition of the temporary agricultural labor certification, with respect to H–2A workers, workers in corresponding employment, or U.S. workers improperly rejected for employment, or improperly laid off or displaced, by issuing a Notice of Debarment.

(b) *Effect on future applications.* (1) No application for H–2A workers may be filed by or on behalf of a debarred employer, or by an employer represented by a debarred agent or attorney, subject to the time limits set forth in paragraph (c)(2) of this section. If such an application is filed, it will be denied without review.

(2) No application for H–2A workers may be filed by or on behalf of a successor in interest, as defined in 20 CFR 655.104, to a debarred employer, agent, or attorney, subject to the term limits set forth in paragraph (c)(2) of this section. If the CO determines that such an application is filed, the CO will issue a Notice of Deficiency (NOD) pursuant to 20 CFR 655.141 or deny the application pursuant to 20 CFR 655.164, as appropriate depending upon the status of the *Application for Temporary Employment Certification,* solely on the basis that the entity is a successor in interest to a debarred employer, agent, or attorney. The employer, agent, or attorney may appeal its status as a successor in interest to the debarred entity, pursuant to the procedures for appeals of CO determinations at 20 CFR 655.171.

* * * * *

(d) * * *

(1) * * *

(viii) A violation of the requirements of 20 CFR 655.135(j), (k), or (o);

* * * * *

(j) *Successors in interest.* When an employer, agent, or attorney is debarred

under this section, any successor in interest to the debarred employer, agent, or attorney is also debarred, regardless of whether the successor is named or not named in the notice of debarment issued under paragraph (a) of this section.

■ 33. Amend § 501.33 by revising paragraph (b)(2) to read as follows:

§ 501.33 Request for hearing.

* * * * *

(b) * * *

(2) Specify the issue or issues stated in the notice of determination giving rise to such request (any issues not raised in the request may be deemed waived);

* * * * *

José Javier Rodríguez,

Assistant Secretary for Employment and Training, Labor.

Jessica Looman,

Administrator, Wage and Hour Division.

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